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THE
FEDERAL REPORTER.

VOLUME 93.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

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¹ Additional Circuit Judgeship created by act approved January 25, 1899.

² Additional Circuit Judgeship created by act approved January 25, 1899.

³ Retired February 21, 1899.

⁴ Commissioned March 3, 1899.

⁵ Resigned, to take effect on appointment of successor.

⁶ Commissioned September 23, 1898.

⁷ Deceased December 10, 1898.

⁸ Commissioned January 23, 1899.

⁹ Resigned, to take effect upon his qualifying as Circuit Judge.

¹⁰ Commissioned February 28, 1899.

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¹ Resigned February 23, 1899.

² Commissioned March 1, 1899.

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

WOODSIDE et al. v. CICERONI.¹

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 450.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—FRAUD.

A citizen of California, not entitled to sue adverse claimants of mining rights in his land in a federal court, conveyed the property to an alien. The grantee was a laborer, without means, and he agreed to pay only \$600 as the price, though the land was worth \$1,800; and he paid only \$10 down, giving a mortgage for the balance. Shortly afterwards he sued in a federal court to quiet title. *Held*, that the facts did not show that the transfer was simulated for the purpose of conferring jurisdiction on the federal court.

2. SAME—AMOUNT IN CONTROVERSY—SUITS TO QUIET TITLE.

In a suit to quiet title, it is not the value of defendant's claim that constitutes the amount in controversy; it is the value of the whole of the real estate to which the claim extends.

3. MINING RIGHTS—CONVEYANCES—CONSTRUCTION—PROPERTY CONVEYED.

In the first part of a deed there were a bargain, sale, and conveyance of the right to enter upon land for mining purposes only, and to prospect and mine the same. Then followed a provision that the prospecting and mining should be done with as little damage as possible. It was then provided that, "for the purposes aforesaid," a right of way was granted across the land, which was then described; and following the description, without break or punctuation, were the words, "together with the mines of gold therein contained." *Held*, that the last-quoted clause was a part of the description, and not a grant of the mines.

4. SAME—CONDITIONS SUBSEQUENT.

A deed conveyed the right to enter on land for mining purposes only, and to prospect and mine the same, "if [the grantee] should discover any gold in quartz suitable for mining." *Held*, that the quoted clause was not a condition subsequent.

5. SAME—REVOCABLE LICENSES.

Nor was the deed a grant of a mere license, revocable at the will of the grantor.

6. SAME—INCORPOREAL HEREDITAMENTS.

On the contrary, an incorporeal hereditament was conveyed; the deed containing apt words of conveyance of such a right, and reciting a sufficient consideration, which had been paid, and the grant being to the grantee and his heirs and assigns forever.

¹ Rehearing denied March 2, 1899.

7. SAME—ABANDONMENT—EXCLUSIVE RIGHTS.

A grant of the right to enter on land for mining purposes only, and to prospect and mine the same, not being exclusive, the grantor and his subsequent grantees, also, had the right to prospect and mine on the same land. Hence no presumption could arise of abandonment of the rights first granted, from the fact that similar rights were exercised by the grantor and his subsequent grantees.

8. SAME—ADVERSE USER.

Nor would such use of the premises by the grantor and his subsequent grantees be adverse to the first grantee, where he was not excluded from the exercise of his rights.

9. SAME—ABANDONMENT.

The mere failure of the first grantee to exercise his rights would not extinguish them.

Appeal from the Circuit Court of the United States for the Northern District of California.

J. P. Langhorne, for appellants.

W. E. F. Deal and Edmund Tauszky, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. On September 27, 1884, Joseph Hocking executed to John W. Anderson a conveyance, of which the following is a copy:

"This indenture, made the 27th day of September, A. D. 1884, between Joseph Hocking, party of the first part, and John W. Anderson, the party of the second part, witnesseth that the party of the first part, for the consideration of one dollar, and other valuable considerations, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, and convey to the party of the second part, and to his heirs and assigns, forever, the right to enter on the following described tract or parcel of land for mining purposes only, and to prospect and mine the same, if he should discover any gold in quartz suitable for mining. Said prospecting and mining of said land to be done with as little damage to the surface of the land for agricultural purposes as a proper mining thereof will permit, and for the same purposes the party of the first part hereby grants the right of way across the tract of land hereinafter described. Said tract of land being situated in Tuolumne county, California, and being the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section No. 30, in township No. 1 north, range No. 15 east, M. D. M., together with the mines of gold therein contained. In witness whereof, the party of the first part has hereunto set his hand and seal this — day and year," etc.

On the same day, Joseph Hocking sold and conveyed to John Rocca the land which is described in the foregoing deed, reserving therefrom the rights which had been granted by the deed to Anderson, in the following words:

"Less the right to enter on said land, and to prospect and mine for gold, if any be hereafter discovered thereon, this day granted to J. W. Anderson."

On April 23, 1896, Antonio Ciceroni, who had succeeded to the interest of John Rocca, commenced the present suit against the personal representatives and widow of John W. Anderson to quiet the title of the complainant to the said property. The complaint alleged that the complainant was the owner of, and in the possession of, said real estate, and that the defendants, without right or title,

claimed an estate or interest therein adverse to him. The defendants, answering the bill, set up their rights under the conveyance from Hocking to Anderson. Upon the testimony taken upon the issues, the court decreed that the complainant was the owner of the premises, and that the claims of the defendants were invalid and without right.

Upon the appeal to this court, the jurisdiction is challenged upon the ground that the transfer to Ciceroni was collusive for the purpose of conferring jurisdiction upon this court. It was shown that Ciceroni was an alien, and as such entitled to bring a suit in the United States court, whereas his grantor was a citizen of California, and had no such right. It was shown, moreover, that Ciceroni was a laborer, without means; that the price which he agreed to pay for the land was \$600, of which he paid but \$10 in cash, giving his note and mortgage for \$590; and that the true value of the land was in the neighborhood of \$1,800. We think that the evidence falls short of showing that the transfer was not an absolute conveyance. There is no evidence whatever that any right was reserved to the former owner, or that there was an understanding or agreement that the property was to be reconveyed to him. Much reliance is placed on the fact that the evidence shows that the complainant did not know that the suit had been commenced until two weeks after the bill was filed; but this is undoubtedly a mistake in the testimony. When he testified that he did not know, when he bought, that suit had been brought, he evidently meant that he did not know of the adverse claims against the title; for it appears that the bill was signed and sworn to by the complainant in person. The fact that the price which he agreed to pay for the land was less than its value may be accounted for by the fact that the title was beclouded by the defendants' claim. The title was uncertain, and was about to be involved in litigation.

It is contended, also, by the appellants, that it is not shown that the value of the subject in controversy is sufficient to confer jurisdiction. The bill alleged that the value of the land exceeded \$2,000. The testimony of two witnesses was taken to show this. One testified that it was worth \$2,500. The other testified, in substance, that, owing to the possibility that a certain ore vein on neighboring premises extended through the premises in controversy, the latter had a speculative value of \$2,500. No evidence was taken to contradict these witnesses. We think this evidence is sufficient to show that the value is as alleged in the bill. But it is urged that the subject in controversy is not the whole of the real estate, but only the interest therein which was conveyed to Anderson, and that no evidence was taken, and the court is without information concerning the value of that interest. If the interest so conveyed to Anderson were confined to any defined portion of the real estate, there can be no doubt that the matter in controversy would be limited to that portion, and the value thereof would be the amount involved. But the rights granted under the deed to Anderson cover the whole of the land. No portion of it is exempt from the privilege of right of way, and the right to prospect and mine, which he thereby acquired. Such being the case, the claim of the defendants affects the right of

the complainant to the enjoyment of the whole of his estate. In a suit to quiet title, or to remove a cloud therefrom, it is not the value of the defendant's claim which is the amount in controversy, but it is the whole of the real estate to which the claim extends. It would be impossible, for instance, to estimate the value of an interest claimed under a forged or fraudulent instrument. It is the property to which such an instrument relates that is the subject of the controversy. In *Smith v. Adams*, 130 U. S. 175, 9 Sup. Ct. 569, the supreme court said:

"Thus, a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected. *Alexander v. Pendleton*, 8 Cranch, 462; *Piersoll v. Elliott*, 6 Pet. 95; *Stark v. Starrs*, 6 Wall. 402; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495."

The decision of the case upon its merits involves the construction of the deed from Hocking to Anderson. What is the nature of the rights which were conveyed by that instrument? The appellants contend that the clause, "together with the mines of gold therein contained," is to be read as a portion of the subject granted, and that it imports a grant of all the mines of gold in the premises described in the deed. Upon consideration of the whole instrument, and not unmindful of the rule that the words of a grant are to be construed most strongly against him whose words they are, we think that the clause referred to is intended to be a portion of the description of the premises over which a right of way is granted, and not a grant of the mines of gold therein. There are in the first part of the deed a bargain, sale, and conveyance of the right to enter upon the lands for mining purposes only, and to prospect and mine the same. Then follows the provision that the prospecting and mining shall be done with as little damage as may be. Then it is provided that, "for the purposes aforesaid," a right of way is granted "across the tract of land hereinafter described." The words, "together with the mines of gold," etc., are a portion of the description of the land across which the right of way is given. They follow the description, without break or punctuation, and belong to the clause which begins with, "Said tract of land being situate," etc.

It is contended by the appellee that the clause, "if he should discover any gold suitable for mining," imposes a condition upon the rights of the grantee, and renders the deed a conveyance upon condition subsequent, and that, inasmuch as no such discovery was made within a reasonable time, he acquired only a personal license. We do not think, however, that those words create, or were intended to create, a condition of the grant. As they are used, they are superfluous words, and mean no more than that the right granted may be exercised by the grantee at his will. He was authorized in any event, and at all times, to prospect for mines on the property; and he was authorized to mine quartz, if he should find any suitable for mining. Of its suitability for mining purposes he was to be the judge. His right to continue to prospect was not to depend upon his success in finding ore suitable for mining. In that respect it resembled a profit à prendre, of hunting or fishing, which is a cor-

poreal hereditament, continuous irrespective of the success of the hunter or the fisher. He had the right to search, and incidentally the right to mine and carry away the results of his search. We find nothing to indicate an intention that, if he discovered ore suitable for mining, his right was to be continuous, otherwise not. His grantor was to derive no benefit from such a discovery. He was to receive no rent or further consideration therefor. It is but reasonable to presume that, if it had been the intention to place a limit upon the duration of the rights which are in terms granted in the deed, and are therein described as perpetual, it would have been clearly expressed. In brief, the deed conveys to the grantee, without condition, the right to enter, to prospect, and to mine upon the described premises.

Is it a grant of a license, revocable at the will of the grantor, or does it convey an incorporeal hereditament,—a perpetual right to the grantee, and his heirs and assigns, to exercise the privileges which are described? We are of the opinion that it is the latter. It contains apt words of conveyance of such a right. It recites a sufficient consideration, which has already been paid. The grant is to the grantee, and to his heirs and assigns, forever. These features of the instrument, while they are not conclusive of its meaning, are properly to be considered in determining its character. The fact that the right which is conveyed is not made appurtenant to other land of the grantee, or that there is no dominant estate to which it is attached, is not decisive of its nature or duration. Such a right, when it is granted in gross, as in this instance, may nevertheless partake of the nature of an interest in land, and be treated as an incorporeal hereditament. It is not properly an easement, but it is a profit à prendre, such as the right to enter upon the land of another for profit, and to take therefrom something growing thereon, or attached thereto, or subsisting therein. In Washb. Easem. 13, the distinction is thus expressed:

"The distinction seems to be this: If the easement consists in a right of profit à prendre, such as taking soil, gravel, and minerals, and the like, from another's land, it is so far of the character of an estate or interest in the land itself that, if granted to one person in gross, it is to be treated as an estate, and may therefore be for life or inheritance. But if it is an easement proper, such as the right of way, and the like, and it is granted in gross, it is a mere personal interest, and not inheritable."

In the leading case of *Doe v. Wood*, 2 Barn. & Ald. 724, the court said:

"This indenture, in its granting part, does not purport to demise the land or the metals, or the minerals therein comprised. The usual technical words of demising such matters are well known, and usually adopted in a formal deed, when the intent is to demise the land or metals or minerals. But the purport of the granting part of this indenture is to grant, for the term therein mentioned [here, in fee], a liberty, license, power, and authority to dig, work, mine, and search for metals, minerals, in and throughout the lands described, and to dispose of the ore, etc., that should be found within the term, to the use of the grantee, etc. Instead, therefore, of parting with or granting all the ore that was then existing on the land, its words import a grant of such parts thereof as should, upon the license or power given to search and get, be found within the described limits, which is nothing more than a grant of a license to

search and get (irrevocable, indeed, on account of its carrying interest), with a grant of such of the ore only as should be found and got; the grantor parting with no estate or interest in the rest."

In *Grubb v. Bayard*, 2 Wall. Jr. 81, Fed. Cas. No. 5,849, the grant was of the privilege to the grantee, his heirs and assigns, to dig, take, and carry away all iron ore to be found within a certain tract, paying so much a ton. It was held that this was a grant of the right or privilege to dig, take, and carry away ore to be found, and that the assignee of such grantee could bring an action to protect the right; that the privilege was an incorporeal hereditament, or a license irrevocable, which may be demised for a term of years or assigned in fee. Grier, Circuit Justice, said:

"A right or privilege to dig and carry away ore from the land of another is an incorporeal hereditament,—a right to be acquired on the land of another. It is a license irrevocable when granted on sufficient consideration. It may be demised for years, or granted in fee. It is assignable."

In *Ryckman v. Gillis*, 57 N. Y. 68, the grant was to one, and to his heirs and assigns, of the right at all times to enter upon the premises, "and to dig and take therefrom the clay and sand that may be found thereon fit for brickmaking." Said the court, "The defendant was the owner of an incorporeal right." In *Huff v. McCauley*, 53 Pa. St. 206, it was held that a contract that one may take coal for his works from the land of another is a right of profit à prendre, is incorporeal, and incapable of creation, except by grant or prescription. Similar decisions are found in *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Pa. St. 241; *Caldwell v. Fulton*, 31 Pa. St. 475; *Desloge v. Pearce*, 38 Mo. 588; *Riddle v. Brown*, 20 Ala. 412; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710; *Hill v. Lord*, 48 Me. 83; *Grubb v. Guilford*, 4 Watts, 223; *Grubb v. Grubb*, 74 Pa. St. 25.

The cases of *Cahoon v. Bayaud*, 123 N. Y. 298, 25 N. E. 376, and *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 162 Pa. St. 114, 29 Atl. 402, are cited by the appellee to support the contention that the deed to Anderson conveyed only a license revocable at the will of the grantor or his assigns. In *Cahoon v. Bayaud* there was a written contract that the plaintiff should have the right to enter upon the premises, and to prospect and examine for mines and minerals, and to carry away and test the same. If, after making such tests, he should be of the opinion that they were worth working, he then should have the right to enter and mine the same, upon his paying to the owner a certain proportion of the net profits. It was further provided that the agreement should bind the heirs and assigns of the prospective parties. It was held that the right was a license to the plaintiff. But the decision was controlled by the fact, as stated in the opinion, that the agreement "does not contain any words sufficient to constitute a deed of an estate in lands, or even importing the granting of such." The case of *Algonquin Coal Co. v. Northern Coal & Iron Co.* is not in conflict with the conclusion which we have reached, nor with the authorities which have been cited to support the same. In that case a grantor conveyed land in fee simple, reserving to himself, "his heirs and assigns, a free toleration to get coal for their own use." The court held that the reservation did not extend

to all the coal beneath the surface, but that it was merely an incorporeal right, concurrent with the mining right of the grantee, to get and carry away such coal as the grantor and his assigns might personally need for fuel.

It is contended by the appellee that, in any view of the purport of Anderson's deed, the rights which were conveyed to him were forfeited by his nonuser thereof, and were extinguished by the open and adverse possession of the premises by Rocca in prospecting and mining upon the premises during nearly the whole of the period between the date of the deed and the commencement of the suit. But there is no evidence of adverse possession on the part of Rocca. It is shown that he occasionally prospected upon the premises, and that others, by his permission, did likewise, and that he knew nothing of Anderson's deed, or of his prospecting upon the premises, until shortly after the commencement of the suit. There was testimony on the part of the appellants that they and Anderson had also, at intervals, prospected upon the same premises. The right to prospect and mine which was granted to Anderson was not exclusive. It was not inconsistent with the reservation of a concurrent right to the grantor. Undoubtedly, the latter and his subsequent grantees had the right, also, to prospect and to mine upon the same land. Such being the case, there could arise no presumption of the abandonment of the rights granted to Anderson from the exercise of similar rights in the same premises by the owner of the dominant estate; nor would such use be adverse, in the absence of proof that Anderson was excluded from the exercise of the rights which were granted to him. His mere failure to exercise his rights would not operate to extinguish them. It is only where an easement has been acquired by use that its nonuse, without other evidence of abandonment, will extinguish it. An easement created by grant is not lost by nonuser, in the absence of evidence of abandonment or of adverse occupancy. *Pope v. O'Hara*, 48 N. Y. 446; *White v. Crawford*, 10 Mass. 183; *Barnes v. Lloyd*, 112 Mass. 224; *Kuecken v. Voltz*, 110 Ill. 264; *Day v. Walden*, 46 Mich. 575, 10 N. W. 26; *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. 896. The decree will be reversed, and the cause remanded for further proceedings not inconsistent with the foregoing opinion.

NORTH AMERICAN TRADING & TRANSPORTATION CO. v. SMITH et al.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1899.)

No. 491.

1. APPEAL FROM DISTRICT COURT—JURISDICTIONAL AMOUNT.

Rev. St. § 631, allowed an appeal in certain cases from the district to the circuit court, where the amount in controversy exceeded \$50. Act March 3, 1891, § 4, abolished such appeals, and provided (section 6) that the circuit court of appeals should have jurisdiction of appeals from the district court "in all cases other than those" wherein an appeal to the supreme court was provided. The act expressly repealed Rev. St. § 691, fixing the jurisdictional amount on appeal from the circuit to the supreme court, did not refer to section 631, and provided (section 11) that all acts then in force concerning appeals should apply to appeals to the circuit court of

appeals. *Held*, that the act of March 3, 1891, did not repeal Rev. St. § 631, and the provision thereof as to jurisdictional amount remains applicable to appeals to the circuit court of appeals.

2. SAME—REPEAL OF STATUTE.

Such repeal was not affected by Act March 3, 1891, § 14, repealing all acts inconsistent with sections 5 and 6 of such act.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Frederick Bausman, for appellant.

James Kiefer and W. B. Bosley, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Certain of the appellees move to dismiss the appeal upon the ground that as to their claims, respectively, the matter in dispute is less than the sum of \$50. The question presented is whether section 631 of the Revised Statutes has been repealed by the provisions of the act of March 3, 1891, creating the circuit courts of appeals. Section 631 provides as follows:

"From all final decrees of a district court in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the circuit court next to be held in such district, and such circuit court is required to receive, hear, and determine such appeal."

There is no express repeal of this section by the terms of the act of March 3, 1891, but it is contended that a repeal by implication is found in sections 4 and 6 of that act. Section 4 provides as follows:

"That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise from said district courts shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established."

Section 5 enumerates the classes of cases that may be appealed to the supreme court. Section 6 provides as follows:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

Section 4 transfers to the circuit courts of appeals all the appellate jurisdiction which the circuit courts then exercised. It defines the whole appellate jurisdiction of the courts of the United States, and makes provision for all appeals. We think that the term "all appeals," as it is there used, means existing appeals, which were theretofore permitted, and which were provided for by the law which was then in force, and that the "final decision" which is referred to in section 6, and which it is there declared shall be reviewable, means a final decision which was then appealable under the existing law.

At the time of the creation of the district courts, by the terms of the judiciary act a limitation was placed upon appeals from

the district courts to the circuit courts in admiralty cases. It was first enacted that no appeal should be allowed, unless the matter in dispute exceeded the sum of \$300, exclusive of costs. 1 Stat. 83, § 22. By the act of March 3, 1803, the judiciary act was so amended as to permit such appeals where the matter in dispute, exclusive of costs, exceeded the sum of \$50. The statute so amended remained unchanged until the act of March 3, 1891. The fact that this limitation, thus early established, remained in force for nearly a century, indicates the settled policy of congress to limit appeals in admiralty cases, and to protect the small claims of seamen for wages. It vested in the district court final jurisdiction in all cases involving \$50 or less. There is nothing in the terms of the act of 1891 to indicate a purpose to depart from that policy. The appeal from the district court to the circuit court was simple and inexpensive, as compared with the appeal to the circuit court of appeals. If it had been the intention of congress to extend the right of appeal to trifling amounts in admiralty cases, we think that purpose would have been clearly and unequivocally expressed. The act of March 3, 1891, provides further, in section 11, as follows:

"And all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals."

It is significant, also, that the act contains express repeals of section 691, which provides that final judgment of circuit courts, whether of causes therein originally begun, or removed thereto from state courts, or by appeal from district courts, may be reviewed in the supreme court by writ of error, where the matter in dispute, exclusive of costs, exceeds the sum of \$2,000, and of the act of February 16, 1875, by which the jurisdictional amount had been increased to \$5,000. It is inferable that, if it had been the purpose to repeal section 631, there would have been an express repeal of that section, also. The general provision of section 14 of the act, providing that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed," does not by implication repeal section 631, for section 631 is not inconsistent therewith. The motion to dismiss will be allowed.

VON SCHROEDER v. BRITTAN.

(Circuit Court, N. D. California. March 27, 1899.)

No. 12,540.

JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

The relief sought by a bill was the tearing down and rebuilding of a wall on defendant's lot, alleged to encroach upon complainant's building on the adjoining lot by reason of being out of plumb, and the recovery of damages for injury caused thereby to complainant's building. The evidence taken on an issue joined on a plea to the jurisdiction of the court showed that the removal and rebuilding of defendant's wall would cost

not less than \$900, and complainant laid the damages for injury to his building at \$2,700. *Held* that, in the absence of evidence showing such claim to be colorable or fictitious, the matter in dispute exceeded \$2,000.

On Motion to Dismiss for Want of Jurisdiction.

A. H. Ricketts, for complainant.

Wm. Leviston, Heller & Powers, and L. S. B. Sawyer, for respondent.

MORROW, Circuit Judge. This is an action to abate a nuisance, and to recover damages in the sum of \$10,000 for the injury occasioned by the unlawful acts of the respondent. The complainant is an alien, and a subject of the emperor of Germany. The respondent is a citizen of the state of California. Complainant alleges that the eastern brick wall of respondent's building, upon the premises adjoining his own in the city of San Francisco, leans over and encroaches upon the complainant's land in such a way as to make the wall of a brick building, owned by the complainant and standing upon his land, out of plumb, dangerous, and out of repair. The complainant alleges that he acquired the property mentioned herein on November 30, 1897. This action was brought on December 17, 1897. The prayer of the bill of complaint is that the respondent may be compelled by the decree of the court to remove the encroaching wall from the property of the complainant, to put the property of the complainant in good and sufficient repair, and to make satisfaction to complainant for all damages done to his property by reason of the nuisance charged in the complaint; and that respondent may be restrained by the order and injunction of the court from maintaining the encroaching wall. The respondent interposed a plea to the jurisdiction of this court, by which plea a dismissal of the action was sought, upon the ground that the matter did not involve the jurisdictional amount of \$2,000, exclusive of interest and costs. With this plea the complainant took issue by replication, and testimony was taken to determine the truthfulness of the plea.

The jurisdiction of the circuit court extends to controversies between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. Act Aug. 13, 1888 (25 Stat. 433). Section 5 of the act of March 3, 1875 (18 Stat. 470), provides:

"That if in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require," etc.

The plea to the jurisdiction raises the question whether this suit really and substantially involves a dispute or controversy to an amount exceeding, exclusive of interest and costs, the sum or value of \$2,000. In *Hilton v. Dickinson*, 108 U. S. 165; 2 Sup. Ct. 424, the supreme court said:

"It is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction. But it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail."

Has the defendant shown, by the testimony taken upon the plea, that the sum demanded is not the real matter in dispute? From that testimony it appears that the complainant's claim is as follows: (1) For the abatement of the nuisance—that is, the demolition of respondent's east wall—the cost is estimated at \$200, and the rebuilding of the same wall and placing it in good order is variously estimated at from \$700 to \$900 if made of the old material, and at from \$1,300 to \$1,406 if rebuilt of new material; hence the estimate of the total expense or damage under this head varies between \$900 and \$1,100 if the wall is demolished and rebuilt with the old material, and between \$1,500 and \$1,606 if the wall is rebuilt with new material. Whether the wall shall be demolished and rebuilt is one of the matters in dispute. (2) In the matter of repairs for damage done to his own property, the complainant claims to the amount of \$2,752. This may be excessive, but it is a matter in dispute between them, and the evidence does not show that the claim is merely colorable or fictitious. Hence it appears that the expense that may be incurred in demolishing the respondent's wall, rebuilding it, and placing it in good condition, and in repairing complainant's own damaged property, is variously estimated at from \$4,252 to \$4,358. In addition, complainant claims damages for injury actually done to his property during the continuance of the nuisance charged in the complaint. From this testimony it satisfactorily appears to the court that the suit really and substantially involves a dispute or controversy in an amount properly within the jurisdiction of the court.

The plea will therefore be overruled, and the motion to dismiss the bill denied.

MICHIGAN TEL. CO. v. CITY OF CHARLOTTE et al.

(Circuit Court, W. D. Michigan, S. D. April 11, 1899.)

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A claim made by a telephone company in its bill, in good faith, that, by reason of the construction of its system of poles and wires in the streets of a city with the consent of the city, a contract was created which entitles it to maintain such system where it was erected, and that such contract is impaired by an ordinance subsequently passed by the city, states a federal question, which gives a circuit court of the United States jurisdiction of a suit to enjoin the enforcement of the ordinance.

2. TELEGRAPHS AND TELEPHONES—RIGHT TO USE POST ROADS—LOCAL POLICE REGULATIONS.

The right given telegraph companies by Rev. St. U. S. § 5263, to construct and maintain their lines over all post roads of the United States, is permissive only, and subject to all state or local legislation regulating its exercise; and such permission does not affect the right of a municipality, in the exercise of its police powers, to enact and enforce ordinances intended to promote the safety and convenience of the public in the use of its streets.

8. SAME—INTERSTATE COMMERCE.

The constitutional provision vesting in congress the exclusive power to regulate and control interstate commerce does not preclude the exercise by states of their police powers, by imposing on telephone lines regulations designed for the safety of the local public.

4. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACTS—EFFECT OF CONTRACT BY CITY.

A city cannot, by a contract which permits a telephone company to construct and maintain its line upon a certain street, deprive itself of the power to enact such legislation as is necessary for the general welfare; and an ordinance modifying such permission, or requiring the removal of the line to another location, cannot be held unconstitutional, as an impairment of the obligation of the contract, where it is designed for the public safety and convenience.

5. SAME—DUE PROCESS OF LAW—ORDINANCE REQUIRING TELEPHONE LINE REMOVED FROM STREET.

All grants of rights or privileges in streets by a city vested by its charter with the power of supervision and control of its streets are subject to the power and duty of the city to enact such legislation as may be required from time to time in the proper exercise of such supervision and control in the interests of the public; and an ordinance which can fairly be seen to be directed to a legitimate purpose, falling within such power and duty,—as one requiring a telephone company which had been granted the right to maintain its line in a certain street to remove the same, on the ground that it had become dangerous and inconvenient to persons using the street, but offering another location for the erection of the line, which is a reasonable substitute,—is within the legitimate powers of the city, and cannot be held unconstitutional by a court, as depriving the company of its property without due process of law.

In Equity. On motion for preliminary injunction.

Wells, Angell, Boynton & McMillan, for complainant.

James M. Powers and Garry O. Fox, for defendant.

SEVERENS, District Judge. The bill in this case was filed by the complainant, the Michigan Telephone Company, against the city of Charlotte, to restrain it from enforcing an ordinance requiring the company to transfer its poles and wires from where they stand, in front of blocks 24 and 31, on Main street, in said city, to the alley next adjoining said street, and running parallel therewith. This ordinance was passed upon the grounds that the poles now standing and supporting the wires along said street are decayed to such an extent that they have become inadequate to the support of the system of wires which they carry, and also that the company has accumulated on said poles a great number of wires, which it employs in the conduct of its business, and to such an extent as to endanger the life and safety of the citizens of said city, and others occupying the buildings on said street or traveling therein. The power of the common council to order such a transfer is denied by the complainant, which alleges that while its poles are defective, and the system needs repair in that respect, it proposes to substitute new and sufficient poles in place of the old, and in this respect stands ready to comply with the requirement of the ordinance. But the complainant denies that the wires strung upon its poles constitute any menace to the lives or safety of the public, and alleges that the transfer of its poles and wires to the adjoining alley would be attended with considerable expense and inconvenience, and that the common council transcended its

authority when it ordered such transfer. In addition to its answer, the city has submitted several affidavits in support thereof; and the substance of the case set up in its behalf is not only that the poles are inadequate, but also that, independently of this, the multitude of wires strung thereon creates a condition of danger which it is the duty and right of the common council to obviate by directing the transfer of the company's lines to the adjoining alley, which is much less frequented by the public, and where the danger would be greatly minimized.

The company introduced its telephone system into the city of Charlotte in the year 1883, under the authority of section 3718d, 3 How. Ann. St., which reads as follows:

"Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets and highways, and across or under any of the waters in this state, with all necessary erections and fixtures therefor: provided, that the same shall not injuriously interfere with other public uses of the said places, streets, and highways, and the navigation of said waters."

The charter of the city of Charlotte contained the following provision delegating the supervision and control of its streets to the city:

"The common council shall have supervision of all public highways, bridges, streets, avenues, alleys, sidewalks, and public grounds within the city, and shall cause the same to be kept in repair and free from nuisance." Loc. Acts 1895, p. 198, § 170.

This clause of the charter was in force at the time when the complainant introduced its system into the city, and still remains operative. It is sufficiently shown that the city gave its consent to the original construction of the telephone system along the streets of the city,—among them, Main street, where the poles and lines have since continued. It is also clear enough that the proposed transfer from Main street to the alley could be made without any very considerable expense; the change involving eight or ten additional poles, increasing the length of the wires to the extent of crossing about two blocks, and perhaps some minor incidental material for making connections.

The defendant, the city of Charlotte, contends that no case is stated by the bill which brings it within the jurisdiction of the federal court. Several grounds for jurisdiction are relied upon by the complainant,—among them, this: That the introduction of the telephone system and service by the complainant into the city of Charlotte, with the acquiescence and concurrence of the city, and the incurring of the cost of the construction and maintenance of the system, created a contract that the company might take and retain possession of the streets which it used, and that this contract was impaired by the passage of the ordinance complained of. This is the claim made by the complainant, and, if made in good faith, it affords sufficient ground for the exercise of jurisdiction under that clause of the constitution of the United States which forbids the impairment of the obligation of contracts by state legislation. *City of New Orleans v. New Orleans Waterworks*, 142 U. S. 79, 12 Sup. Ct. 142; *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653. And there is no reason to doubt the bona fides of the company in making this claim.

Counsel for the complainant supports its claim upon the merits on several distinct grounds:

1. It is insisted that the action taken by the common council violates the provisions of section 5263 of the Revised Statutes of the United States, which provides that any telegraph company shall have the right to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States, or which may hereafter be declared such by law, and such lines of telegraph shall be so constructed and maintained as not to interfere with the ordinary travel on such post roads; and it is claimed that Main street, in the city of Charlotte, is such post road, and, further, that this company is a telegraph company, within the meaning of the statute,—citing in support of this latter proposition *City of Richmond v. Southern Bell Telegraph & Telephone Co.*, 28 C. C. A. 659, 85 Fed. 19, and the cases relied upon by the court in deciding that case. It is urged that this provision of law confers upon the complainant the right to occupy any street in the city of Charlotte which is a post road, without let or hindrance from the common council. But in my opinion the statute has no such effect. It is permissive, merely, and the power is given subject to other lawfully existing rights,—among them, that of the state and its municipalities to exercise police powers for the safety, health, and convenience of the public. In my opinion, it was not the intention of congress to arbitrarily disturb or interfere with the exercise of the police powers of the state. A statute giving such authority would be anomalous, and, indeed, of doubtful validity. It is a rule of general application that legislation by congress in respect to all such matters, conferring rights and privileges, is deemed to be subject to local legislation enacted for the purpose of regulating the exercise of such rights and privileges so as to protect the citizens of the state in respect to those matters which fall within the scope of the police power. Of course, it is not intended to say that the local authority may arbitrarily interfere with such rights and privileges, and, under the guise of its conceded authority, enact legislation which is really designed to accomplish some ulterior purpose beyond the scope of its legitimate power.

2. It is further contended that the action of the common council of the city constitutes an unlawful interference with commerce between the several states. Assuming that this rule applies to telephonic communication as a means of such commerce, it is to be observed that the clause in the constitution which gives to congress the control of interstate commerce does not preclude the exercise of power in the states to impose regulations designed for the safety of the local public. *Sherlock v. Alling*, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 18 Sup. Ct. 862.

3. It is also urged that the ordinance of the common council amounts to an impairment of the obligation of the contract between the complainant and the city. But here, again, assuming, as we do, that the contract exists, it is well settled that, with respect to contracts of

this character, they are subject to such incidental modification as results from legislation required in the public interest. It is a fundamental proposition that the legislature cannot deprive itself, by contract, of the power to pass such laws as are necessary for the general welfare of the public. Prominent among the kinds of legislation which may be enacted for that purpose are such as are designed for the public safety and convenience. *New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. 437; *Wabash R. Co. v. City of Defiance*, 167 U. S. 88, 17 Sup. Ct. 748; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513.

4. It is also said that the action of the common council deprives the complainant of its property without due process of law. This assumes that the complainant has a vested right to occupy this particular street. But this position is untenable. The city was required, when it admitted the complainant to its streets, to consider the public interests, in defining in what particular streets the lines might be located. The then existing conditions might have made it proper that this street should be so used. But the construction of buildings on the street, and the multiplication of wires, may have rendered it now imprudent that they should remain. The same duty of provident supervision on the part of the city continues to rest upon it. If there was any vested right in the privilege which was accorded by the city to construct and maintain telephone lines in the streets, it is a privilege which must continue in subordination to the strictly legislative action of the city which it exercises in respect to the matters delegated to it by the legislature for the public welfare. *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U. S. 659; *Railroad Co. v. Gibbes*, 142 U. S. 386-393, 12 Sup. Ct. 255; *Banking Co. v. Smith*, 128 U. S. 179, 9 Sup. Ct. 47; *Coates v. Mayor, etc.*, 7 Cow. 585.

Indeed, each and every of the grounds upon which the complainant relies is negatived by the application of one general proposition, which is that the city, being vested by the legislature with the power of supervision and control of its streets in the manner and to the extent in which that power is given by its charter, has the authority to make such a requirement as it made by the ordinance in question, provided it was made in good faith, and can fairly be seen to be directed to a legitimate purpose falling within the purposes of the delegated authority. As has been already said, if this action of the common council was purely arbitrary, and had no fair tendency in the direction of the public safety, the result would have been different. If power exists, and the exercise of it is not clearly in disregard of its proper bounds, the court is not authorized to determine the validity thereof by its own sense of the wisdom or expediency of the action taken, nor weigh in a nice balance the question of its justice in a general sense. 7 Am. & Eng. Enc. Law (2d Ed.) p. 676, and cases therein cited. In my judgment, there is no sufficient ground upon which the court would be warranted in holding that the common council in this instance transcended its power. It does not exclude the telephone company, but regulates the details of its operations in the service rendered, by requiring it to change the location of this line to a near-by place in the city. And this does not impose a duty so burdensome as to excite any apprehen-

sion that serious hardship is inflicted. It may be that the city cannot compel the company to erect its poles and stretch its wires in the alley; but it has the power, if the necessity therefor exists, to compel the discontinuance of the use of Main street, and in doing this it is bound to provide, if practicable, a reasonable substitute therefor. This it has done. The result is that the motion must be denied. Let an order be entered accordingly.

RYDER et al. v. BATEMAN et ux.

(Circuit Court, W. D. Tennessee. October 3, 1898.)

No. 526.

1. REMOVAL OF CAUSES—POWER TO REMAND BEFORE TERM AT WHICH RECORD IS RETURNABLE.

Where, after the filing of a petition for removal, but before the first day of the next term of the federal court to which the record is returnable, application is made to such court for extraordinary relief, such as the appointment of a receiver to preserve the property, and by leave the record is filed, the court may then inquire into its jurisdiction; and if it will be without jurisdiction of the cause when the first day of the next term arrives, and especially if the suspension of jurisdiction until that time is likely to result in injury to the parties, it may at once remand the cause to the state court.

2. RECEIVER—HEARING OF APPLICATION—ANSWER AS EVIDENCE.

Though a bill waives answer under oath, a sworn answer may be considered as an affidavit, the same as the bill, on an application for a receiver.

3. GROUNDS FOR APPOINTMENT.

A receiver will not be appointed to take charge of real estate which is in the possession of defendants, and to collect the rents therefrom, on the application of complainants, who are out of possession, and seeking by their bill to establish a claim of ownership, where the only evidence before the court is the bill and the answer, which denies all the material allegations of the bill, and especially where it appears doubtful, on a consideration of the bill alone, whether the complainant is entitled to possession.

4. SAME—RIGHT OF TRUSTEE TO RECEIVER.

The fact that a complainant is a trustee, and vested with the legal title to property, does not entitle her to the appointment of a receiver therefor, as against the beneficiary, who is a married woman and in possession, where the trustee at the same time denies the trust, and asserts a hostile title to the property.

5. SAME—SUIT TO RECOVER REAL ESTATE—INSOLVENCY OF DEFENDANT.

A court is not justified in appointing a receiver for real estate, of which the defendant is in the possession and enjoyment under a claim of absolute ownership, on the application of an adverse claimant, unless there is a reasonable probability that complainant's right will be established, and that the property is in danger, both of which conditions should be established to the satisfaction of the court. In the absence of such proof, the insolvency of defendant is immaterial; and it is also immaterial whether defendant has the legal title, or the entire beneficial interest, with the bare legal title vested in a trustee.

In Equity. On application for appointment of a receiver.

The original bill sets out the will of one George P. Cooper as the source of title to the real estate involved; the plaintiff Iris C. Ryder claiming a life estate under that will, and the plaintiff Pauline A. Ryder, who is her daughter,

claiming the reversionary fee in the property under the will of her grandfather. The bill avers that many years ago the plaintiff Iris C. Ryder (in 1878) "signed, sealed, and acknowledged, and caused to be placed on record," a certain deed, conveying the property to a trustee, "for and in consideration of the natural love and affection which she, the said Iris, has and bears to her daughter Marie V. Swingley, and for and in consideration of five dollars cash in hand paid by said Adams," to have and to hold "in trust for said Marie V. Swingley forever, in fee simple, free from any and all debts and liabilities, as well as from the control of any husband she may ever have, to her only benefit and behoof." This Marie V. Swingley is the defendant, and her husband, Bateman, is the co-defendant, to this bill. The bill further alleges that the financial consideration for this deed was never paid; that the deed was never delivered; that the defendant Marie was not the offspring of the said Iris C. Ryder; that she had one child of the marriage to her first husband, A. L. Swingley, but that that child died, and the defendant Marie "was related by blood to the first husband of the complainant Iris C. Ryder, and, when a small child, was taken by complainant Iris C. Ryder and her first husband into their family, and by them raised and cared for"; that such care has been continued, she being supported out of the rents of the property, until her marriage to Bateman. The bill next alleges that by a second marriage the plaintiff Pauline A. Ryder is the only child of the other plaintiff, Iris C. Ryder, the daughter of said George P. Cooper, the testator, and that they are the sole owners of the property, under the will. It further alleges that Bateman and wife are in possession, claiming title under the deed of gift, claiming the rents, refusing, as the agents of the plaintiff, to pay them over to her, and entirely excluding both plaintiffs from all share in them, and that they are endeavoring to sell the property, and are insolvent. It prays for a receiver, for an injunction, and that the deed of gift be canceled, "as a cloud on the title of the plaintiff."

This bill was filed on or about the 28th day of May, 1898, in the chancery court of Shelby county, Tenn., after which certain proceedings were had in that court until the 2d day of July, 1898, two days before the process required the defendants to answer in that court. On that day the defendants filed their petition to remove the case to this court, in which they state "that they are both residents of the state of California, and that their home and residence was in said state of California at the time when this suit was instituted"; that petitioner Marie V. Bateman "is a citizen of said state of California, and was a citizen thereof at the time this suit was instituted"; that petitioner Louis T. Bateman "is a citizen of Great Britain, and was a citizen thereof at the time when this suit was instituted"; "that at the time this suit was instituted the complainants, Pauline Agnes Ryder and Iris C. Ryder, were both residents and citizens of the state of New York, and they both are still residents and citizens of the state of New York"; "that the defendant Louis T. Bateman is merely a nominal defendant, and is only sued in his capacity as husband of Marie V., and petitioners allege that the controversy is separable, and can be fully determined, as between your petitioner Marie V. and the complainants, without the presence of any other defendant." The necessary bond was filed along with this petition, but the record does not show that any order of the state court was ever entered, approving the bond, and directing the removal of the case to the federal court. The term of this court next ensuing after the filing of the petition for removal will occur on the fourth Monday of November, 1898. A transcript of the record was filed in the clerk's office of this court August 4, 1898,—how or by whom does not appear, but certainly without any leave of the court to that end. That transcript shows that, among other proceedings in the state court, on the 1st day of July, 1898, the day before the petition for removal was filed, the plaintiffs were granted leave to amend the bill, and given 10 days within which to file the amendment, and that on the 7th of July, 1898, after the petition for removal had been filed, the plaintiffs filed in that court the amended bill appearing in the transcript. We are informed by the brief of counsel, and the presentation of a copy of the chancellor's order, that, notwithstanding the petition and bond had been filed, the plaintiffs, ignoring the petition for removal, moved in the state court for a pro confesso, and appointment of a receiver by the chancellor. This he refused, as appears by a copy of his order presented by counsel, because the

case had already been removed to the United States circuit court, and because the insolvency of the defendants and injury to the complainants were flatly denied. Immediately after the order of the chancellor refusing the receiver, notice of this application for the appointment of a receiver in this court was served, on the 13th day of August, 1898, after which defendants filed their sworn petition asking for an order compelling the plaintiffs to produce a certain deed, known as "Exhibit D" to plaintiffs' amended bill, which they allege is a forgery, and that it was necessary for them to see the original document before they could file their answer, which they desired to use on the hearing of this application for a receiver. That application of the defendants was refused, for reasons stated in the opinion of the court heretofore filed herein.

The amended bill supplements the original bill with allegations of a somewhat different character. It avers that Nathan Adams, the trustee in the deed of gift, having died, the plaintiff Iris C. Ryder was substituted in his stead by a decree of the chancery court, upon proper proceedings instituted by her for that purpose, by a bill against the defendant Marie and the heirs of the deceased trustee, and that as such substituted trustee she is entitled to all the rights and powers vested in him, and "is alone entitled to collect the rents," etc. It then alleges that after the defendant Marie became of age, and in 1891, she executed "a deed or contract" whereby she "confirmed" the plaintiff Iris C. Ryder's "right to manage and control the said property in as full and complete a manner as she would have managed and controlled it had the deed filed as Exhibit B to the original bill not been made," and "agreed, in consideration of the gifts she had received from complainant Iris C. Ryder," that the plaintiff Agnes P. Ryder "should share with herself the rents and profits derived from the said lands." It next alleges that Bateman, the husband of the defendant Marie, is extravagant and wasteful in his habits, that he entirely dominates and controls the defendant Marie, and that, unless restrained, he will convert the entire rentals and proceeds of sale, if able to sell, to the gratification of his own pleasures, and not to the exclusive behoof, use, and benefit of Marie V. Bateman, his wife. It also alleges, as does the original bill, that Louis T. Bateman and Marie V. Bateman are entirely insolvent, and, if they are permitted longer to collect the rents on the real estate, the complainants will sustain irreparable injury. The amended bill prays for a receiver, for the same relief as the original bill, and "that on the final hearing of this cause the plaintiff Iris C. Ryder be given control and management of the property, and the right to collect the rents therefrom, by virtue of her trusteeship. Both bills waive the oath of defendants to their answer, and both the original bill and the amended bill are sworn to. The original bill alleges that Pauline Agnes Ryder, one of the plaintiffs, is a minor without a guardian, and sues by her mother and next friend, Iris C. Ryder, and that they are both residents of the city of New York, and state of New York, and that the defendants, Louis T. Bateman and his wife, Marie V. Bateman, are residents of the county of Shelby, and state of Tennessee.

After the motion for an order for the inspection of the plaintiffs' exhibit was refused, the defendants, on the 29th of August, 1898, filed their answer to the bill and the amended bill. The answer is sworn to by the defendants, and forwarded along with the transcript from the state court, to be used upon the hearing of this application for a receiver. This answer denies almost every material statement of the bill and the amended bill. It denies that under the will of George P. Cooper there was conferred only a life estate on the said Iris C. Ryder, as charged in the bill, and insists that she acquired a fee-simple title to the property she acquired under that will, and states that on the 30th day of January, 1890, by a proper decree of the chancery court of Shelby county, in the case of Severson against Ryder and others, with all the proper parties before it, and especially with both the plaintiffs and the defendant Marie V. Swingley as parties to the bill, that court construed the will as conferring upon the daughters of George P. Cooper an estate in fee, and not an estate for life, with a remainder over to their children. The answer denies that the plaintiff Pauline A. Ryder is the only living child of the said Iris C. Ryder, and that said Pauline ever became entitled, by her birth, or at any time, to any interest in said property by virtue of the will of her grandfather, as charged in the bill. It emphatically denies that Marie V.

Swingley was taken when a small child and raised and cared for by the plaintiff Iris C. Ryder, and says that she is the lawful child of the said Iris C. Ryder, born in lawful wedlock between her and her deceased husband, A. L. Swingley, and that the "respondents are pained and shocked beyond degree to have such a false assertion made and sworn to by the said Iris C. Ryder." It states that the said Iris C. Ryder has many times, in courts of justice, by her oath declared that she was the mother of the said Marie; that she has always been reputed to be the child of said Iris C. Ryder and her first husband, A. L. Swingley. It admits a deed of trust from the said Iris C. Ryder to Nathan Adams for the use and benefit of the defendant, and avers that it was properly delivered to the trustee, or in some other way, for her benefit, about the date of its execution. It sets up that the plaintiff Iris C. Ryder in February, 1872, was appointed the guardian of the said Marie, upon a bond which was then, and is now, insolvent, and that, shortly after she was qualified as guardian, the plaintiff Iris C. Ryder obtained the sum of \$5,000 life insurance on the life of defendant's father, A. L. Swingley, which belonged exclusively to the defendant Marie, as his daughter; that, immediately upon the receipt thereof by the plaintiff Iris C. Ryder, she converted the money to her own use, and has never paid to the respondent any part thereof, either principal or interest, and that said sum of life insurance money, with compound interest, as under the law the plaintiff would be bound to pay, would be in excess of the value of this property; that her father left other property belonging to the respondent, which the said Iris C. Ryder also has converted to her own use. It then states that in March, 1878, immediately after the execution of the deed of settlement to Adams, the plaintiff Iris C. Ryder, as the guardian of the respondent Marie, collected the rents and profits of the real estate in controversy, and has treated the property as the property of the said Marie ever since that time. It alleges that the respondent Marie has had undisputed possession under the said deed from its date up to this time, a period of over 20 years, and pleads the statute of limitations, and the 7 years' continuous possession and 20 years of uninterrupted ownership, as a defense to any claim of title in the plaintiffs. It denies that there were any errors in the description of the property, as alleged in the bill; and, if there were, it would not avail the plaintiffs to set the deed aside. It denies that the financial consideration of five dollars was not paid. It sets up laches on the part of the plaintiffs in so long withholding this bill. It then says that the respondents never knew or heard of the existence of the "forged deed of September 28, 1891," until it was set up in the amended bill; and against any claim under it the answer again sets up the statute of limitations. The answer then denies that the respondents are attempting to sell the property, or put in any way a cloud upon or incumber the title; denies that they or either of them is insolvent, or that plaintiffs will sustain any injury by the defendants' continued possession of the property. The answer alleges that the plaintiff Iris C. Ryder during all the time of her guardianship has collected about \$200 per month rent from this property, for which she has never accounted to the defendant Marie V., nor to the court that appointed her, as her guardian and trustee, but that the money has been converted to her own use. The answer then sets up that in June, 1890, the plaintiff Iris C. Ryder conveyed a large amount of property in Shelby county to her co-defendant, Pauline, and that, by a proceeding in the chancery court for that purpose, part of that property was sold, and out of the proceeds thereof the defendant Marie was allowed to borrow the sum of \$5,050 upon a mortgage contract signed by the said Marie and her mother, Iris C. Ryder, at an annual interest of about \$300,—the property in controversy in this suit having been conveyed under the mortgage as a security for that loan,—and that the plaintiff Iris C. Ryder joined as grantor in the mortgage in order to execute the supposed trust held by her under the provisions of the decree substituting her as trustee for Adams, the original trustee, who had died. The answer then avers that "respondents emphatically deny that the defendant Marie on the 28th day of September, 1891, or at any other time, executed a deed such as is exhibited by the purported copy thereof made Exhibit D to the amended bill." "Respondents deny that such a deed, or any deed of that character, was ever executed," and say that "the said deed is a miserable and bungling forgery, which has been prepared and concocted

by the said Iris C. Ryder with the intent and purpose of using it as a means of cheating, wronging, and defrauding these respondents." The answer pleads, as to the deed, non est factum, and then proceeds to aver "that if such a deed could have been procured from said Marie, as charged, or if the fact be found to be so, then they charge that it was procured through fraud and duress, and without a knowledge of its contents ever having been communicated to respondent Marie." The answer avers that they have made numerous and sundry applications to be permitted to see the original deed, which has been always refused. The answer says that, at the time the deed purports to have been executed, Marie had just come of age a few days previous; that her mother had been her guardian, and had received \$5,000 of her interest money, and the accumulated interest thereon, and had never made any settlement with her, and besides was claiming the right to exercise constant dominion and control over the affairs of the respondent, in consequence of her trusteeship, and she thereby dominated Marie and her affairs so as to place her under great duress. The answer then says that the said Iris C. Ryder is totally unfit to act as trustee for any one, and that especially is she unfit to execute any trusts connected with respondent's interests, because "she is given to gambling in futures, and squanders the money she can get, in the bucket shops of New York." It states that she has all these years purported to act as trustee under the decree substituting her for Nathan Adams, without ever having given any bond as trustee, without ever having taken the oath of trustee, and that neither bond nor oath have been waived in the deed creating the trust. The answer denies that she is trustee under that substitution, or can claim any rights against the respondent because of it. It sets up that the plaintiff Iris C. Ryder committed a breach of her trust under that deed and decree of substitution, by conveying all the property in controversy to her co-defendant, Pauline, on the 7th day of June, 1898, and that she is seeking by this deed and proceeding to betray her trust. The answer admits that the defendants are asserting the right to appropriate and collect the rents and profits of the property, and deny that the said plaintiffs have any right or share therein. The answer alleges that the deed to Nathan Adams only created a dry and naked legal title in him, and that they are advised that the trust ceased to be an active one when the defendant Marie became 21 years of age, and, while the deed expresses the consideration of love and affection, yet the grantor, Iris C. Ryder, was then indebted to the defendant Marie, principal and interest, in the sum of seven or eight thousand dollars, and that this indebtedness constituted a part of the consideration for the deed. The answer charges that this proceeding is instituted for the purpose of placing the defendants in financial straits, through the operation of a receivership, so as to force them into terms which they could not otherwise obtain, and to further embarrass the defendants by depriving them of the means of paying the interest on the mortgage debt, so that it may be forced to a sale under that security. It states that the defendants have spent several hundred dollars in repairing the property, and have given great attention to the procurement of good tenants, that the taxes are kept paid, and the interest on the mortgage debt is kept paid, and that the husband of the respondent is not extravagant and wasteful in his habits, but is saving and economical in his conduct; and it closes by saying that the defendants are under the necessity of keeping the interest, taxes, and repairs paid, and to "reimburse themselves for expenses, and maintain their credit and character as reliable and responsible citizens, which said Iris C. Ryder has sought to destroy by a wicked and unfounded criminal prosecution, and by a receivership herein on a pretended claim of right on her part."

L. T. M. Canada, for plaintiffs.

Edgington & Edgington, for defendants.

HAMMOND, J. (after stating the facts as above). No affidavit or other proof has been filed on either side to support the remarkable statements of this original and amended bill, or the not less remarkable statements of the answer which has been filed to it;

and we are left, on this application for a receiver, to determine the question upon these bare statements alone.

The slightest inspection of this record shows that there are the gravest questions of our jurisdiction, both as relates to the parties and the subject-matter, under the acts of congress regulating removals from the state courts of suits between citizens and aliens, and forbidding the federal equity courts to entertain jurisdiction where there is a plain, adequate, and complete remedy at law. Acts 1887-88, cc. 373, 866, § 2 (24 Stat. 552; 25 Stat. 433); 1 Supp. Rev. St. pp. 611, 612; Rev. St. § 723. Nor are these questions any less intricate when complicated with the irregularities of practice that have taken place in this case by filing an amended bill in the state court after the petition and bond for removal had been filed; by filing the record in this court, without any application or leave of the court, before the time prescribed by the removal act for its transmission to this court; by filing the defendants' answer without like leave to file the record here; and by submitting this motion for a receiver upon an irregular record, with no proofs, by affidavits or otherwise, in support either of the bill or the answer, the oath to which is waived; the bill and answer being also flatly contradictory in almost every statement, and especially as to the "residence" of the defendants seeking to remove the case, so essential, under the act of 1887, to be established for purposes of jurisdiction by removal under that act. The bill says they are residents of Shelby county, Tenn., and the petition for removal says they are residents of California,—oath against oath. The petition for removal also avers that the defendant husband is, and was at the time suit was begun, "a citizen of Great Britain," and the wife a citizen of California; and it is by no means certain that this is a sufficient description of his national character, though the case may be distinguished, probably, as to that expression, being the equivalent of the more technical form of ancient usage,—“an alien, and a subject of the queen of the United Kingdom of Great Britain and Ireland,” or “an alien, and a subject of the kingdom of Great Britain.” *Stuart v. City of Easton*, 156 U. S. 46, 15 Sup. Ct. 268. Besides this, it has not yet been definitely settled, so far as we are advised, whether or not the defendant wife by her marriage to an alien has not herself become an alien, at least so far as the right to sue, and the liability of being sued, in the federal courts are concerned. *Pequignot v. City of Detroit*, 16 Fed. 211; *Comitis v. Parkerson*, 56 Fed. 556. It also appears that the plaintiffs are citizens of New York, so that the suit is one in which none of the parties are citizens, inhabitants, or residents of the state in which the land in controversy lies, and in which the suit is brought, if the removal petition states the truth, but citizens of another state are suing defendants, who are both aliens, it may be; and, while the petition says they are “residents” of California, the bill says they are “residents” of Tennessee. *Cooley v. McArthur*, 35 Fed. 372; *Cudahy v. McGeoch*, 37 Fed. 1; *Walker v. O'Neill*, 38 Fed. 374; *Sherwood v. Valley Co.*, 55 Fed. 1. Is an alien a “resident” of any state, within the purview of this act of congress? *Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526; *Railway*

Co. v. Gonzales, 151 U. S. 496, 506, 507, 14 Sup. Ct. 401. The petition for removal asserts a separable controversy, and that the husband is only a nominal party; but is that possible, when a husband and wife are charged as joint trespassers, withholding the possession of real estate from the plaintiffs, claiming to be the rightful owners? *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449.

The questions arising under Rev. St. § 723, as to an adequate remedy at law, are quite as complex as any above noted: Whether, if this be a bill "to remove a cloud" from the title of the plaintiffs, they can sustain it, being out of possession. *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712. Whether the filing of an answer has waived this objection. *Reynes v. Dumont*, 130 U. S. 355, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; *Betts v. Lewis*, 19 How. 72; *Reynolds v. Watkins*, 9 C. C. A. 273, 60 Fed. 824; *Wait v. O'Neil*, 22 C. C. A. 248, 76 Fed. 408; *Id.*, 72 Fed. 348. Whether it is in fact a bill to remove a cloud, and not maintainable, or is in fact a bill to rescind one's deed of gift for want of consideration, or (taking the irregularly filed amended bill into consideration) a bill to enforce the devises of a will, or one to enforce the trusts of a settlement by deed of gift to protect a married woman, or the specific performance of a contract to share the "proceeds" of real estate, and for its "management and control," and therefore maintainable, in some of these aspects, under the general prayer for relief, although not under the special prayer to remove a cloud. Inconsistent as these many-sided claims for relief may be, under a general prayer, there being no demurrer or plea to the jurisdiction, whether or not, again, the filing of the answer has not waived all objections in that behalf; a plea only being appropriate to present the antagonistic facts set up in the answer as against the jurisdiction of a court of equity to entertain the bill in any aspect. This opens a rather wide field of inquiry as to the effect of Rev. St. § 723, on a bill so inartistic as this, and so destitute of any interpretation by its prayer of what is wanted in the way of relief, except that a receiver is wanted, as if that might be the main purpose of the bill, instead of an incidental purpose, dependent upon a fairly made out case of *prima facie* right to the property, through established methods of equitable relief or remedy, and not a mere action at law to recover a possession wrongfully withheld, which an action of ejectment would remedy, in some of its aspects, at least. Where is the legal title to this property, in the view of the bill? Clearly, in the plaintiffs,—one or both. Then why would not ejectment lie? If one out of possession cannot, in a federal court of equity, maintain a bill to remove a cloud from the legal title, particularly when the alleged cloud is one's own deed, not denied as to its execution, but only as to its effect, there being a failure of consideration, if the question of jurisdiction be open, notwithstanding the answer, shall the case be remanded to the state court, if such a jurisdiction may be exercised there, be docketed here on the law side as an action at law rightfully removed, upon a rule

to replead, or be dismissed without prejudice to bringing an action at law? These are all perplexing questions, not very easy of solution on a record such as is now presented. Yet, under the strict command of section 5 of the act of 1875, still in force, that if at any time it shall appear, no matter how, that the court has no jurisdiction, the suit shall be dismissed or remanded by the court on its own motion, it is always the duty of the court to look to the jurisdiction and determine it. Act 1875, § 5 (18 Stat. 472); 1 Supp. Rev. St. p. 83; *Morris v. Gilmer*, 129 U. S. 315, 325, 9 Sup. Ct. 289; *Cameron v. Hodges*, 127 U. S. 322, 326, 8 Sup. Ct. 1154; *Graves v. Corbin*, 132 U. S. 571, 590, 10 Sup. Ct. 196; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692. So, when an application is made for the appointment of a receiver, it becomes all the more necessary to look immediately to the question of jurisdiction, lest, if one be appointed, other perplexities arise, that might embarrass the court, if it should turn out there was at the beginning no jurisdiction of the case. *Electrical Supply Co. v. Put-in-Bay Waterworks, Light & Railway Co.*, 84 Fed. 740; *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379; *Compton v. Jesup*, 15 C. C. A. 397, 68 Fed. 263.

The question whether the court or judge may or shall remand the case for want of jurisdiction on the occasion of an application for a receiver, or other extraordinary action, made in the time intermediary from the filing of the removal petition in the state court to the first day of the next term of the federal court, to which alone the record is returnable, by the very terms of the statute, has never been authoritatively decided, so far as I am aware. Rev. St. § 639; Act 1875, § 7 (18 Stat. 472); 1 Supp. Rev. St. p. 83; Acts 1887, 1888, § 3 (24 Stat. 552; 25 Stat. 433); 1 Supp. Rev. St. pp. 611, 613; *Frink v. Blackinton Co.*, 80 Fed. 306; *Hamilton v. Fowler*, 83 Fed. 321.

Nevertheless, it would seem that, if the court within that time may take extraordinary jurisdiction for extraordinary purposes, it might and should then and there remand the case, if it have no jurisdiction, without pretermittting that fundamental inquiry to a later date; especially if the parties were likely to suffer injury by a long delay between terms, as in this case of quite five months between the two dates. The rigid rule that the federal court can acquire jurisdiction only *strictissimi juris*, that its jurisdiction is defeated unless the record is filed strictly according to the statute, and that it has no power to proceed, or authority over the case, generally, until that date arrives, must, *ex necessitate rei*, yield to the circumstance that the injury of a suspension of jurisdiction between the two courts, as if between the heavens and the earth, may involve the parties in serious loss, and the court in the embarrassment of appointing a receiver where there is no jurisdiction to do anything at all in the premises, instead of remanding the case at once to a court competent to deal with that question without any embarrassment. Either the relief that comes of remanding the case under such circumstances must be classed with that of granting injunctions, dissolving them, appointing receivers, and the like, as extraordinary relief, which, like the others, the court may grant, within the time, as of necessity, against the general rule, or else section 3 of the act

of 1875, as amended by the acts of 1887 and 1888, requiring the record to be filed at the next succeeding term of the federal court, must be construed, *pari passu*, with section 5 of the act of 1875, and in the light of the always established rule that the federal court might take intermediate and extraordinary jurisdiction for the purpose of preserving the property, and the like, and for that purpose, if circumstances demand it, may at that time remand the case, if there can be no jurisdiction acquired when the first day of the next term arrives,—if the jurisdiction be impossible by any further action to be taken in the case, and the filing of the record at the statutory time cannot confer or complete it. Why should the case be longer held, if there can be no jurisdiction? True, this question, perhaps, should be asked rather of congress than the courts; but by construing the two sections, as above suggested, for the common good of the general scheme of the statute, we may hold that the one is modified by the other, so that, if, by leave of the court, for some extraordinary purpose, on the application of either party, the record be filed before the first day of the next succeeding term of the federal court, that court also acquires jurisdiction then and there to remand the case, if it can have no jurisdiction of it, and, in obedience to the fifth section of the judiciary act, must remand it. In the case of *Respublica v. Betsey*, 1 Dall. 468, 478, the word “not,” in a statute, was eliminated on this principle of construction, the court remarking that:

“In the construction of statutes, too, judges have sometimes gone contrary to the general words of it. They have expounded the words of an act contrary to the text, to make it agree with reason and equity.”

Again, in *Levinz v. Will*, 1 Dall. 430, 433, while construing statutes, the court observes that:

“In doubtful cases, therefore, we may enlarge the construction of an act of assembly, according to the reason and sense of the lawmakers, either expressed in other parts of the act itself, or guessed by considering the frame and design of the whole.” Citing *Arthur v. Bokenham*, 11 Mod. 161.

If the act, therefore, may be so enlarged as to take jurisdiction before our term for some extraordinary purpose, it may be so enlarged as to effectuate that same purpose by some other extraordinary relief, if need be.

The foregoing questions as to our jurisdiction have engaged, therefore, my serious attention, with the purpose of immediately remanding the case, if it should be found that we certainly were without any jurisdiction of it, and that it ought to be remanded. But, as now advised, it seems that we have jurisdiction both of the parties and of the subject-matter, as a court of equity. However that may be, for the present the jurisdictional questions are reserved for the progress of the case, as the parties may be advised in the premises. For the purposes of this application, the bill will be treated as well filed in equity, at least for the purpose of letting an equitable, if not a legal, joint tenant into the enjoyment of her share of the rents and profits under the deed from the feme defendant to the plaintiffs. It is true that an action of debt or *assumpsit* might lie for any share of the rents collected and wrongfully withheld, but

this would scarcely be adequate or complete, and would require a constant bringing of suits as fast as the rents were collected. Besides, for the present the answer will be treated as a waiver of all objections on the score of a want of equity in that behalf, as well as to the whole bill. In that view, this would be technically a bill for the specific performance of that deed or contract. Apart from that deed, the suit is a mere struggle over the legal or equitable title by claimants out of possession against one in possession under a deed especially good against the plaintiffs, if it be good at all, as against the averments of the bill. And this is the best attitude of the case as presented for the plaintiffs on their application for a receiver.

The bill is sworn to, and there is not an item of proof otherwise offered in support of the application for a receiver. Concede that it may be used as an affidavit in support of the application, and it is fully met by the sworn answer of the defendants, which flatly contradicts every essential statement of the bill. The oath to the answer is waived, and it is thereby, perhaps, even on an application for a receiver made by the plaintiff, shorn of the ordinary force of an answer in chancery as proof on all the issues of the case. Yet it is as good as the bill, as an affidavit, and then we have an exact equilibrium of proof as to the facts,—oath against oath, and nothing more on either side. But the one is the oath of a claimant of ownership in possession, in support of that possession; and the other, of a claimant out of possession, seeking to establish an adverse claim of ownership. The circumstances of this possession do not distinctly appear. The bill says—incidentally, somewhat—that plaintiff Iris C. Ryder, on account of her devotion to defendant Marie, “has permitted her and her husband to act as the agent” of the plaintiffs “in the collection of the rents, permitting the said Marie Bateman and Louis T. Bateman to enjoy a portion of said rents when so collected”; that this was their only means of livelihood; that they have taken advantage of this “generosity,” and now set up an exclusive right to the property under the deed of gift, denying all right of plaintiffs, having “accounted to complainant for an insignificant amount of the rents they have collected.” The answer treats this part of the bill somewhat obscurely, and sets up adverse possession in defendant Marie ever since the deed of gift, about 20 years, that the possession of the plaintiff was held as guardian or trustee for the defendant Marie, that she has never accounted to defendant, but has appropriated the money largely to her own use, and misappropriated much of it by “gambling in the bucket shops.” The result of this, as evidence, is that the defendants substantially deny any agency, and claim the possession as one in their own right; and again it is only oath against oath, with the burden of proof on the plaintiff. Thus it is with all the important facts,—as to the proof of them, the burden of proof being always on the plaintiffs, it must be remembered. The bill says that the original deed of gift was never delivered. The answer says it was. The fact that it went to record appears, and is not denied, which is a corroborating circumstance, if not a conclusive one, in favor of delivery, standing

by itself, and unexplained by any facts to deprive this fact of its legal effect as a delivery. So, take the averment of the bill that the plaintiff Iris C. Ryder is not the mother of the defendant Marie. It is denied by the answer, and denounced by the defendants as "a horrible perjury." Naturally, the plaintiff best knows how this fact is. Just as naturally, there should be other people who either know the fact specifically, or of other facts to corroborate the plaintiff's statement that the defendant Marie is not her child by birth. Yet we are asked, without the least corroborating proof, to oust the defendant of her possession and enjoyment upon this bare statement of the plaintiff, against the fact that the very deed itself recites that she is the mother of the donee, and, according to the statements of even the bill itself, has conducted herself as such. Moreover, the fact is of a character, formidable as it seems and may be in relation to the will of George P. Cooper, and the right of defendant to claim under it as his grandchild, that is not controlling as against the defendant's title under the deed of gift; for the consideration of natural love and affection may attach in behalf of an adopted child as well as of one's own child, and, if the fact stated as a basis of that consideration be false, nevertheless the deed may be good, and the grantor be estopped by the deed itself to deny it.

Coming now to the plaintiffs' claim under the will of their father and grandfather, it appears by the bill that at the very least the plaintiff Iris C. Ryder had a life estate in this property, which passed under her deed to the defendant, and that of itself will support her possession as a rightful one, until the deed of gift is rescinded by a decree on this bill; and the real question, on the application for a receiver, is whether it appears probable that the deed of gift will be rescinded at the hearing upon the proof offered to sustain the application. The plaintiffs must show at least a *prima facie* case of right by the proof adduced. The want of it has already been pointed out; but, more, if the facts stated for rescission should be proved at the hearing, it is very doubtful if they would sustain a decree for rescission, except as to the fact of nondelivery, and, as to that, the bill contains no averment of a single circumstance to militate against its delivery for record, as before pointed out. Again, the answer sets up the fact that a court of competent jurisdiction, with these plaintiffs and defendants before it, has construed the grandfather's will to have devised to the plaintiff Iris C. Ryder, not a life estate, with remainder to her children, but an absolute estate in fee. A certified copy of this decree is not furnished here, and possibly the mere statement of the answer is not proof of the fact; but it presents an issue of fact, at least, which, as an issue, may be considered on this application as to the probability of plaintiffs' success at the hearing.

The amended bill presents a claim by the plaintiff Iris C. Ryder to be let into possession as a substituted trustee for Adams, the original trustee, who has died. For the present application it is sufficient to say that, on the case made by the bill alone, it is scarcely possible that a court of equity would install as trustee for a married woman one who denies the title of the beneficiary, repudiates

the trust, and sets up for herself and another an adverse and hostile title. Indeed, on the application of the married woman, such a trustee probably would be removed, if in possession, and another, more friendly to the trust and the beneficiary, substituted. Nor can the plaintiff, under those circumstances, assume the attitude of the next friend of the beneficiary, to protect her against the alleged extravagance of her husband, if that could be, under such a trust as the deed creates, a ground of equitable interference with the ordinary right of one having the whole beneficial estate, to do with its income as she might please.

The disputed deed from the defendant to the plaintiffs presents an altogether better claim for them to be let into possession for at least their share of the rents. It is very peculiar in its form, and may be of doubtful construction as to its legal effect. As a mere contract to allow the plaintiff Iris C. Ryder "to manage and control" the property, as it is suggested by the amended bill to be, it may not be irrevocable by the defendant, notwithstanding its agreement that it shall be "irrevocable"; for surely no court of equity would enforce such an agreement, when the "management and control" were in the hands of one who since its execution had set up adverse claims to the property, denying not only the title of the grantor, but its effect as reserving anything by it to herself. Courts of equity do not compel any one to keep, on the score of agency, their property rights, whatever they may be, in the control of hostile agents or trustees claiming for themselves against the trust or agency, and may even relieve against a contract to that effect, as unconscionable. But even if the deed goes further, and reconveys to Iris C. Ryder the estate she held before, still it plainly reserves to the defendant a share of the property; and, as before, a court of equity will not compel one co-tenant to submit absolutely the control to another co-tenant, who denies all share to the other, or all interest, as the plaintiff does here. And yet that control is the relief asked by the bill. It is precisely on this principle that the defendant cannot keep possession, absolutely, if that deed be valid; and for precisely that reason, if the alleged danger by insolvency, extravagance, and wastefulness were proved, a receiver should be appointed, and would be, if the execution of the deed had been admitted by the answer. But, as always before, the answer denies the existence of the deed, avers it is fabricated and forged; and again there is only oath against oath as to the fact, with the burden of proving it on the plaintiffs. The deed itself is not exhibited, but only a copy, and it appears by the answer that the plaintiff refuses to disclose it and to allow the defendants to see it; and by other proceedings in the case it appears that she puts the defendants to their bill of discovery to obtain a sight of the original document, as she has a right to do, according to our decision herein. But, notwithstanding that right, the fact that the document is withheld is to be taken as a suspicious circumstance against the plaintiff on this application. The ground for withholding it is stated to be that the defendant Louis T. Bateman is not a proper person to have possession of papers, but, if that be so, the danger could be guarded, according to the practice, by depositing the deed with the

clerk, into whose keeping it would remain during the process of inspection. Another suspicious circumstance, which, until explained, must have its effect on the hearing of this application, is that this deed, Exhibit D to the amended bill, alleged by respondents to be a forgery, was not mentioned in the original bill as a source of right or title in the plaintiffs, or referred to in any way, and is for the first time mentioned in the amended bill. That is a peculiar fact in the case. So, if the case is to be one of strategetical maneuvers on the chessboard of litigation by parties mutually distrustful of the common honesty of each other, the courts can aid neither litigant, except by keeping within the strict lines of legal remedy and procedure. There is no proof on this application of the existence of the deed whereby the plaintiffs claim a share of the rents and property, except their oath, and that is met by the oath of the defendants of its nonexistence. It is not on such proof that courts of equity appoint receivers, which are not to be had for the mere asking.

The alleged insolvency of the defendants is denied, and there is no proof of it, nor of any fact or circumstance from which it may be inferred,—again, mere oath against oath of interested parties. But no allegations of insolvency can strengthen the application, under the circumstances above set forth. If the property belongs to the defendants, they are shown by its ownership not to be insolvent, in the sense of having no property at all; and it is not to be held that every man is to keep enough property, outside of that which is claimed adversely, to protect him from being ousted by a receiver from that which he has. The bearing of the fact of insolvency is often misunderstood on an application for a receiver, and often, erroneously, it is supposed to be controlling. An insolvent party has the same right as another to enjoy his own until a better title is displayed. If a plaintiff sets up a case where the defendant is under some sort of obligation to pay over the rents to some one else, and he be insolvent, that fact might be controlling, perhaps; but not if he claims as owner, and is in possession and enjoyment as owner, absolutely. Then, if his right of ownership be challenged, the plaintiff must show something more than the challenge, to be entitled to a receiver pending the litigation. He must show a probably better right of ownership; otherwise insolvency is quite immaterial. If the corpus be in danger, there might be a better claim against an insolvent in possession of disputed property. Here the answer denies all charges of mismanagement; avers that taxes and mortgage interest are promptly paid, and repairs kept up as required.

One cannot read this bill and answer without the suggestion that it may have been improvident that the mother or foster mother, as the fact may be, should have given this large and valuable property to her child or foster child, subjecting herself to possible deprivation through that ingratitude of a thankless child which is "sharper than a serpent's tooth"; but, bitterly as she may now regret the deed, the courts cannot revoke the gift, beyond the rules of law. The deeds of grantors and donors must operate according to their terms, and cannot be rescinded because of the neglect of filial duties

by children; courts dealing only with their legal duties or obligations.

In the case of *Sage v. Railroad Co.*, 125 U. S. 361, 376, 8 Sup. Ct. 891, Mr. Justice Harlan observes that:

"Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution, * * * and always with reference to the special circumstances of each case as it arises."

The case of *Owen v. Homan*, 3 Macn. & G. 378, 4 H. L. Cas. 997, is perhaps the leading case on this subject, and is appropriate here. It is there said that:

"The granting of a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case,—one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree."

In another case (*Bainbridge v. Baddeley*, 3 Macn. & G. 413) it is said there are two grounds only for appointing a receiver:

"(1) That there is a reasonable probability of success on the part of the plaintiff; and (2) that the property, the subject of the suit, is in danger."

In *Vose v. Reed*, 1 Woods, 647, Fed. Cas. No. 17,011, Mr. Justice Bradley lays down substantially the same rules for the guidance of the courts as found in the other cases.

Chancellor Kent, in *Verplank v. Caines*, 1 Johns. Ch. 58, remarked that:

"The court ought not to interfere pending litigation, when the plaintiff's right is not perfectly clear, and the property itself, or the income arising from it, is not shown to be in danger."

That is the universal rule in cases like this,—reasonable probability of plaintiff's right, and danger to the property, established before the hearing by sufficient proof to satisfy the court of both these conditions.

And in *Houlditch v. Lord Donegall*, 1 Ball & B. 402, it has been observed:

"That such interference is, to a certain extent, giving relief,—in fact, depriving the defendants of a present use and enjoyment of the estate, and so far a decision *pro tempore* against them; and therefore, without some strong necessity, the court ought not to do any act to disturb the existing possession, until, from a view of the whole case by a regular adjudication, it can pass upon the right." *Willis v. Corlies*, 2 Edw. Ch. 281, 286.

In *Baird v. Turnpike Co.*, 1 Lea, 397, the court, in determining whether a decree appointing a receiver may be superseded, remarks that such an appointment is extraordinary process; that ordinarily it cannot be superseded by the appellate court, unless "it would affect possession which is itself a right," where the contest is over the legal title to land; and the intimation is that in such a case there is the want of power to appoint a receiver. Possibly that may be going too far, but it shows with what solicitude courts protect the possession of one having a *prima facie* right to it, against a plaintiff who does not show a better *prima facie* right at the time of the application.

In *Richmond v. Yates*, 3 Baxt. 204, there was a supersedeas of an interlocutory decree appointing a receiver of the rents on the application of a defendant, as against a plaintiff who was in possession, in a controversy as to the real owner of the land. The court says:

"It is a contest as to the title of the land, the complainant being in possession; and, until it is determined at the hearing that her title is invalid, she cannot be disturbed in her possession." 2 Daniel, Ch. Prac. (6th Ed.) 1715, 1718, 1720, 1725.

This author notes that:

"A receiver may be appointed against a party having possession under a legal title. Thus, where fraud can be clearly proved, and immediate danger is likely to result, if the intermediate possession should not be taken under the care of the court, a receiver may be appointed."

For which he quotes in the notes Lord Eldon's observation to that effect in *Lloyd v. Passingham*, 16 Ves. 70; saying, also, that "the court interposes against the legal title with reluctance."

This doctrine is approved by the supreme court in *Wiswall v. Sampson*, 14 How. 52, 64, where it is thus stated:

"If the person holding the legal interest is not in possession, the equitable claimant against the property is entitled to the interference of the court, not only for the purpose of preserving it from waste, but for the purpose of obtaining the rents and profits accruing, as a fund in court to abide the result of the litigation. And the court will also appoint a receiver, even against a party having possession under a legal title, if it be satisfied such party has wrongfully obtained that interest in the property. Thus, where fraud can be proved, and immediate danger is likely to result, if possession pending the litigation should not be taken by the court in the meantime."

The text writers are equally explicit on this subject, and cite innumerable cases following the lead of those already cited here. High, Rec. §§ 19, 20, 591-603, et seq.; Beach, Rec. §§ 5, 7, 67-70, 72, 480-484, 486, 488, 489; 3 Pom. Eq. Jur. §§ 1330-1335; Beach, Mod. Eq. Jur. §§ 931, 933, 936, 941; Beach, Mod. Eq. Prac. § 720.

The case of *Hugonin v. Basely*, 13 Ves. 105, wherein a receiver was appointed, has some features quite similar to this case, but the distinctions between the two are apparent. A widow, with an estate in Jamaica, lamenting her destitute condition, without consideration executed a conveyance to her clergyman, as a friend she could trust to manage her affairs; reserving for herself only an annuity of an amount about equal to the rental value. Lord Chancellor Erskine was embarrassed by the fact that the legal estate and possession were with the defendant, but there being "a very strong probability that the plaintiff had the title to call back this estate, and because of the suggestion of counsel that one standing in the capacity of a trustee could not take a bounty from the cestui que trust without great suspicion of undue influence," appointed a receiver pending the litigation. That was a case of a donor seeking to recover the estate from a donee who was at the same time trustee for the reserved interest, upon the ground of undue influence. This is the case of a donor without any reserved interest seeking to recover from the donee, for whom at the same time she is a trustee, upon the ground that the donee is not in fact the donor's daughter, as the

deed recites, and of a subsequent reconveyance by the donee which is denounced a forgery.

Mr. High in his work on Receivers, as do the other authors cited, states that the insolvency of a defendant in possession does not of itself warrant the court in appointing a receiver, but, in addition, it must appear that the plaintiff has a probable right to recover in the end. High, Rec. § 18, citing *Gregory v. Gregory*, 33 N. Y. Super. Ct. 39; *Lawrence Iron-Works Co. v. Rockbridge Co.*, 47 Fed. 755.

Recurring now to the quotation from Mr. Justice Nelson's exposition of the principles governing the application for a receiver in a case like this, in *Wiswall v. Sampson*, *supra*, it is apparent that the defendant has not the legal title, strictly and technically considered, perhaps, but she has the "legal interest," to use his words,—chosen, no doubt, to accurately express the fact, running through the authorities, that the protection of the defendant in possession does not depend on the bare technical legal title, but on the right to enjoy the income or profits of the estate as the owner thereof; and, united with her trustee, the defendant has that, if her deed is good, both as to the legal and equitable interest. She may be separated from the bare legal title, but otherwise she has the entire interest, under the terms of her deed. It is not necessary to inquire whether the trustee under that deed had anything more than "a dry trust," or whether the effect was to give her a legal title. Certainly he has no active duties imposed by the terms of the trust. She has, in my opinion, the same standing in a court of equity, on an application like this, and under the peculiar circumstances of this case, as if she stood here with the legal title, or as if she and her trustee were both standing here, in possession. It is not to be overlooked that one of the plaintiffs is the substituted trustee of the deed of settlement and gift, but, as already pointed out, she is a hostile trustee, denying her own title as trustee, and the defendants' interest under the trust, by denying the validity of the deed, and seeking to set it aside. She cannot claim under it and against it, and if she were in possession, making such claims of adverse ownership as she makes here, a court of equity would remove her as trustee, or appoint a receiver against her, on the application of the defendant or her next friend. Therefore she can claim nothing as to a receiver on that score, but her application must stand on the merits of the hostile claims of adverse title she sets up by this bill. The application for a receiver must be denied. Ordered accordingly.

RYDER et al. v. BATEMAN et ux.

(Circuit Court, W. D. Tennessee. October 3, 1898.)

1. EQUITY PRACTICE—REQUIRING PRODUCTION OF DOCUMENTS—RULES IN FEDERAL COURTS OF EQUITY.

Rev. St. § 724, is designed merely to give courts of law of the United States the power to require the production of documents to obviate the necessity of parties going into equity with a bill of discovery for that purpose in aid of an action at law, and in no way affects the practice of federal courts of equity, which is governed by the general equity rules prescribed by the supreme court, and where they do not apply by the

practice of the high court of chancery of England at the time those rules were promulgated in 1842.

2. SAME—RIGHT TO INSPECTION OF DOCUMENTS BEFORE ANSWER.

A federal court of equity will not compel a plaintiff to produce for inspection a deed on which rights in real property alleged in the bill are founded, and a copy of which is attached to the bill as an exhibit on a petition of defendant before answer alleging that such deed is a forgery, but, if genuine, was obtained by fraud; nor will the court enlarge the time for answering until the deed has been filed with the clerk. No litigant can be compelled, as a matter of general right, to produce his evidence for the inspection of his adversary in advance of the hearing, and the defendant is not entitled to an inspection of the deed to enable him to form an opinion as to its genuineness, and thus determine which of the two inconsistent defenses he will make, but he is required to answer the bill in accordance with his knowledge and the facts.

On Motion to Require the Production of an Exhibit for Inspection.

L. T. M. Canada, for plaintiffs.

Edgington & Edgington, for defendants.

HAMMOND, J. This is an application by the defendants, upon a sworn petition, to have the plaintiffs produce and file with the clerk for their inspection a certain deed mentioned by the plaintiffs in their bill as "Exhibit D" thereto, or else have an order enlarging the time of the defendants to file their answer until a given time after the plaintiffs shall have filed the original of the said deed with the clerk for that purpose. The bill makes a copy of the original deed an exhibit to the bill, but it is stated in this petition that the plaintiff Iris C. Ryder has repeatedly refused to permit the defendants to see the original. The defendants say, in their sworn petition, "that the said deed is a forgery, and that no such deed was ever made by the said defendant Marie." Again, they say, "Respondent Marie has no recollection or knowledge of the execution, signing, or acknowledgment of the document sued on, and, if the signature to the same should prove to be her genuine signature, then it was obtained by fraud." The defendants further say in their petition that the deed purports to have been acknowledged in Los Angeles county, Cal., before a notary public, and they believe that this acknowledgment is also a forgery, and do not believe that it is the genuine signature and seal of the notary public attached to said deed; and, if it be so attached, that it is a forgery. The defendants say, also, in the petition, that they will not be enabled to answer the bill intelligently without an inspection of this paper, to the end "that they shall have proper facilities to prepare the evidence for the defense of this case." And they ask to have all further proceedings stayed until they have secured an inspection of the original document. It also appears by the statements of counsel and by the record that the plaintiffs have moved for the appointment of a receiver for the considerable quantity of real estate involved in the controversy; and the defendants, before the hearing of the motion for a receiver, desire to file their answer to the bill, and this they cannot do until they have inspected the plaintiffs' exhibit. For this reason there has been considerable urgency about this application.

The plaintiff Iris C. Ryder has filed an answer to this petition of the defendants, also sworn to, denying that the deed is a forgery,

and stating that on or before the hearing of this cause she will produce the paper, and establish its genuineness; that she has made a copy of the paper an exhibit to her bill; and states in the bill that on or before the hearing she will produce the paper, or a certified copy thereof, as legal evidence. She states that the petition is filed only for delay; that the defendants are totally insolvent, and are squandering the rents of the property; and that the defendant Louis Bateman is an unscrupulous man, not to be trusted with papers; and asks to have the motion for the receiver heard without further delay.

This application must be denied. It is a great mistake to suppose that parties to a litigation have a promiscuous right to the production and inspection of the papers and documents in the possession of their adversary. A loose practice has grown up on this subject, and there is generally a good deal of complaisance on the part of counsel and the parties to the suit in the production of papers; but whenever the practice has been challenged it has been found that there are limitations to the right, which it is necessary that the courts should safely guard, in order to secure the citizen against an invasion of his right to hold and keep his papers from unlawful or impertinent inspection. Even litigants who expect to use their papers in evidence are not required to produce them for the information of the other side, except under strictly guarded rules of practice that are intended to secure the protection of this right. Mr. Justice Bradley, in the case of *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, denounces the practice of invading this right under the forms of law by judicial process, and shows how it is guarded in criminal procedure by a constitutional provision; which was also enforced in the case of *Potter v. Beal*, 2 C. C. A. 60, 50 Fed. 860, by annulling an order that had been granted for the inspection of papers in a criminal case. There is, perhaps, no constitutional provision to protect the citizen against seizures and searches in civil suits, as in criminal cases, but it will be found, nevertheless, that the courts carefully avoid any unlawful violation of the citizen's right in respect of this protection. *Railroad Co. v. Botsford*, 141 U. S. 250, 254, 11 Sup. Ct. 1000.

Lord Chancellor Selborne remarks, in *Minet v. Morgan*, 8 Ch. App. 361, 364, that "there might, perhaps, be great reason for holding that, if a man comes into court as plaintiff, attacking somebody else, he ought to be bound to disclose everything on which he relies for the purpose of his attack. But undoubtedly that is not the present rule of the court"; wherefore it is required that we shall determine under just what circumstances the parties have the right to compel each other to produce documents for the inspection or use of the adversary in the litigation.

Counsel, in their brief, refer to the judiciary act of 1789 (1 Stat. 82, c. 20, § 15), which is now Rev. St. § 724, as furnishing authority on the part of the court to make this order. But it will be seen that this act is confined to actions at law, and does not at all apply to courts of equity. The only purpose and effect of that act is to give courts of law the power to do what courts of equity may do in the matter of producing documents without the formality of going into a court of equity

with a bill of discovery in aid of an action at law. Story, Eq. Pl. p. 106, § 555, note; *Railway Co. v. Botsford*, supra. Mr. Justice Bradley, in *Boyd v. U. S.*, supra, refers to this statute, and praises the wisdom of congress in strictly limiting the right of production to "cases and under circumstances where the parties might be compelled to produce books and writings by the ordinary rules of proceeding in chancery." He says: "The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been hazardous." 116 U. S. 631, 6 Sup. Ct. 533. It will thus be seen that the supreme court of the United States, by this interpretation, limits the power of courts of law, under this act of congress, to precisely the power that courts of equity have to compel the production of documents. And it becomes, therefore, all the more important to determine how courts of equity proceed in the exercise of their power to subserve the ends of justice, and at the same time protect the litigant against unlawful compulsion in the matter of the production of his evidence to the inspection of his adversary.

There has been in recent years, by legislation in parliament in England and in the legislatures of the states, a very decided reform in the matter of procedure, the purpose being to avoid the cost and expense of bills of discovery to compel the production of documents which, under the rules governing courts of equity, should be produced, by authorizing all courts to compel the production upon motion made by the parties, without the formality of bills of discovery. An example of this legislation will be found in St. 15 & 16 Vict. c. 18, § 20, which allowed the parties after answer, under certain circumstances, to secure the production of documents by petition; and by more recent legislation in England, and by orders of court, the practice has been entirely changed, and the production is enforced upon a proceeding by affidavit. Another example is found in the New Jersey equity rule 31, that being a state where equity practice is still preserved in its original form and purity to a great extent. That rule allows the inspection to be had without a bill of discovery, and upon motion. Dick. Eq. Prec. 151, 208. But it is to be observed that in all this legislation the courts are careful, while changing the methods of procedure, not to change the fundamental principles which govern the exercise of the right of compelling the production of documents; no doubt actuated by the same wisdom which Mr. Justice Bradley attributes to congress in conferring this enlarged power upon the federal courts in actions at law. Congress has not yet chosen to change the method of procedure in the federal courts of equity, and the very fact that Rev. St. § 724, is confined to courts of law, is conclusive that the courts of equity must proceed as they did and do without the aid of that statute. We are governed by the general equity rules prescribed by the supreme court of the United States, and, where they do not apply, by the practice of the high court of chancery in England at the time of the promulgation of those rules, in 1842. Equity rule 90; *Bein v. Heath*, 12 How. 163,

178; *Betts v. Lewis*, 19 How. 72. It will be found that that elaborate system of rules was largely intended to settle many disputed questions of chancery practice, but unfortunately they did not take up this question of the production of documents, and there is no rule governing the practice. We must find the correct practice from other sources, as also the particular circumstances entitling the parties to the production of documents as against each other.

Mr. Justice Bradley, in the *Boyd Case*, cites Pollock on the Production of Documents, an old English work, which I have been unable to procure. And there is another work, Wigram on Discovery, which also I have been unable to consult. It appears that there has been a good deal of conflict of authority on this subject. However, before we examine the authorities which govern the right and the practice, it will be well enough to understand precisely what is wanted in this case. The petition discloses the fact that the defendant is uncertain whether she actually signed the deed of which inspection is wanted or not, and says that, if the signature should prove to be genuine, then it was obtained by fraud. Evidently what is wanted is an aid to the defendant's memory to determine whether she signed the document or not. She certainly knows, or ought to know, whether, as a fact, she signed any deed transferring the property in controversy; and it is not unreasonable to require her to answer according to her knowledge and her memory, and not to give her the choice of determining whether the deed is a forgery, or a genuine document signed by her, according as she shall determine whether the signature to the document is genuine or not by looking at it. It is not her opinion whether the actual signature to the document is in her own handwriting which the plaintiffs want by her answer and demand by their bill. It is her knowledge of the fact whether she transferred her property according to the purport of that document that the plaintiffs demand by their bill. And they have a right to her answer to that demand from her own knowledge of the fact. Again, the defendant knows, or ought to know, now, and should be able to state without an inspection of the document, whether or not there be in existence facts and circumstances or events which constitute a fraud in procuring her genuine signature to that document; and it would seem that justice would require that she should select which of the two alternative defenses she suggests by this petition she will make, without any aid from an inspection of the plaintiffs' document and muniment of title. The two defenses are obviously inconsistent with each other. The deed cannot be at the same time a forgery and a genuine signature obtained under circumstances which invalidate it for some fraud committed against the defendant; and it is plain from the face of the petition that what she really wants is to see the paper before she chooses any defense. If she and those she may call upon to pass their judgment upon the genuineness of the signature should say that it is a forgery, then she will declare by her answer that it is a forgery; but, if she recognizes it as a genuine signature, then she will set up other facts and other circumstances in defense of the bill, which will avoid the deed upon some ground of "fraud."

Is it not entirely obvious that there is no principle of justice which requires, under any circumstances, that a defendant should have this advantage in determining what defense she will make, but that real justice requires that she shall answer according to her knowledge and according to the facts, without any alternative choice about the matter? Hence it would seem that under any method of procedure or under any rule of right upon this subject, which leaves open, to be determined in any way, a question of inspection, it should be denied, under circumstances like these, until after the defendant has made her choice of defenses, if she supposes she has a choice under such a state of facts. No cause could better illustrate than this the wisdom of the rule declared in the cases that every litigant has the right to reserve the proofs that establish his case until the hearing thereof, and is not bound to advise his adversary of the strength of his case in order to enable him most successfully to defend against it; in order to enable him to do what is proposed in this case,—choose whether the defendant shall set up one of two antagonistic and incongruous defenses. She ought to be able to defend according to the facts, without such choice, if the defense be honest.

The celebrated case of *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 114, 1 Wils. Ch. 113, and 2 Wils. Ch. 29, is the leading case in favor of this application by the defendants for an inspection of the plaintiffs' document. It was there held that the proper order is not one to produce the document for inspection, but to enlarge the time of the defendant for answering the bill until such time as the plaintiffs shall deposit the document with the clerk of the court for the inspection of the defendant; and that order was made in that case. It was a bill against executors seeking an account and payment of two promissory notes made by the testator. The defendants did not charge forgery in the plain terms of this petition we have before us, but in the polite language of social diplomacy applicable to instruments set up by a princess of Wales they did say that when they had seen the promissory notes some time before they "appeared not equal in handwriting, construction, and spelling to the late duke's, and the form of the signature seemed unusual." A motion was made to have these documents produced and inspected by defendants before making answer to the bill. It was at first refused by Lord Eldon until the affidavit was made more specific and in the language above quoted. He afterwards, however, allowed the order, and gave, in an elaborate opinion, his reasons for doing so. The solicitor general, in his argument in favor of the motion, called attention to the exceptional circumstance that it was a bill against a dead man, and his executors could not know whether the signatures were genuine until they had seen them; whereas, if the defendant had been living, he would be able to make answer from his own knowledge of the fact of signing the paper, and therefore the order then might not be appropriate. There were other "specialties," as some of the judges in subsequent cases remark, about this case, growing out of the relationship of the plaintiff to the deceased duke, her brother; but it is not necessary to call particular attention to them here. The lord chancellor's opinion is very instructive, but requires full and

careful reading to understand the reason for his decision; and it is evident from the face of it that he was struggling against the common rule to find an exception in that case. He said that, if the defendant wants the production of deeds from the plaintiff, who has not said what, by his bill, he may say,—that he has left the instruments in the hands of the clerk that the defendant may inspect them in order to answer the interrogatories that are propounded thereon,—then he must file a cross bill, but the defendant cannot have an answer to his cross bill for the discovery until he has answered the original bill. Therefore, if the peculiar circumstances require that he must see the paper before answering the bill, necessarily there must be some relaxation and exception to the general rule, or there would be worked an injustice to the defendant. He then quotes from the Practical Register, the great authority on chancery practice in that day, that under such circumstances the plaintiff shall give the defendant a copy of the instrument. Mark, the Practical Register says only a copy; but the lord chancellor proceeded to find the special circumstances in this case which constituted an exception to the general rule, and made the order that the defendants should not be required to answer until a fortnight after the plaintiff had deposited the notes with the clerk in court. The princess never did deposit the notes, and after some 18 months' delay the bill was dismissed for noncompliance with the order.

This case of the Princess of Wales was stigmatized by Chancellor Walworth in *Kelly v. Eckford*, 5 Paige, 548, as "a political decision," and he says it had always been so considered. Certainly, judges who have subsequently considered it in England have dissented from it as not being founded on any sound reasoning, and it is there regarded as having been overruled.

In *Penfold v. Nunn*, 5 Sim. 409, Vice Chancellor Shadwell ruled that: "The court will not, on motion of defendant, compel a plaintiff to produce documents in his possession, although the defendant swears that an inspection of them is necessary to enable him to answer the bill. He must file a bill of discovery." The opinion denies the authority of the Princess of Wales Case, and directly refuses to follow it.

In *Milligan v. Mitchell*, 6 Sim. 186, Vice Chancellor Shadwell again rules that: "It is contrary to the general tenor of the practice of this court to order a plaintiff, on the application of the defendant, to produce a document in his custody; and I do not think I am bound to follow the decision in *Princess of Wales v. Earl of Liverpool* except in a case precisely similar to it. There were specialties in that case that do not occur in this."

In *Pickering v. Rigby*, 18 Ves. 484, Lord Eldon himself refused the motion even in a partnership case, which has generally been considered to be an exception to the general rule, because partners have an equal interest and ownership in the documents belonging to the firm. The lord chancellor required a cross bill in that case. And again, in *Maund v. Allies*, 4 Mylne & C. 503, the lord chancellor again refused an order for the inspection of the plaintiff's document where there was a partnership, and one of the partners was receiver, except so far as

his receiver's books were concerned. In this case the court quoted the remark of Lord Langdale in *Wedderburn v. Wedderburn*, 2 Beav. 212, that the courts have certainly sometimes shown astuteness in making these orders. Counsel had said that the court would sometimes labor indirectly to make such orders, but always repudiated jurisdiction to do so when brought face to face with it; and then it was that Lord Langdale made the above remark, and referred to *Shepherd v. Morris*, 1 Beav. 175, 4 Beav. 252, which was a case where the court refused the order for inspection, but again, as in the *Princess of Wales Case*, did enlarge the time to make the answer until after the plaintiff had filed the documents with the clerk.

In *Wiley v. Pistor*, 7 Ves. 411, Lord Eldon again refused the motion to inspect the plaintiff's documents, although they had been made exhibits to a deposition which he had taken in the case.

In *Micklethwait v. Moore*, 3 Mer. 292, Lord Eldon much discussed the question, and again refused the motion for the production of documents, and held that a cross bill must be filed; and he said in that case that even a plaintiff, although he has the right to inspect deeds admitted by the defendant's answer to be in his possession, on which his own title rests, cannot compel the production of those relating only to the defendant's own title. And it will be seen from the authorities that the plaintiff has a much larger right to inspect the documents of the defendant which the defendant has filed in his answer than the defendant can ever have as against the plaintiff, for the reason that the plaintiff's bill, even where it is not strictly or technically a bill for discovery, calls upon the defendant to answer specifically as to the allegations of the bill; and so, when the defendant, in his answer, refers to documents in his possession in such a way as to make them a part of his answer, the plaintiff may, without a bill of discovery, by motion compel the defendant to produce the documents for his inspection. But this right of the plaintiff to inspect the defendant's documents is limited to particular cases, and is carefully guarded by the courts, so as not to intrude upon the right of a litigant to keep possession of his own proof until he chooses in the usual way to produce it at the hearing. *Atkins v. Wryght*, 14 Ves. 211.

In *Brown v. Newall*, 2 Mylne & C. 558, at page 573, Lord Chancellor Cottenham refers rather contemptuously to the *Princess of Wales Case*, and decides that the right of inspection does not exist; quoting approvingly Lord Thurlow in *Anon.*, 2 Dickens, 778, as follows: "Did you ever know an instance of a defendant's applying against a plaintiff even to produce deeds? There cannot be any. It hath been denied. If you want it, you must file a cross bill for the purpose."

In *Burton v. Neville*, 2 Cox, Ch. 242, Lord Chancellor Thurlow refused an order upon the defendant to produce papers which had not been submitted by him to be produced, saying the courts have never gone beyond the case where the parties had a common interest in the paper.

In *Spragg v. Corner*, 2 Cox, Ch. 109, the defendant moved to have the plaintiff leave with the clerk a deed, it being stated by the bill that it was in the "plaintiff's custody, and ready to be produced as the

court should direct." Here Lord Chancellor Thurlow said that, "As the motion is not consented to, it was totally impossible, for it is a universal principle that, if the defendant wants discovery of any deed in the hands of the plaintiff, he must file a cross bill for the purpose."

In the case of *Jackson v. Sedgwick*, 2 Wils. Ch. 167, the application was refused and the *Princess of Wales Case* was explained.

In *Davers v. Davers*, 2 P. Wms. 410, the master of the rolls had granted an order on the defendant's petition to inspect a deed which had been referred to in a deposition taken by the plaintiff; and that order the lord chancellor discharged, "for that the other side had no right to see the strength of the plaintiff's cause or evidence of title before the hearing, and no such order was ever yet made. If so, motions would be made every day from curiosity to pick holes in the deed," etc. And the same ruling was made in *Hodson v. Earl of Warrington*, 3 P. Wms. 35, only there it was the case of a defendant's deed proved by a deposition taken by the defendant. It was there stated that the parties have no right to see each other's exhibits, but must file a bill, since it remained at the election of the defendant whether he would make use of the deed at the hearing or not. It was also there said in argument that the master of the rolls constantly made these orders, but that, as often as he made them, the lord chancellor set them aside.

In *Attorney General v. Brooksbank*, 1 Younge & J. 439, the motion by the defendant for a production and inspection of the plaintiff's papers was granted under peculiar circumstances, the chief of which was that the transactions involved the settlement of an army agent with the war department, which was challenged after 25 years; and the court said that under peculiar circumstances they would sometimes deviate from the common practice, which will bend to particular cases in order to prevent injustice.

In *Jones v. Lewis*, 2 Sim. & S. 242, there was a case of a written agreement by a testator to convey his estate to his daughter, which afterwards he devised to another. The defendants asked for an inspection of this agreement to enable them to answer. The production was ordered upon motion supported by affidavit that the defendant believed the instrument to be forged, and that he could not fully answer the bill before he inspected it. Vice Chancellor Leach acted in this case upon the authority of the *Princess of Wales Case*, but this order was afterwards vacated by Lord Eldon himself, who had granted the order in the *Princess of Wales Case*, as appears by the following memorandum in the original edition of 4 Sim. 324, which, by the way, is generally left out of the reprints and decisions of the English chancery reports. The memorandum is as follows: "The order made by Sir J. Leach, vice chancellor, in *Jones v. Lewis*, 2 Sim. & S. 242, was discharged by Lord Eldon, but without costs." This has generally been regarded as an indirect overruling of the *Case of the Princess of Wales*, and has been so treated by the most of the judges who have subsequently considered the question; but some of them have adhered to the *Princess of Wales Case*, strictly limiting it, however, to the peculiar circumstances of that case, the most important

of which was that both in that case and in *Jones v. Lewis* the person whose signature was said to be forged was dead, wherefore there was more reason or justice in departing from the ordinary rule, and allowing the executors an inspection of the document in order to determine whether or not there had been a forgery committed.

Lord Langdale somewhat defends the *Princess of Wales Case* in *Taylor v. Heming*, 4 Beav. 235, and explains the practice. In that case the plaintiff had offered to produce and deposit the letters referred to in his bill, but afterwards refused. He was compelled, by the usual order authorizing the answer to be delayed until he did deposit, to produce and file them for inspection. Lord Langdale said in that and other cases that the *Princess of Wales Case* was not amenable to the animadversions that had been made upon it, for that it could be defended upon its particular circumstances, both upon principle and authority; and he referred to the previous case of *Shepherd v. Morris*, 1 Beav. 175, where he had granted the same order for enlarging the time to answer until the plaintiff had filed his documents,—again under peculiar circumstances. There the plaintiff's original bill had called for an account, and the correction of errors made by the defendant in rendering reports to the plaintiff, and by an amended bill charged false entries in the defendant's accounts. The plaintiff having called upon the defendant to correct his accounts as they had been rendered to the plaintiff himself by the defendant, who was his agent, the master of the rolls said that this he could not do until the identical documents which he had been called upon to correct were produced. It was not a case of correcting his accounts as he kept them, but of correcting the accounts as he had rendered them to the plaintiff. This was a close but clear distinction, and the lord chancellor compelled the production of the documents.

Evidently afflicted with the criticisms upon this adherence to the discredited *Case of the Princess of Wales*, Lord Langdale, in *Bate v. Bate*, 7 Beav. 528, 537, again takes occasion to explain the distinction between that class of cases and the cases in which he had followed it. He ruled in *Bate v. Bate* that "a plaintiff, unless he specifically offers to do so by the bill, or is required to do so by the cross bill, is not bound to produce, previous to defendant being compelled to put in his answer, documents admitted to be in the plaintiff's possession, and alleged as proving his case." It was the case of a bill for the settlement of disputed partnership matters against three defendants, which charged that certain indentures mentioned in the bill were in fact prepared from instructions given by the defendants without any communication with the plaintiff, and were caused to be prepared in such a way as they thought best for their own views and purposes, and they always refused to produce or show the conveyances of the said premises, or the draft thereof, to the plaintiff, although the plaintiff had frequently applied by letter and otherwise for an inspection of the said documents, "as by reference to the correspondence in the plaintiff's possession, when produced, will appear." It was moved in behalf of the defendants that they might have a month's time to answer after the plaintiff had produced and deposited with the clerk for the inspection of the defendants the correspondence in

the said bill stated to be in the plaintiff's possession, more particularly set out in the motion. The defendant made affidavit that he had kept no copy of the letters that had been written by him to the plaintiff respecting the matters stated in the bill, and that he could not properly put in his answer to plaintiff's bill and amended bill until he had opportunity of inspecting the letters which he had written to the plaintiff, and which the bill admitted to be in the possession of the plaintiff. It was this motion which Lord Langdale, the master of the rolls, refused. He says, in explanation of his judgment:

"There have been several cases upon this subject; and I think they may be divided into two classes: First, cases like that of the Princess of Wales v. Earl of Liverpool; and, secondly, two several cases which came before me, and have been referred to, namely, Taylor v. Hemming and Shepherd v. Morris. These were cases in which the plaintiff, by his bill, not only stated that he had possession of the documents, intending to use those documents in support of his case, but he called upon the defendant to look at them, and offered to produce them for the purpose. The plaintiff, in substance and effect, stated by his bill that the defendant could not give the answer which the plaintiff desired to have for his own use unless the defendant would look at those documents; and, the plaintiff having done that, then refused to produce the documents. I think I may assume, after the investigation which this case has undergone, that there is no case whatever to be produced in which the plaintiff, charging a particular fact to be within the knowledge of the defendant, and stating further that he had evidence of the fact in letters which are in his possession, has been held bound to produce those documents before the defendant could be called upon to put in his answer. The strong impression upon my mind is that there is no such case. None so contrary to the ordinary principle has been produced, and I believe that if you were to lay it down as a proposition that the plaintiff shall not proceed until the defendant knows the evidence which the plaintiff has, you would state a proposition very much at variance with the ordinary opinion of mankind as well as of lawyers. No doubt you have a right, in this court, to look at the evidence which the plaintiff states to be in his possession; but that right is only to be obtained upon a cross bill. Every party has, in this court, that advantage, which is not to be had so effectually in any other jurisdiction. He may discover that which is in the knowledge and breast of the plaintiff before he proceeds to a hearing of the cause, but he must do it in such a way as to give the plaintiff an opportunity of stating all the circumstances connected with the matter. It is undoubtedly extremely important, when the plaintiff is called upon to furnish any discovery, that he should do it in the proper form, and be at liberty to state all the circumstances relating to the matter, and that he should have all the guard and protection which he derives from being able to give a full statement of all the circumstances belonging to the case."

This was in 1844,—but a little while after our equity rules had been promulgated,—and may be taken to fairly represent the English practice of that time, which is binding upon us.

Lord Eldon, in the Princess of Wales Case, remarked that "there is a mighty difference between simply producing an instrument and producing it in answer to a bill of discovery, where the defendant has an opportunity of accompanying the production with a statement of everything necessary to protect him from its consequences." This, taken in connection with the principle already adverted to, that no litigant can be compelled, as a matter of general right, to produce his evidence for the inspection of his adversary until he does so under the formalities that take place at the time of giving testimony for the hearing, furnishes the foundation for the general rule of prac-

tice that motions like this will not be granted; and never unless the case falls within the peculiar circumstances which make it an exception to the general rule. It is the reason why a court of equity requires either the plaintiff or the defendant to file a bill of discovery to compel the production of such documents, and all are familiar with the restrictions that are thrown around the right of discovery.

The case of *Elder v. Carter*, 25 Q. B. Div. 194, explains the modern English practice under legislative authority to make rules of practice upon this subject for both courts of law and equity that have superseded the old practice; but this, of course, is not binding on us. It will be found, however, even under the modern practice, which has done away with the necessity for bills of discovery, and substituted therefor a system of production upon motion, sustained and defended by the affidavits of the parties, that the courts follow substantially the same principles that governed the old practice; and parties now are required to produce only under the same circumstances where they have been compelled to produce before,—either upon a bill of discovery or upon a motion to produce. Thus, in *Wilson v. Thornbury* (1874) L. R. 17 Eq. 517, an order on the defendant to produce alleged forged checks for the comparison of handwriting was refused under the modern practice; and in *Boyd v. Petrie*, L. R. 5 Eq. 290, the master of the rolls had on motion ordered the plaintiffs to produce mortgages after an answer saying that the defendants did not know whether or not they had executed them, but, if they had, it was in ignorance of their contents, and they asked for an inspection of the documents by expert witnesses to enable them to determine whether or not it was their handwriting; but on appeal this order of the master of the rolls was vacated by the court of appeals. *Boyd v. Petrie*, 3 Ch. App. 818. That was a case where the motion, like the case we have in hand, was refused after answer filed. What would it have been if the motion had been made before the answer was filed?

Mr. Daniel, in his work on Chancery Practice, devotes a chapter to this subject of the production of documents, and cites the foregoing and many other cases for the text, in which he displays the practice that is binding upon us, as well as the modern practice under more recent English legislation. 2 Daniel, Ch. Prac. (6th Ed.) 1817 et seq. Instructive reading will also be found in Dick. Eq. Prac. pp. 151, 208, where the English cases are somewhat cited.

The American authorities are to the same effect, except where controlled by modern legislation. Beach, Mod. Eq. Prac. § 522, as to the production by defendants, and Id. § 524, as to the production by the plaintiff,—citing 3 Greenl. Ev. (15th Ed.) 302, 303, and many American cases. Story, Eq. Pl. (10th Ed.) § 211b: "If the bill refers to documents in the plaintiff's possession, the defendant cannot compel their production by affidavit before the answers to the petition, and only by cross bill." Id. §§ 858-860; Id. § 390; Id. p. 762, and note; Id. § 852b, and note. *Kelly v. Eckford*, 5 Paige, 548, holds that partnership books constitute an exception to the general rule, as they belong to both parties alike. It was in this case that Chancellor Walworth denounces the Princess of Wales Case as a political decision.

In *Eager v. Wiswall*, 2 Paige, 369, it is stated to be a matter of course to compel the inspection of defendant's books or papers made a part of the answer; but Chancellor Kent, in *Watson v. Renwick*, 4 Johns. Ch. 381, clearly shows that this is rather a loose statement of the practice. In the last case Chancellor Kent refused to order the production of documents by defendants, and states the rule more accurately than Chancellor Walworth has done. Chancellor Kent especially approves Lord Eldon's reasons for the caution of courts in compelling the production of documents by motion, because producing papers in answer to a bill of discovery furnishes the party a safeguard by enabling him to state explanatory circumstances accompanying the production, which cannot be done where the production is compelled by summary motion.

In *Denning v. Smith*, 3 Johns. Ch. 409, an order was refused as vexatious, and in *Lupton v. Johnson*, 2 Johns. Ch. 429, an order requiring the plaintiff to produce bonds in his possession was vacated, and it was held that a cross bill was necessary, although the proceeding by motion was less expensive.

In *Commercial Bank v. Bank of New York*, 4 Hill, 516, a party was compelled to produce an exhibit to a deposition, confessedly contrary to the English practice, and reasons are given for the difference between the practice there and in this country.

In *Evans v. Staples*, 42 N. J. Eq. 584, 8 Atl. 528, an order for the production of documents upon a co-defendant was refused, and it was held that a bill of discovery was required. The case especially approves *Kelly v. Eckford*, supra.

Our equity rule 72 declares that, "where a defendant in equity files a cross bill for discovery only, against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compelled to answer the cross-bill." This was evidently intended to settle a somewhat disputed question of practice, then existing in England, which had relation to the subject we have in hand, as well as to other situations in equity practice. It shows that, if the defendant in this case had filed a cross bill asking for a discovery of the plaintiff's exhibit on the same grounds that are stated in this petition, the plaintiff would not be compelled to answer that cross bill until the defendant had answered the original bill. And it will be found that the reason for this rule is the very reason that is given in the foregoing cases for the refusal of this motion, namely, that the defendant must answer the bill upon his own knowledge and information before he can require the discovery of evidence in the hands of the plaintiff. After he has answered the original bill upon his own knowledge and information and belief as then existing, he may procure discovery from the plaintiff in aid of the case he has made by his answer, or, after that discovery, he may amend his answer, and take advantage of the circumstances shown by the discovery; but, unless there are peculiar circumstances, as in the Case of the Princess of Wales, which form an exception to the rule requiring a bill of discovery, the plaintiffs will not be required, upon a mere motion, to produce documents to aid the defendants in making their answer. Motion denied.

BERRY et ux. v. NORTHWESTERN & P. HYPOTHEEK BANK (NORTHWESTERN & P. MORTG. CO.).

(Circuit Court of Appeals, Ninth Circuit. October 5, 1898.)

No. 440.

1. MORTGAGES—DESCRIPTION—MISTAKE—ESTOPPEL.

Where a mortgagor owned both the S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of a quarter section of land, and the former was inserted, by mistake of the scrivener, instead of the latter, and after the mistake was discovered the owner mortgaged the S. W. $\frac{1}{4}$ to another, and took no steps to have the prior mortgage reformed, he cannot object to a foreclosure decree directing a sale of the S. E. $\frac{1}{4}$ thereunder.

2. FEDERAL COURTS—STATE COURT DECISION—EFFECT.

The decision of the highest court of a state construing a state statute, and declaring that an acknowledgment by a married woman precisely similar, except names and dates, to the one in question, was in substantial compliance therewith, and valid, is binding on the federal courts sitting in such state.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

Edgar C. Steele, for appellants.

J. H. Forney, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellants, Franklin M. Berry and M. A. Berry, his wife, were defendants in the court below to a suit for the foreclosure of a mortgage. A decree of foreclosure and sale having been rendered against them (89 Fed. 408), they bring the case here by appeal. The mortgaged property is described as lot No. 2, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 6, in township 41 N., of range 5 W. of Boise meridian, situated in the county of Latah, state of Idaho, and containing 120.19 acres. The evidence in the case shows that, by mistake of the scrivener, the S. E. instead of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the section of land mentioned was described in the mortgage. Both the S. E. and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 6 were, however, at the time of the execution of the mortgage, the common property of the appellants. One of the two points made on their behalf in support of the appeal is that it was error in the court below to decree a foreclosure and sale of the 40 acres of land inserted in the mortgage by mistake. The evidence shows that long prior to the commencement of this suit the mistake was discovered by the appellants, and that subsequent to such discovery they mortgaged to another party the 40-acre tract which it was intended by the respective parties to include in the present mortgage, and in lieu of which the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 6 was inserted. This fact probably accounts for the further fact that at no time—not even in the present suit—has there been any effort on the part of the appellants to reform the mortgage. This latter fact is a conclusive answer to the first point made on their behalf.

The only other point made on behalf of the appellants is that the mortgage is ineffectual, as against Mrs. Berry, because of the cer-

tificate of acknowledgment thereto attached. It is claimed that this certificate fails to conform to the Idaho statute in respect to the acknowledgment of such instruments by married women. By section 2956 of the Revised Statutes of Idaho, it is provided:

"That the acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument, on an examination without the hearing of her husband; nor certified to unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution."

Section 2960 of the same statute provides that:

"The certificate of acknowledgment by a married woman must be substantially in the following form:

"Territory of Idaho, County of —, ss.:

"On this — day of — in the year of —, before me, (here insert the name and quality of the officer,) personally appeared — known to me (or proved to me on the oath of —) to be the person whose name is subscribed to the within instrument, described as a married woman; and upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution."

The certificate of the notary public attached to the mortgage in question is as follows:

"State of Washington, County of Whitman—ss.:

"I, A. A. Kincaid, a notary public in and for said county and state, do hereby certify that on the 23d day of July, 1890, personally appeared before me Franklin M. Berry and M. A. Berry, his wife, to me known to be the individuals described in, and who executed, the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned. And I further certify that I did fully apprise the said M. A. Berry, wife of the said Franklin M. Berry, of the contents of said instrument, and of her rights thereto, and the effects of signing the same, and that she did then freely and voluntarily, separate and apart from her said husband, sign and acknowledge the said instrument. Given under my hand and official seal this 23d day of July, 1890.

"[N. P. Wash.]

A. A. Kincaid,

"Notary Public Residing at Palouse City."

A precisely similar certificate, except as to the names and dates, was held by the supreme court of Idaho to conform to the requirements of the Idaho statute, in the case of *Bank v. Rauch*, 51 Pac. 764; the court saying:

"The intent and purport of the statute are to protect the rights of a married woman from the dictation or domination of the marital companion. The end sought by the law is not to enable married women, either at the suggestion or dictation of their husbands, to perpetrate a fraud, by seeking to avoid, upon a mere technicality, what was, at the time it was made, a fair and honest transaction, the benefits of which have been received and enjoyed, either directly or indirectly, by the party seeking to avoid it. The statute does not require a literal, but a substantial, compliance therewith. If the certificate shows the acknowledgment to have been the free and voluntary act of the wife, uninfluenced by fear of, or duress by, her husband, and that at the time of making the acknowledgment she was fully advised of the character of the instrument she was executing, and the effect of her act, and such acknowledgment was separate and apart, and without the hearing of her husband, we think the exigency of the law is fully met."

That ruling was adhered to and affirmed by the same court in the subsequent cases of *Christensen v. Hollingsworth*, 53 Pac. 211, and *Jaeckel v. Pease*, Id. 399. That the construction of the state statute of Idaho by the highest court of that state in respect to a question of this sort is binding upon the federal courts, is thoroughly well settled. Therefore, without expressing or intimating any views of our own in respect to the conformation of the certificate of acknowledgment of the mortgage in suit to the statute of Idaho, the judgment of the court below is affirmed.

DENTON v. BAKER.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 447.

1. JUDGMENTS—PARTIES—VACATION—RECEIVERS.

Though not a party to a suit against the bank in a state court, the receiver of a national bank may appear in that court, and contest the validity of the judgment.

2. SAME—EQUITABLE RELIEF—LACHES.

A judgment was fraudulently obtained in a state court against a national bank without making a receiver thereof a party. The receiver learned of it a few days later, but took no action in the state court to contest the judgment for nearly two years, the time expiring in the meanwhile within which he might move that court to vacate the judgment for fraud, and his application therein was denied. *Held*, that he was guilty of laches, and equity would not annul the judgment.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Frederick Bausman, for appellant.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a suit in equity brought in the United States circuit court for the Northern division of the district of Washington, on the 22d day of April, 1896, by the receiver of the insolvent Merchants' National Bank of Seattle, to obtain a decree declaring void a judgment rendered by the superior court of the state of Washington for the county of King in an action brought in that court by David B. Denton against the insolvent bank, after the appointment and qualification of the receiver, and after the latter had taken possession of the bank and its property. To that action the receiver was not made a party, and knew nothing of the suit until after the rendition of the judgment, which was for the sum of \$29,716. That action was brought by Denton, as the assignee of a claim held by one Angus Mackintosh, who was the president of the insolvent bank, and the summons in the action was served upon one William T. Wickware, who was its cashier. Wickware put the summons in a pigeonhole, claims to have mentioned the matter to Mackintosh and to one Meserve, who had some employment under the receiver, and paid no further attention thereto. There was accordingly no appearance to the action on the part of the bank or of the

receiver, and the judgment went by default. The record in this suit shows that the Mackintosh claim, upon which the action in the state court was based, grew out of these facts: Mackintosh, as has been said, was the president of the Merchants' National Bank. He was also a stockholder and director of a corporation styled "Sidney Sewer-Pipe & Terra-Cotta Works," of which corporation Denton was also a stockholder and director. Its principal place of business, as well as its principal property, was located in Kitsap county, state of Washington. It had also some property in the county of King. It had issued certain mortgage bonds, of the face value of \$25,000, which were owned by Mackintosh. It had never paid a dividend on its stock, and had been so unsuccessful in its business as to cause it to suspend operations. On the 15th day of April, 1893, Mackintosh brought suit in the superior court of King county, Wash., against the Sidney Sewer-Pipe & Terra-Cotta Works, for the sum of \$47,000, on certain of its promissory notes, in which action, upon admissions of the defendant, judgment was thereafter entered in favor of the plaintiff for \$48,000; upon which judgment, on the 19th day of May following, two executions were issued, one to the sheriff of King county and the other to the sheriff of Kitsap county, under the latter of which executions a sale was made, on the 11th day of July, 1893, of all of the property of the Sewer-Pipe & Terra-Cotta Company in Kitsap county, to Mackintosh, for \$1,487.87; and on the 7th day of July, 1893, a sale was made to Mackintosh, under the King county execution, of all of the real property of the company, situated in King county, for the sum of \$10, together with certain personal property of the defendant to the writ, for the sum of \$130. The sheriff's certificates issued in pursuance of these sales were by Mackintosh assigned to Wickware, the cashier of the bank, who subsequently received the sheriff's deeds for the property, and thereafter conveyed the property by deed to the wife of Mackintosh. A few days after the sheriff's sales, to wit, July 26, 1893, at a meeting of the board of directors of the Merchants' National Bank, there was entered upon the minutes of the board the following:

"The cashier reported that he had procured the following accommodation and advances for the use of the bank in keeping up its funds, to wit, \$20,000 from Wells, Fargo & Co.'s Bank of San Francisco, \$10,000 rediscounts from First National Bank of Chicago, \$26,000 from the National Park Bank of New York, and that additional notes were in New York, and in transit to New York for rediscount; that, in order to procure the rediscount by the National Park Bank of notes sent to said bank on June 30th last, it was necessary to deposit collateral security with the same, and that he borrowed from Angus Mackintosh, the president of the bank, \$25,000 first mortgage notes or bonds, issued by the Sidney Sewer-Pipe & Terra-Cotta Works, and used the same for such collateral. On motion, the action and proceedings of the cashier in borrowing money and rediscounting the bank's paper, for the purpose of keeping the bank in funds, was ratified and confirmed. On motion, the action of the cashier in borrowing twenty-five thousand dollars securities from A. Mackintosh, and used as collateral at the National Park Bank of New York, for the benefit of his bank, was ratified and confirmed; and the cashier was authorized and directed to make and deliver to said Mackintosh proper vouchers for the securities named, and acknowledging the bank's indebtedness to said Mackintosh for the value thereof, which indebtedness is to be retired by the return of the securities on or before January 1, 1894."

On the same day, and in professed compliance with the foregoing resolution, the cashier, Wickware, issued to the president, Mackintosh, this instrument:

"Merchants' National Bank. United States Depository.

"\$25,000.00.

Seattle, Wash., July 26th, 1893.

"This is to certify that the Merchants' National Bank of Seattle is indebted to Angus Mackintosh in the sum of twenty-five thousand dollars, gold coin, and interest thereon at the rate of eight per cent. per annum from the 1st day of July, 1893; the same being for twenty-five (25) \$1,000 each first mortgage gold bonds and coupons of the Sidney Sewer-Pipe & Terra-Cotta Works, borrowed by this bank from said Mackintosh for use as collateral security in obtaining the rediscount of paper at the National Park Bank New York, where said bonds are now deposited as collateral security for the use of this bank. The said bonds and coupons are to be returnable to said Mackintosh on or before January 1st, 1894; otherwise to be paid for in gold coin, with interest as hereinabove stated. This was done and executed by order of the board of directors of this bank at a meeting of said board held this 26th day of July, A. D. 1893.

"[Seal.]

The Merchants' National Bank of Seattle, Washington,
"By Wm. T. Wickware, Cashier."

W. H. Reeves, a director of the bank, testified that there was no discussion in regard to the resolution of July 26, 1893, but that Mackintosh did all the talking, and that, after the adjournment of the meeting of the directors, he and one Agen, another director, talked the matter over, and, said the witness:

"We both agreed that we regarded the bonds as of no value; but they were tacked on to the other securities, which had been put in the hands of the National Park Bank of New York, and added to those securities, to make an impression upon the people abroad as increasing the security."

And there is other testimony in the record going to show that the bonds were of very little, if any, value.

After the complainant in the present suit was appointed and qualified as receiver of the bank, to wit, on the 15th day of August, 1895, Mackintosh presented to him a claim for \$29,250, based upon the foregoing instrument, executed by Wickware as cashier, which the receiver rejected, and it is this claim which he assigned to Denton, who subsequently, and on September 27, 1895, presented it to the receiver, with a like result, and upon which Denton afterwards commenced his action against the bank in the state court of King county, Wash., and recovered the judgment already mentioned.

If we were free to decide this cause upon the merits, we would not have the slightest difficulty in holding the claim upon which the judgment here sought to be annulled was entered, as well as the judgment itself, fraudulent and void, as against the stockholders and creditors of the insolvent bank, and in affirming the decree appealed from. But, unfortunately, through the neglect of the receiver, the rights and interests of those parties appear to be charged with this claim and judgment, without any apparent hope of relief. Certainly, there can be none in the present suit, and for these reasons: Baker became receiver on the 19th day of June, 1895. The judgment in the action of Denton against the bank was rendered on the 30th day of November, 1895, notice of which judgment the receiver, in his testimony, admits to have received a few days after

its rendition. To get rid of that judgment, the receiver had the opportunity and the means, by proceeding in the court in which the judgment was rendered. It is provided by the statutes of the state of Washington (2 Hill's Ann. Code, § 1393) as follows:

"The superior court in which a judgment has been rendered * * * shall have the power, after the term at which said judgment * * * was made, to vacate or modify such judgment: * * * (3) [For] * * * irregularity in obtaining the judgment. * * * (4) For fraud practiced by the successful party in obtaining the judgment. * * *

And, by section 1395 of the same Code, the proceeding to that end may be commenced within one year after the rendering of such judgment.

"The power of a court of equity to relieve against a judgment," said the supreme court in *Brown v. Buena Vista Co.*, 95 U. S. 157, 159, "upon the ground of fraud, in a proceeding had directly for that purpose, is well settled; and the power extends, also, to cases of accident and mistake. But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. In all such cases, he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief." To the same effect are many decided cases and text writers. We cite a few of them: *Knox Co. v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 257; *Nougue v. Clapp*, 101 U. S. 551; *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009; *Furnald v. Glenn*, 56 Fed. 373; *Association v. Lohmiller*, 20 C. C. A. 274, 74 Fed. 23; *Ede v. Hazen*, 61 Cal. 360; 1 Black, *Judgm. (1st Ed.)* § 361; *Freem. Judgm.* §§ 486, 489, 490, 495; *Story, Eq. Jur.* §§ 894, 896.

Although not made a party to the action brought by Denton in the state court, the right of the receiver, based upon a seasonable application, to appear in that court and contest the validity of the judgment, does not admit of doubt. *Bank v. Colby*, 21 Wall. 609; *Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189, 192; *Denton v. Bank (Wash.)* 51 Pac. 473. The receiver, therefore, had ample opportunity to take appropriate proceedings in the very action in which the judgment was rendered, to contest its validity on any ground of fraud or irregularity that existed. Instead of resorting to that forum, and while the right to do so still existed, he brought the present suit in the court below. That a court of equity will not interfere, under such circumstances, is thoroughly well settled, as will be seen by a reference to the authorities already cited.

Not only did the receiver allow the period prescribed by sections 1393 and 1395 of the Washington Statutes (2 Hill's Ann. Code) to pass without making any motion for the annulment of the judgment, but he made no appearance in that court at all until March 10, 1897, nearly two years after the rendition of the judgment against the bank, at which time he applied to the superior court which gave the judgment to vacate and set it aside, and to permit him to file an answer and defend as such receiver; in support of which he filed an affidavit of his own, in which, according to the opinion of the su-

preme court of Washington, rendered upon his appeal from the refusal of the trial court to grant his motion, he set forth, substantially, "that the securities under the contract between the bank and Mackintosh were worthless, and that Mackintosh was a stockholder in the bank and president thereof; that, at a meeting of the directors of the bank, the cashier was authorized to deliver to Mackintosh proper vouchers for the securities, acknowledging the bank's indebtedness to Mackintosh for the value thereof, which indebtedness was to be retired by the return of the securities on or before January 1, 1894." "The affidavit," added the supreme court of Washington, "charges collusion between the cashier of the bank and Mackintosh, in that the cashier did not make known the service of summons upon the bank to the receiver, Baker, and sets up that many facts set forth in the complaint of plaintiff were untrue." *Denton v. Bank* (Wash.) 51 Pac. 473. The supreme court of Washington held that the only grounds upon which the receiver could, at so late a date, make the motion, are found in section 221, 2 Hill's Ann. Code, as follows:

"The court may * * * upon affidavit showing good cause therefor, after notice to the adverse party, * * * upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment * * * taken against him through his mistake, inadvertence, surprise, or excusable neglect."

Construing this section of the statute, the court said:

"The mistake, inadvertence, surprise, or excusable neglect mentioned in section 221 of the Code, supra, all relate to facts which were unknown to the moving party prior to the time of the entry of the judgment, or misunderstood by such party. The receiver was charged with knowledge of plaintiff's claim against the insolvent bank, and that plaintiff might sue upon it in the superior court and obtain judgment therein; and whether he knew of the actual pendency of the action would, under all the facts disclosed in this record, be immaterial. A seasonable application to that court, after the entry of judgment, would present an entirely different proposition. While cases may be found where long delays have been excused in the moving party in making an application to vacate a judgment, no case has been called to our attention where the facts are similar to those in the case under consideration. We do not discover any excusable neglect in the receiver in making this application. On the contrary, a fair inference, from all his acts, in relation to the judgment entered, is that he had deliberately determined not to make such an application or to appear in the superior court, and afterwards changed his intention when the motion to vacate was made. We think, from the record presented here, that the order of the superior court denying the application to vacate the judgment was correct, and it is affirmed."

By this result the complainant is bound. *Embry v. Palmer*, 107 U. S. 317, 2 Sup. Ct. 25; *Folsom v. Ballard*, 16 C. C. A. 593, 70 Fed. 12; *Hendrickson v. Bradley*, 29 C. C. A. 303, 85 Fed. 508; 1 Black, Judgm. § 362.

In respect to the cross bill, it is sufficient to refer to what was held by this court in *Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189, that the cross complainant's remedy is at law, and not in equity.

It results that the judgment must be reversed, and the cause remanded, with directions to the court below to dismiss both the bill and the cross bill, each party to pay his own costs.

NEW YORK GUARANTY & INDEMNITY CO. et al. v. TACOMA RAILWAY & MOTOR CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 20, 1899.)

No. 473.

1. TAXATION—VALIDITY OF ASSESSMENT—OWNERSHIP OF PROPERTY.

The power house and other buildings of an electric street-railroad company were situated on a tract of land, a part of which was owned by the company, and a part held under a lease for 25 years, which bound the company to pay the taxes thereon. *Held*, that the company might properly be regarded as the owner of the entire property, for purposes of taxation, and its assessment as an entirety was valid.

2. SAME—IMPROVEMENTS ON REAL ESTATE.

Where a street-railroad company may properly be regarded as the owner, for the purposes of taxation, of leased land upon which its power house and plant are in part situated, such buildings are taxable, under the statutes of the state of Washington, as a part of the real estate.

3. SAME—RAILROAD RIGHT OF WAY—ACTUAL USE FOR OTHER PURPOSES.

Under the statute of Washington (1 Hill's Ann. Code, § 1046) providing that all lands occupied and claimed exclusively as right of way for railroads must be assessed as a whole, and as real estate, at a certain sum per mile, a part of the designated right of way of a railroad, but which is in the actual use and occupation of a street-railroad company for purposes of its power plant, under a lease for 25 years, cannot properly be taxed as a part of the right of way of the railroad company.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

This suit was brought on the equity side of the circuit court of the United States for the Western division of the district of Washington to obtain a decree adjudging the invalidity of, and canceling of record, certain taxes levied by the county of Pierce and the city of Tacoma, respectively, upon certain property now owned by the complainant Carr. The property upon which the taxes were levied consists of a power house and power plant used in operating certain street-railway lines in the city of Tacoma, in Pierce county, state of Washington, and a suburban line connecting the town of Stellacoom, in that county, with the city of Tacoma. On March 26, 1897, all of the property mentioned, including the street-railway lines, was sold as an entirety by a master of the court below, in pursuance of a decree entered by that court in a suit brought therein by the New York Guaranty & Indemnity Company, trustee, for the foreclosure of a trust deed of the property made to it for the security of certain bonded indebtedness, at which sale the property was purchased by one Levis, who afterwards conveyed it to the complainant Carr. Of the proceeds of that foreclosure sale, there remained in the registry of the court, when this suit was instituted, an undistributed balance of \$13,454.88; and the taxes here in question, standing delinquent against the power house and power plant on the tax records of the county of Pierce and the city of Tacoma, respectively, and it being the duty of the receivers appointed in the foreclosure suit to discharge all valid taxes against the property, and the complainant in that suit being entitled, as trustee, to receive, for distribution to the bondholders, any surplus of the fund in court remaining after the discharge of all the receiver's obligations, this suit was instituted jointly by the trustee, complainant in the former suit, and the present owner of the property under the sale in that suit, to contest the validity of the disputed taxes. By an amendment of the bill, certain taxes on lots in the Ridgedale addition to the city of Tacoma, included in the railway property acquired by the complainant Carr, and the validity of which was not disputed by the complainant's bill, was included in the subject-matter of the present suit, to the end that the decree to be entered therein, directing the payment of the fund in court of such taxes as should be adjudged valid, might extend to the taxes on those

lots. No review of the decree of the court below in respect to the taxes on those lots, however, is here sought. The taxes levied upon the trackage of the Steilacoom Line were held by the court below to be invalid, and their cancellation was directed. To this part of the decree no objection was taken in any form. The remaining taxes controverted by the bill were held by the court below to be valid, and it is to reverse that part of the decree that the present appeal is brought. Those taxes were levied on the power house and power plant, together with the site thereof, by the county of Pierce in the years 1891, 1892, 1893, and 1895, and by the city of Tacoma in the years 1892 and 1893. The power house and power plant are situated upon a tract of land in the city of Tacoma, the westerly portion of which (that is to say, the part lying west of the east boundary of Cliff avenue produced) was, during the years of the contested tax levies, owned in fee by the Tacoma Railway & Motor Company, while the easterly portion of the tract (that is to say, all that part lying east of the east boundary of Cliff avenue produced) was during those years held by the motor company under a lease of date April 18, 1889, from the Northern Pacific Railroad Company for a term of 25 years from May 1, 1889; reserving an annual cash rental, and providing for the payment of the taxes by the lessee during the term of the lease. The motor company's part of the tract was formerly a part of Cliff avenue, a platted street of the city of Tacoma, and prior to the building of the power plant the city of Tacoma, at the instance of the Northern Pacific Railway Company, passed an ordinance, approved May 11, 1889, vacating that part of Cliff avenue now embraced in, and constituting the whole of, the part of the tract owned in fee by the motor company. Another street in the city, known as "A Street," adjoined the vacated portion of Cliff avenue on the west; and under the law of the state of Washington, and the provisions of the vacating ordinance, the title to the whole of the vacated strip passed to the Northern Pacific Company, as owner in fee of the whole land adjoining the vacated strip on the east, and the railroad company shortly afterwards, to wit, May 1, 1890, conveyed it in fee to the motor company. The Northern Pacific Railroad Company's ownership in fee of the leased part of the power-plant site was a matter of public record. That part of the power-plant site owned in fee by the motor company is about two-fifths, and the part leased from the Northern Pacific Company is about three-fifths, of the area of the whole site. The relative value of the two portions of the site is not made to appear. The improvements, which consist of a power house, power plant, and car barn, together with certain machinery, stand in about equal portions upon the two parts of the site; and the respective portions of the improvements are alleged in the bill, and found by the master, to be of about equal values. They are also alleged in the bill, and admitted by the answers thereto, and found by the master, to be "one entire and inseparable aggregation of buildings, structures, plant, and machinery, covering the whole of said tract, and neither the use nor the valuation thereof have been, or are, capable of segregation." For the years 1891, 1892, and 1893 the power-plant site was assessed as an entirety by the county of Pierce at \$39,330, \$27,500, and \$27,500, respectively, and "improvements" thereon at \$15,000, during each of those years. For the year 1895 the site was assessed by the county at \$12,300, no assessment being made for improvements thereon. For each of the years 1892 and 1893 the site, as an entirety, was assessed by the city of Tacoma at \$54,080, and improvements thereon at \$18,000. The city taxes for the year 1892 having become delinquent, a portion of the property was sold therefore to the defendant Gove, to whom a tax certificate therefor was issued. The other taxes in question still stand delinquent on the rolls.

The sixth, eighth, eighteenth, nineteenth, twentieth, and part of the twenty-first findings of the master are as follows: "(6) That portion of said land upon which said power plant stood during said years, east of Cliff avenue, and described on said plat, Exhibit E, by the lines B-E, C-B, C-F, and F-E, was embraced within what was designated by the Northern Pacific Railroad Company, and listed by the county of Pierce, as the right of way of the Northern Pacific Railroad Company; but it was in the actual use and occupation of the Tacoma Railway & Motor Company for the purposes of the power plant." "(8) That during all the years from 1891 to 1896, inclusive, the Northern Pacific Railroad Company and its receivers paid all of the taxes assessed and

charged against the right of way of said Northern Pacific Railroad Company in the city of Tacoma." "(18) That the personal property of the Tacoma Railway & Motor Company was assessed during each of said years 1891 to 1896, inclusive, by the assessor of Pierce county, for the purpose of taxation, after having been duly returned to said assessor, and the same was duly equalized by the board of equalization; and said assessment included all of the personal property of said company, and, among other things, the power plant of said company, including buildings and machinery, as an entirety, and the line of street railway between Eleventh street, in the city of Tacoma, and a point in the town of Steilacoom,—being about twelve miles of track, substructures, and superstructures,—known as the 'Steilacoom Line.' That said Tacoma Railway & Motor Company and its receivers have heretofore paid all taxes levied and assessed against it as personal property. (19) That the taxes standing charged on the tax rolls of Pierce county for the years 1893, 1894, 1895, and 1896, on what is termed the 'Tacoma & Steilacoom Line,' were entered on the real-estate assessment rolls of said county, and embraced the same property entered upon the personal property assessment rolls of the Tacoma Railway & Motor Company, on which payment was made by said company. That the city of Tacoma in the years 1892 and 1893, added to the real-estate assessment on the property described on page 4 of this report the sum of \$18,000 for improvements. That there were no improvements upon said lands that year, or any other year, other than the building, power plant, and machinery, which was an inseparable aggregation of building, machinery, car barn, etc., incapable of separate segregation or valuation; and all said power plant, and everything situate upon said land, was assessed by the city of Tacoma in the years 1892 and 1893, and by the county of Pierce in the years 1891 to 1896, inclusive, as personal property, and the taxes were paid on the same as personal property. (20) That all of the taxes described in the bill and in the evidence as having been charged and levied upon improvements upon the land described in the bill constitute a double assessment, in that said assessment on what is designated therein as on improvements is a duplication of the assessment of personal property returned and assessed for each and all of said years. That the taxes and assessments charged on account of right of way, substructures, and superstructures on the real-estate rolls of Pierce county on what is known as the 'Tacoma & Steilacoom Line,' and the taxes levied thereon by the authorities of Pierce county, are a double assessment, in that they are a duplication of the same property assessed and taxed under the head of 'Track Belonging to the Tacoma Railway & Motor Company,' and upon which payment had heretofore been made by the Tacoma Railway & Motor Company. (21) That during all of the year 1892 there was situate upon the lands above described, on page 4 of this report, a power house, power plant, and car barn belonging to and owned by said Tacoma Railway & Motor Company, which together constituted one entire and inseparable aggregation of buildings, structures, plant, and machinery, covering the whole of said tract, neither the use nor the value of which were or are capable of segregation, and which was so situated partly upon the portion of said land leased from said Northern Pacific Railroad Company and partly upon the land owned by said Tacoma Railway & Motor Company, as aforesaid, in about equal portions and values, upon said two parts of said tract, respectively. That in the year 1892 the defendant, city of Tacoma, by its authorized officers, undertook to, and did, assess the above-described lands as one tract, to and in the name of the Tacoma Railway & Motor Company, for purposes of municipal taxation of said city for said year, and so assessed the value of said tract at the sum of \$54,080, and so assessed the value of the improvements on said tract, apart and separate from the land, at the sum of \$18,000, and thereupon entered said assessments upon its assessment roll for purposes of its municipal taxation for the year 1892. That thereafter said city levied and extended on its tax rolls for said year 1892 the sum of \$864.96, as taxes of said year charged against said tract, and the improvements thereon for municipal purposes of the city for said year. That the taxes so extended and entered in said tax rolls being unpaid at the date when, by force of the provisions of the charter of said city, the city taxes levied for the year 1892 became delinquent, said sum was entered by the authorized officer of said city as delinquent taxes

against said premises for the year 1892; and thereafter said land, together with the power plant, power house, and car barn thereon, was sold by said city of Tacoma, at a tax sale held in said city, pursuant to the provisions of its charter, on February 6, 1893, to the defendant Royal A. Gove for the sum of \$999.48, which sum the said Royal A. Gove then and there paid to said city therefor, and thereupon a certificate of such sale was issued and delivered to said defendant Royal A. Gove by the authorized officer of said city, pursuant to the provisions of the charter of said city, and said defendant is now the owner and holder of said certificate."

The trial court sustained exceptions filed by the county of Pierce and the city of Tacoma and the defendant Gove, respectively, to that part of paragraph 6 of the master's findings which reads as follows, "And listed by the county of Pierce," and to that part of paragraph 19 which reads as follows, "And all said power plant, and everything situate upon said land so assessed by the city of Tacoma in the years 1892 and 1893, and by the county of Pierce in the years 1891 to 1896, inclusive, as personal property," and to that part of paragraph 20 of the master's findings which reads as follows, "That all of the taxes described in the bill and in the evidence as having been charged and levied upon improvements upon the land described in the bill constitute a double assessment, in that said assessment on what is designated therein as on improvements is a duplication of the assessment of personal property returned and assessed for each and all of said years."

All other exceptions to the findings and report of the master were by the court below overruled.

Thos. R. Shepard and Benjamin S. Grosscup, for appellants.

A. R. Titlow, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

On the part of the appellant it is contended—First, that the assessment of the land in question was void because embracing two separate tracts of diverse ownership; included in which is the second contention, that its assessment as a single parcel, without specifying the name of the known owner of the leased portion thereof, was void; third, that the assessment of the land was invalid, in so far as that part of it held under lease is concerned, on the ground that such part was embraced in the Northern Pacific Railroad Company's right of way, which was taxable under the laws of the state of Washington, and actually listed, assessed, and taxed at a certain sum per mile and the taxes thereon paid; fourth, that the power plant situated on the power-plant site in question was actually returned by the motor company in its lists of personal property for the years in question as personal property, and was actually so assessed, and the taxes paid, for which reason, it is claimed, the assessment of the same as improvements upon real estate was, pro tanto, a duplication of the personal assessment; and, lastly, that the power plant was properly assessable only as personal property, and its assessment as improvements upon real estate therefore void.

1. The assessments for the years 1891 and 1892 were made under the provisions of the revenue law of the state of Washington approved March 9, 1891, which, so far as the point now under consideration is concerned, are as follows:

"Sec. 45. The assessor shall make out in the real property assessment book, in numerical order, complete lists of all lands or lots subject to taxation,

showing the names of the owners, if known to him, and if unknown, so stated opposite each tract or lot in pencil memorandum, the number of acres, and the lots or parts of lots, or blocks, included in each description of property.
* * *

The assessments for the year 1893 were made under the provisions of the act of March 15, 1893, section 45 of which is as follows:

"Sec. 45. The assessor shall list all real property according to the smallest legal subdivision as near as practicable, and where land has been platted into lots and blocks, he shall list each lot or fraction thereof separately. The assessor shall make out in the real property assessment books, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known, and if unknown, so stated opposite each tract or lot in pencil memorandum, the number of acres, and lots or parts of lots included in each description of property. * * *

The assessment for the year 1895 was made under the provisions already quoted from the revenue law of 1893, which, however, had been amended by section 4 of an act approved March 23, 1895, by the insertion of the following provision at the end of the first sentence of section 45 of the act of 1893:

"Provided, that when several lots in any block, or several blocks in any plat of any addition, subdivision or townsite, or several tracts of land, shall be owned by any one person, firm, syndicate or corporation, the assessor may group such lots and blocks and tracts so far as practicable."

There can be no doubt that these statutory provisions, under and by virtue of which the assessments in question were made, require separate assessment of tracts of land of diverse ownership. Obedience to such requirement is essential to the validity of the proceedings. "It cannot," says Judge Cooley in his work on Taxation (2d Ed., p. 400), "be held in any case that it is unimportant to the taxpayer whether this requirement is complied with or not. Indeed, it is made solely for his benefit; it being wholly immaterial, so far as the interest of the state is concerned, whether separate estates are or are not separately assessed." The supreme court of the state of Washington, where the lands in question are situated, distinctly held in the case of *Lockwood v. Roys*, 11 Wash. 697, 703, 40 Pac. 346, that:

"A separate valuation of distinct parcels of land, when required by the statute, is made for the benefit of the owner, and involves a substantial right, and that when he is deprived of such substantial right the assessment is invalid and void."

That the decision of such a question by the highest court of the state, in respect to the assessment for taxes of land within the state, is binding on the federal courts, is well settled. The court below, however, held that the motor company was the owner, for the purposes of taxation, of the entire power-plant site, saying in its opinion:

"By the terms of the lease, the railway and motor company was obliged to pay the taxes on the leased ground, and was the occupant, and was the owner in fee and occupant of that part of the ground covered by the power plant and car barn, not included in the lease. Therefore it was the owner, for the purposes of taxation, of the whole property."

The case shows that the power plant covers the entire power-plant site, and that the improvements on the land form an inseparable mass, incapable of division for use or valuation. They were so erect-

ed by the motor company upon the land, to one portion of which it held the fee, and for the remaining portion a lease for the term of 25 years, by the terms of which lease it covenanted to pay all taxes levied on such leased premises. We agree with the court below that, under such circumstances, the motor company may be properly treated, for the purposes of taxation, as owner of the property. It is not essential, under all circumstances, that the fee be in the party against whom the assessment is made. Thus, in *Pike v. Wasell*, 94 U. S. 711, certain lands held by Pike had been condemned and sold under the confiscation act of July 17, 1862 (12 Stat. 589), which forfeiture, as to him, was complete and absolute, but the ownership of which property, after his death, was vested in his heirs by virtue of the joint resolution of congress passed contemporaneously with the act of confiscation. The defendants to the suit held under the confiscation sale, and, having refused to pay the taxes levied upon the property, Pike's children sought by the suit to compel the defendants to pay them during the life of their father. The court said:

"It only remains to inquire whether the children of Albert Pike stand in such a relation to the property confiscated, and not affected by the attachment proceedings, that they may maintain an action to require the defendants to keep down the taxes during the life of their father. There can be no doubt but the defendants, as tenants for life, are bound in law to pay the taxes upon the property during the continuance of their estate. *Varney v. Stevens*, 22 Me. 334; *Cairns v. Chabert*, 3 Edw. Ch. 312. This the defendants do not dispute; but they insist that, until the death of the father, the children have no interest in the property, and therefore cannot appear to protect the inheritance. It is true, as a general rule, that, so long as the ancestor lives, the heirs have no interest in his estate; but the question here is as to the rights which the confiscation act has conferred upon the heirs apparent or presumptive of one whose estate in lands has been condemned and sold. In *Wallach v. Van Riswick*, 92 U. S. 202, without undertaking to determine where the fee dwelt during the life estate, we decided that it was withheld from confiscation exclusively for the benefit of the heirs. They, and they alone, could take it at the termination of the life estate. The children of Albert Pike, as his heirs apparent, are also apparently the next in succession to the estate. Either they or their representatives must take the title when their father dies. If they do not hold the fee, they are certainly the only persons now living who represent those for whose benefit the joint resolution of congress was passed. They, at least, appear to have the estate in expectancy. Under these circumstances, as there is no one else to look after the interests of the succession, we think they may properly be permitted to do whatever is necessary to protect it from forfeiture or incumbrance. The defendants admit that they have determined not to pay the taxes upon the property. The danger of incumbrance by reason of this failure to perform their duties as tenants for life is therefore imminent, and the case a proper one for a court of equity to interfere and grant appropriate relief. In *Cairns v. Chabert*, supra, when the tenant for life failed to keep down the taxes, an order was made for the appointment of a receiver of so much of the rents and income of the estate as should be necessary to pay off and discharge the amounts then in arrear. We see no reason why similar relief may not be granted in respect to the accruing taxes, in case the tenants fail to perform their duties in that behalf; but, without undertaking to direct specifically as to the form in which the protection asked shall be secured, we shall reverse the decree, and remand the cause to the circuit court, with instructions to proceed in conformity to this opinion, as law and justice may require."

In *Kennedy v. Railroad Co.*, 62 Ill. 395, by an act of the legislature of the state a person or company operating a railroad was made

liable for taxes upon the rolling stock used upon such road, without reference to the ownership of the road or the rolling stock so used. By a written agreement with the Pullman Palace-Car Company, the railroad company employed on its road sleeping cars of the car company, hauled the same, furnished fuel and lights, kept them in running order, and received its ordinary fare for the transportation of passengers in them. The car company was bound by the agreement to keep in repair the carpets, upholstery, and bedding, excepting repairs necessary from accident and casualty while upon the run of the road, received a fare for extra accommodation, and furnished its own employes to receive the same, and wait upon the passengers. It was held that, although the general property in the cars was in the car company, yet the railroad company had such a community of interest and such a qualified property in them for the time being, that, for the purposes of taxation, they must be regarded, under the statute, as belonging to the rolling stock of the railroad company, and subject to be taxed as such. The court said, among other things:

"There are not unfrequently cases in the law where one having a less estate in property than that of the absolute ownership fulfills the condition of being owner. The requirement, too, of the statute, is to list, not the rolling-stock which the company owns, but the rolling stock 'belonging' to the company. We are of opinion that the appellee has such a qualified property in these sleeping cars that, for taxable purposes, they may be regarded, within the fair meaning of the statute, as 'belonging' to the rolling stock of the railroad company, and that they are subject to be taxed as forming a portion of the same. * * * We do not conceive, as is objected, that this would involve the result of double taxation of both the railroad company and the car company. The liability of the railroad company to pay taxes on the cars, as a portion of its rolling stock, would operate to exempt the company from liability to pay the taxes as owner of the cars. The railroad company would be viewed as the owner pro hac vice."

We are of opinion that the motor company's exclusive possession and enjoyment for the period of 25 years of the leased portion of the power-plant site, with a covenant binding it to pay the taxes thereon, "fulfills the condition of being owner" for the purposes of taxation.

2. This conclusion upon the question of ownership also disposes of appellants' contention that the power plant was only properly assessable as personal property, for that contention is based entirely upon that provision of the Washington statutes declaring that:

"Personal property, for the purposes of taxation, shall be construed to embrace and include * * * all improvements upon lands the fee of which is still vested in the United States or in the state of Washington or in any railroad company or corporation. * * *" 1 Hill's Ann. Code, § 1020.

But section 1051 of the same statutes provides, among other things, that:

"All the real estate, including the stations and other buildings and structures thereon, other than that denominated railroad track, belonging to any railroad, shall be listed as lands or lots, as the case may be, in the county where the same are located."

And there are general provisions of the same statutes to the effect that:

"Real property, for the purposes of taxation, shall be construed to include the land itself * * * and all buildings, structures and improvements * * * and that in assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined, and also the value of all improvements and structures thereon, and the aggregate value of the property, including all structures and other improvements." 1 Hill's Ann. Code, §§ 1019, 1059.

It is not necessary to decide whether the term "improvements," used in section 1020, should be given the broad interpretation claimed for it on the part of the appellants, for the reason that as the motor company is to be regarded, for the purposes of taxation, as the owner of the leased portion of the power-plant site, in so far as concerns the assessment of the land itself, it must necessarily be so regarded in so far as concerns the improvements thereon, erected at its own expense and for its own use, under the provisions of the lease already mentioned.

3. Another statute of the state in force when the assessments in question were made provides as follows:

"All lands occupied and claimed exclusively as the right of way for railroads by railroad companies or corporations, with all the tracks and all the sub-structures and superstructures which support the same, must be assessed as a whole and as real estate, without separating the same into lands and improvements, at a certain sum per mile. * * *" 1 Hill's Ann. Code, § 1046.

The findings of the master, as approved by the court, show that the leased portion of the power-plant site "was embraced within what was designated by the Northern Pacific Railroad Company as the right of way of the Northern Pacific Railroad, but it was in the actual use and occupation of the Tacoma Railway & Motor Company for the purposes of a power plant." This actual use and occupation by the motor company, as elsewhere appears in the findings, was under the 25-year lease, and was not only unconnected with the business of the railroad company, but was altogether antagonistic to its occupation as the right of way of that company. Under such circumstances, it is plain that it could not be properly taxed, under the statute cited, as a part of the Northern Pacific Company's right of way, and there is no finding or evidence that it was in fact so assessed.

4. The power plant, consisting, as it does, of improvements on land of which the motor company must, for the purposes of taxation, be deemed the owner, was properly assessable as "improvements" thereon. Under the provisions of section 1059 of the Washington statute, above cited, whether such proper assessment, or the lien for the unpaid taxes thereon, could be in any way affected by the improper assessment of such improvements as personal property, and the payment of such taxes, need not be decided, for the reason that the record does not sufficiently show that the power plant was in fact assessed to the motor company as personal property. In finding 19 the master found, among other things, that "all said power plant and everything situate upon said land was assessed by the city of Tacoma in the years 1892 and 1893, and by the county of Pierce in the years 1891 to 1896, inclusive, as personal property, and the taxes were paid on the same as personal property"; and in finding 20, that "all of the

taxes described in the bill and in the evidence as having been charged and levied upon improvements upon the land described in the bill constitute a double assessment, in that said assessment on what is designated therein as on improvements is a duplication of the assessment of personal property returned and assessed for each and all of said years." To these specific portions of findings 19 and 20 the defendants excepted, which exceptions were sustained by the court below. But an exception to a similar clause embodied in finding 18 of the master (relating, however, only to the assessment made by Pierce county) is covered by a general ruling of the court immediately following the foregoing specific rulings, stating that "all other exceptions to the findings and report of the master in chancery are overruled." It is not to be supposed that the court, after considering specifically the portions of findings 19 and 20 to which exceptions were taken, and after, by its ruling thereon, holding, in effect, that the evidence was insufficient to show that the improvements had been assessed to the motor company as personal property, intended, in the next breath, to hold the exact opposite. It is quite evident, we think, that the court inadvertently overlooked the fact that the clause of finding 19 that it had specifically considered and ruled upon was also embraced in another finding. Indeed, the findings should have contained but one statement of the same fact. It is just such unnecessary repetitions that add to the bulk of judicial proceedings, resulting in unnecessary costs to the parties thereto, and unnecessary labor to the courts. Moreover, the appellants, by their assignment of errors, call in question, among other things, the ruling of the court in sustaining the exception to the same matter embraced in findings 19 and 20. Under the circumstances stated, we think we are justified in examining the evidence to see whether the appellants proved that the improvements upon the power-plant site were in fact assessed as personal property. As has been seen from the statement of facts, the improvements on the power-plant site were assessed by the county of Pierce for each of the years 1891, 1892, and 1893 at \$15,000, and for the year 1895 at \$12,300; and for each of the years 1892 and 1893 they were assessed by the city of Tacoma at \$18,000. It has further been seen that those improvements consist of a power house, car barn, and certain machinery; the plant covering the entire site, and forming an inseparable mass, incapable of division for use or valuation. The tax lists for the years 1892 and 1893 handed in by the motor company to the assessor of Pierce county contain various items of personal property, including "machinery," valued at \$40,000. Its statement for the year 1893 handed to the assessor of the city of Tacoma included "personal property" valued at \$84,170; and for the year 1893, "personal property, inside of Tacoma," valued at \$50,500. In so far as the county assessments are concerned, it is quite certain that the term "machinery" cannot be held to include the power house and car barn, inseparably connected with which, according to the findings, is the machinery of the power plant. When to this is added the further fact that the maximum county assessment of the machinery of the power plant, together with and including the house and barn, was only \$15,000,

whereas the "machinery" alone of the personal property lists was assessed at \$40,000, clear proof ought to be required as to the identity of the two assessments. We think it clear that the evidence does not furnish it in respect to the assessments by the county of Pierce; nor, in our opinion, is it sufficient to show that the city assessment of "personal property" to the amounts of \$84,170 and \$50,500 for the years 1892 and 1893, respectively, included the power plant, assessed during each of the same years at \$15,000 as "improvements on real estate." The judgment is affirmed.

PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND FOR GRANTING ANNUITIES v. JACKSONVILLE, T. & K. W. RY. CO. et al.

MERCANTILE TRUST CO. et al. v. PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND FOR GRANTING ANNUITIES et al.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1899.)

No. 668.

1. RAILROADS—RECEIVERS—FORECLOSURE—ACTIONS.

Stockholders of a railroad corporation brought a suit for a receiver, but, before hearing, a receiver was appointed in a subsequent foreclosure suit by the bondholders. The receiver was authorized to pay all operating expenses incurred within a certain time. Complainant stockholders were allowed to intervene in the bondholders' suit. A month after the appointment, on a hearing of both bills and the previous orders made thereon, the receivership was set aside, the proceedings in the bondholders' suit stayed, and the motion for a receiver in the stockholders' suit granted. The new receiver was authorized to pay all operating expenses incurred in the previous six months. On appeal, the order granting the stay in the bondholders' suit was reversed, and the former receivership restored, leaving the lower court to determine who should be receiver. Pending the appeal, all the property of the corporation was held and operated by the second receiver. Thereafter the lower court, acting in regard to both suits, removed the second receiver, and ordered that his accounts be filed, and all persons having claims against him file them with the clerk of the court, to be referred to a master. The next day the court appointed a new receiver, to whom the second receiver turned over all the property, including cash on hand; and he was authorized to pay all operating expenses incurred during the six months preceding the first order appointing a receiver. Thereafter the master's report on the claims referred was confirmed, and the sum found due as operating expenses, under the second receiver, less the amount paid thereon, was adjudged a first lien on the property. Subsequently a decree was made in the stockholders' suit reciting a final decree of foreclosure in the bondholders' suit, and providing that all claims or liens against the corporation in the stockholders' suit should be transferred to the bondholders' suit. A like decree was entered in the bondholders' suit, and all the claims transferred were sent to a master, to investigate, and report priorities. *Held*, that the transfer of the claims against the second receiver, from the one suit to the other, and adjudging the operating expenses a first lien, was proper.

2. SAME—PROPER EXPENSES.

Compensation for the services of a master appointed to examine and pass on the accounts of a receiver of a railroad corporation is a proper charge against the property, under the former practice of the federal courts.

3. SAME.

The compensation of an attorney for a receiver (the receiver having been discharged, and the funds surrendered to the owner) is a proper preferred charge against the property.

Appeals from the Circuit Court of the United States for the Southern District of Florida.

Bill in equity by the Pennsylvania Company for Insurance on Lives and for Granting Annuities against the Jacksonville, Tampa & Key West Railway Company to foreclose a mortgage. The American Construction Company intervened. Also, a bill in equity by the American Construction Company against the Jacksonville, Tampa & Key West Railway Company for the appointment of a receiver. From a decree confirming the master's report as to the indebtedness of the railway company, and adjudging priorities, the Pennsylvania Company, in the first suit, and the Mercantile Trust Company and others, in the second suit, appeal. Affirmed.

John C. Cooper and R. H. Liggitt, for appellant Mercantile Trust Co.

T. M. Day, Jr., for appellee Jacksonville, T. & K. W. Ry. Co.

Before McCORMICK, Circuit Judge, and BOARMAN and PAR-LANGE, District Judges.

McCORMICK, Circuit Judge. On July 6, 1892, the American Construction Company exhibited its bill in the circuit court of the United States for the Northern district of Florida against the Jacksonville, Tampa & Key West Railway Company, the Florida Construction Company, the Florida Commercial Company, and Robert H. Coleman, Charles C. Deming, Archibald Rogers, Frank Q. Brown, and John W. Candler, directors of the defendant railway company. The bill averred that on May 8, 1890, three distinct roads, namely, the Jacksonville, Tampa & Key West Railway Company, the Atlantic Coast, St. Johns & Indian River Railway Company, and the Sanford & Lake Eustis Railway Company, were each railroad corporations, and each owned and operated a railroad in Florida, and on that day these three railroad companies were consolidated into one, which took the name of the Jacksonville, Tampa & Key West Railway Company, and became the owner of the properties of the three constituent companies; that the stock of the new company (the defendant railway) was \$3,010,000, of which the complainant owned, and was entitled to have certificates of stock to the par value of, \$168,750, but that the stock had not been issued to it; that at the time of the consolidation of the constituent companies each had a bonded indebtedness aggregating \$2,216,000, secured, respectively, by a mortgage on its railroad property, in each of which mortgages the Mercantile Trust Company of New York was trustee; that on May 15, 1890, the defendant railway company executed a series of bonds of the par value of \$4,000,000, which were designated the "Consolidated Bonds," secured by a mortgage of even date upon the main line and its two branches, in which mortgage the Pennsylvania Company (appellant) is trustee; that of this issue the trustee held \$2,-

216,000 for the redemption of the three series of first mortgage bonds, and that the remainder of the consolidated bonds were held as security for floating and otherwise unsecured indebtedness of the railway company; that the defendant Robert H. Coleman owned a majority of the stock of the Florida Construction Company, and controlled its board of directors; that the Florida Construction Company owned a majority of the stock of the railway company, and controlled the election of its board of directors, and the personnel of the boards of directors of the two companies was substantially identical, and Coleman controlled both directories; that a part of the so-called floating debt was illegal and fraudulent; that at one time, prior to the filing of the bill, the Florida Construction Company was indebted in a large amount, evidenced by its promissory notes, for which Robert H. Coleman was liable either as indorser or as surety, and that Coleman and the Florida Construction Company had caused notes of the railway company to be executed and substituted from time to time for the notes of the Florida Construction Company, thus relieving it and Coleman from this liability, and imposing the burden upon the railway company without any consideration; that Coleman claimed to own and hold interest-bearing notes of the railway company to the amount of \$1,800,000; that the floating debt of the railway company, according to its books and financial statements, was \$10,000 on December 31, 1888, \$243,702.98 on June 30, 1890, and \$1,787,784.75 on June 30, 1891; that the complainant had made application to the proper officers of the defendant company for explanations of the discrepancies and inconsistencies in the accounts of the defendant railway company, and as to the increase in its floating debt notwithstanding the rapid increase of its net earnings, and as to the heavy deficiency indicated, and as to the accounts between the Florida Construction Company and the defendant railway company, and those between the railway company and its president, and had made demand for the issue of its stock in the railway company, but that it had failed to gain the information it sought; that the officers and directors of the railway company, being interested as stockholders and directors of the Florida Construction Company, had failed to have prepared true statements of the accounts and expenditures thereof, and entirely failed and neglected to issue to the complainant the stock owned by it; that, if the affairs of the railway company were honestly and efficiently managed by officers and persons whose interests were not hostile to the interest of the stockholders of the defendant company, its stock would be valuable property; that the defendant railway company on or about September 24, 1888, entered into a contract with the Florida Commercial Company, wherein it purchased of that company all or nearly all of the bonds and stock of the Florida Southern Railway Company and the stock of the St. Johns & Lake Eustis Railway Company, then operating lines of railroad in Florida; that the defendant railway company purchased these bonds and stock of the two other named railway companies for the purpose of ultimately becoming the owner of the railroads of these companies, and it paid for the stock and bonds by issuing a series of its own bonds, known as "Collateral Trust

Bonds," amounting in the aggregate to the sum of \$3,592,000, par value, which it delivered to the Florida Construction Company, and pledged the stock and bonds it had purchased as collateral security for this issue of collateral trust bonds, and that, if this contract was valid, the collateral trust bonds were a valid and existing indebtedness of the defendant railway company; that, though not secured by any mortgage on its property, they were secured by mortgage on the bonds and stock of the Florida Southern Railway Company and the St. Johns & Lake Eustis Railway Company, and that this contract with the Florida Commercial Company was illegal and voidable; that the plaintiff did not know, and had no means of knowledge except by the discovery as prayed for in its bill, whether or not the contract was beneficial to the complainant as a stockholder of the defendant railway company, and that it reserved the right to elect whether it would repudiate or ratify the same when it had acquired full knowledge of the facts and circumstances attending the purchase and the effect thereof; that the Florida Construction Company was not then, and had not been for several years, engaged in the construction of any railroad, but that it was the owner of the capital stock of the Indian River Steamship Company and of the Jupiter & Lake Railway Company, corporations organized and doing business in Florida; and that the cost of constructing and maintaining these properties, and of operating the same, was paid in large part out of funds of the defendant railway company, and for the money paid on this account, amounting, as the complainant was informed and believed, to \$200,000, the defendant railway company had no security, but that the same formed part of the large indebtedness of the Florida Construction Company to the defendant railway company.

The prayer of the bill is for a discovery and an accounting, for an injunction and a receiver, and for the cancellation and annulment of the contract with the Florida Commercial Company, if, on full discovery, it shall be shown to be for the interests and benefits of the complainant and other stockholders to have the contract canceled, and for general relief. The bill was verified by the complainant's secretary, supported by assisting affidavits and other exhibits; and, on the day that it was exhibited, the district judge passed an order granting a temporary injunction as prayed for in the bill, and requiring the defendant railway company to show cause on or before the 11th day of July, 1892, why a receiver should not be appointed. On the day named, the defendant railway company appeared by its counsel, Cooper & Cooper and T. M. Day, Jr., and moved the court for an extension of the time, and for a continuance of the hearing of the complainant's motion for the appointment of a receiver and for an injunction for a period of 30 days, or such time as the court might designate. This application was supported by the affidavit of Robert B. Cable, the general manager of the defendant railway, and of Charles C. Deming, its vice president and secretary. Whereupon the district judge ordered that the motion of the complainant be continued until July 28, 1892. On the 23d day of that month the Pennsylvania Company, trustee in the second mortgage bonds, exhibited its bill of complaint against the defendant railway company

to the Honorable Don A. Pardee, circuit judge (not then in the state of Florida), verified by its president, and supported by exhibits and assisting affidavits, accompanied by the acceptance of service by the defendant railway company, and its admission of the truth of the averments in the bill, which bill was in the customary form, prayed for a foreclosure, for the appointment of a receiver and for injunction, as usual in such cases; and both parties having united in the request that, if the application for a receiver should be granted, Robert B. Cable be named as such receiver, the circuit judge thereupon passed his decree, of date July 23, 1892, appointing Robert B. Cable receiver,—noting in the decree that the appointment was provisional, to the extent that any person or party having an interest in the property of the defendant railway company might show cause within 30 days why the appointment should not be confirmed, and that the appointment should not affect or forestall any action that the court or any of its judges “may hereafter see proper to take on any bill heretofore filed in this court against said railroad company, wherein a receivership has been also prayed for.” These two bills were each filed in the circuit court at Jacksonville, then in the Northern district of Florida. Hereafter in this opinion the case first brought will be styled the “stockholders’ suit,” and the other the “bondholders’ suit.”

On the day to which the hearing of the motion of the complainant in the stockholders’ suit had been continued, that motion came on for hearing before the district judge; and the defendant railway company appeared by its counsel above named, and by the affidavit of its vice president, Charles C. Deming, and showed, for cause why the complainant’s motion should not be granted, the institution of the bondholders’ suit, and the order of the circuit judge thereon, with other grounds not necessary to notice. On the same day the complainant in the stockholders’ suit presented its petition of intervention in the bondholders’ suit, alleging the exhibiting of its bill, as above shown, to which bill, and the exhibits and affidavits in support thereof, it prayed that reference might be made as often as might be necessary; that the court had granted a temporary injunction, and had ordered the defendant railway company to show cause on or before the 11th day of the current month why a receiver should not be appointed, and that on the day last named the railway company had moved the court for further time to prepare to resist the motion, and to show cause why a receiver should not be appointed, representing that it could show good cause; that on these representations the court had extended the time; that, after thus procuring the extension of time, the defendant company caused the bondholders’ suit to be brought; that the same was a collusive suit, and, on the application of the complainant therein, the defendant consenting thereto, the circuit judge granted an order appointing Cable receiver. The petitioner prayed a reference to the bill and affidavits on which the receiver was appointed, averring that it appears from an examination of the bills and the exhibits and affidavits in the two causes above mentioned that the second suit is collusive, and that the circuit judge was imposed upon; that Cable is the man-

ager and appointee of the directors of the company, against whom the petitioner in its bill has made charges of gross fraud, mismanagement, and diversion of the funds of the company; that the directors are the owners of the floating debt mentioned in the petitioner's bill, and are the very persons, if any one, who have applied to the complainant to bring the suit wherein Cable has been appointed receiver; that it fully appears by the pleadings and proceedings that the railway company and its directors represent and control both the defendant and the complainant in the bondholders' suit; wherefore, and for divers other good causes appearing of record in the pleadings and the exhibits and affidavits, to which reference is prayed, the petitioner prays leave to file its petition for intervention, and prays that the order appointing a receiver be set aside and vacated, and that all proceedings in the bondholders' suit be stayed until the further order of the court, and for such other different and further relief as to the court may seem just and equitable.

The subject-matter of both bills, the exhibits supporting each, and the previous orders made thereon, respectively, being thus brought on for hearing at the same time before the court in which each bill was filed, was contradictorily argued by counsel, and was held under argument and consideration by the court until August 4, 1892, when, on consideration of the intervening petition and the two several bills, and the exhibits and affidavits in support of each, it was decreed that the order appointing Robert B. Cable receiver be set aside and vacated, and that all further proceedings in the bondholders' suit be stayed until the further order of the court. And in the stockholders' suit the motion of the complainant for the appointment of a receiver was granted, and Mason Young was appointed, and invested with the powers and charged with the duties customary in such receiverships. From these orders appeals were taken to this court. We held that the trustee in the second mortgage was entitled to have the property therein mortgaged taken possession of by the court through the appointment of a receiver at its suit; that the order granting the stay of proceedings in its suit should be reversed, and the stay dissolved; that the receivership granted on July 23, 1892, should be restored; and that the orders in reference to the receivership should be had in the bondholders' suit, and the reports of the operations, earnings, and expenses of the property covered by the consolidated mortgage, should be made to the court in that case. It was left to the circuit court to determine what person was the proper one to execute the office of receiver.—to continue the receiver, Cable, or to appoint a more suitable person in his place, as the relations of the parties, and the character and condition of the property, might, in the judgment of that court, require. 2 U. S. App. 606, 5 C. C. A. 53, and 55 Fed. 131. The decree appealed from in the stockholders' suit was reversed, except as to so much thereof as granted the injunction, which was modified, and as modified was affirmed. In each of these cases an application was duly made for a certiorari to the supreme court, which applications were finally disposed of by that court March 27 and April 3, 1893. 148 U. S. 372-388, 13 Sup. Ct. 758. Pending proceedings on the appeals to this

court and on the applications for certiorari to the supreme court, all the properties of the defendant railway company, as specified and indicated in the decree appointing Young receiver, were held and operated by him as such, under the authority, direction, and orders of the circuit court.

On April 7 and 8, 1893, the circuit judge and the district judge, sitting together, in open court, and concurring, passed the decrees in the two suits, putting into effect in each the mandate of this court. By these decrees the circuit court ordered that the decree appointing Young receiver be vacated, the property which he held as receiver be forthwith restored to the officers of the railway company, and his accounts filed with the clerk, within 20 days, and all persons having claims or demands due, arising out of the operation of the property by Receiver Young, were required to file the same with the clerk, which accounts and claims, on being filed, should be referred to a special master, to be thereafter designated, for investigation and report; that the American Construction Company pay the costs of the appealed causes; that the order of August 4, 1892, staying proceedings in the bondholders' suit, and vacating the order of July 23, 1892, be set aside, and the stay of proceedings dissolved; that the receivership granted and created by the order dated July 23, 1892, be restored; and that the property described in the order be restored to Cable, as receiver. After passing the decrees on April 7, 1893, putting into effect the mandates of this court, the circuit court on the next day, for reasons assigned, not derogatory to Receiver Cable, or to his capacity to manage the railroad, considered that it was best for another receiver to be appointed, and passed a decree in the bondholders' suit appointing Joseph H. Durkee, the present receiver. On the same day (April 8, 1893) an order was passed in the stockholders' suit appointing Charles S. Adams, Esq., special master, to whom, as such master, the accounts of Receiver Young, and the claims of all other persons arising out of his operation of the property, were to be referred. This last order bears only the signature of the district judge. On November 10, 1892, the complainant in the stockholders' suit amended its bill so as to make the trustee in each of the mortgages defendants therein, and prayed for process of subpoena against each of them, and on the 22d day of November obtained an order for making substituted service on each of them. This order was served on the Mercantile Trust Company on December 10, 1892. On December 16, 1892, each of these trustees, specially limiting its appearance to the purposes of the motion, and of objecting to the jurisdiction of the court, appeared by its solicitor, R. H. Liggitt (the names of associated solicitors being joined), and moved the court to vacate and set aside the orders for substituted service on each of them, on the ground that they were not residents of the district, and because the suit is not such a one as substituted service can be made therein. These motions were not acted on. The complainant in the bondholders' suit, by its solicitors, Cooper & Cooper, on June 28, 1893, asked and obtained leave to amend its bill by making the Mercantile Trust Company a party defendant.

In June, 1893, Special Master Adams proceeded to take testimony touching the matters that had been referred to him, the solicitors for

the respective parties interested in the litigation being present. In August he made a partial report, showing what had been done up to that time, and much that remained to be done. He continued the taking of testimony from day to day as rapidly as the convenience of counsel permitted, until April 30, 1894, at which time the parties closed the testimony. Thereupon full argument by counsel was heard by the master; and at the close of the oral argument, at his request, the different counsel, including Messrs. Cooper & Cooper, filed briefs. The master made a very full and able report of his findings, which was filed June 6, 1894. To this report the defendant railway company, by its solicitors, Cooper & Cooper and T. M. Day, submitted 21 exceptions, touching more or less all of the substance in the master's report, and thus renewing before the court the exceptions which they had been most alert, fertile, and strenuous in urging before the master pending his hearing and consideration of the matters. An act to change the boundaries of the judicial districts of the state of Florida, approved July 23, 1894 (28 Stat. 117, c. 149), provided for holding terms of the circuit court for the Southern district at Jacksonville, and that all cases then pending in the circuit court for the Northern district at Jacksonville be transferred to the said circuit court for the Southern district. On this account, probably, the master's report and the exceptions thereto did not come on to be heard until December, 1895. The hearing thereof was then had before the Honorable James W. Locke, the judge for the Southern district of Florida. He was a member of this court, and took part in the hearings and decision of the appeals above referred to, when the same were before this court. After having fully heard the report of Receiver Young, and of the special master thereon, and all the exceptions thereto, the circuit court, on December 27, 1895, adjudged and decreed that, in regard to all accounts approved and allowed in the master's report as paid or unpaid, the same be approved and allowed, and the master's action therein confirmed; that the amounts conditionally approved by the master be approved upon a compliance with the conditions declared and specified by him; that the amounts found by the master to be due from the railway company as operating expenses, less such amounts as have already been paid by the present receiver upon orders of the court, to wit, \$88,086.32 (remaining unpaid), be declared to be due from the railway company, and a first lien upon the property. And it was further adjudged and decreed that the amount of \$46,374.39, found by the master to be due from the defendant railway company on account of the operation of the Florida Southern Railway Company, be approved as justly due; but it appearing that Mason Young had turned over and paid to the Florida Southern Railway Company, upon his retiring from the receivership, the sum of \$47,558.95,—a sum exceeding the indebtedness found due as above,—it was adjudged and ordered that the sum of \$46,374.39 is due from the Florida Southern Railway Company.

On January 17, 1896, the circuit court passed a decree in the stockholders' suit as follows:

"It appearing to the court, in the above-entitled cause, that the entire corpus of the railroad property of the defendant the Jacksonville, Tampa & Key

West Railway Company is in the possession and control of the receiver of this court, heretofore appointed in the cause of the Pennsylvania Company for Insurance on Lives and for Granting Annuities against the Jacksonville, Tampa & Key West Railway Company, the American Construction Company, and the Mercantile Trust Company, and that any decree heretofore made or to be made in this cause, establishing a lien of priority, and requiring payment from the corpus of the property of the said Jacksonville, Tampa & Key West Railway Company, or from the proceeds of the sale thereof, must be transferred to the cause under which the said receiver is acting, for payment; and it further appearing to this court that a final decree of foreclosure has been entered in the said cause of the Pennsylvania Company, etc., and that it is necessary to ascertain and determine the status of all claims against the corpus of the property of the said Jacksonville, Tampa & Key West Railway Company in the hands of the said receiver, and to classify them in order of their priorities, and determine the aggregate amount of the same, before a sale of the said property under the foreclosure decree can be made: It is hereby ordered and decreed that all interventions or claims in this cause which have been heretofore decreed to be liens upon the property of the Jacksonville, Tampa & Key West Railway Company, together with the approved unpaid operating expenses of Mason Young, late receiver herein, and interventions or claims, all interventions or claims not yet finally adjudicated, which are claimed to be entitled to be liens upon the corpus of the property of the said railway company, be, and are hereby, transferred to the cause of the Pennsylvania Company for Insurance on Lives and for Granting Annuities against the Jacksonville, Tampa & Key West Railway Company, etc., for such reference, decree, or order as may be made in that cause."

And on the same day the following decree was passed in the bondholders' suit:

"It appearing to this court that it is desirable and necessary to adjudicate, determine, and classify the status and priorities of all interventions, claims, judgments, and decrees heretofore rendered in this cause, or now before this court for trial and determination, including such claims and interventions in the cause of the American Construction Company against the Jacksonville, Tampa & Key West Railway Company as have been transferred to this cause, before a sale of the corpus of the defendant the Jacksonville, Tampa & Key West Railway Company, in the hands of the receiver of this court, under final decree in foreclosure heretofore rendered, it is ordered, adjudged, and decreed that all unpaid interventions, claims, judgments, and decrees brought in this cause, or originating in the said cause of the American Construction Company against the Jacksonville, Tampa & Key West Railway Company, and transferred to this cause, including the approved, unpaid operating expenses of Mason Young, receiver in said cause, whether the same have been fully adjudicated, or are now before the court for trial and determination, be, and the same are hereby, referred to Charles S. Adams, Esq., as special master herein, with instructions—First, to take testimony and report his findings of law and fact upon all matters not heretofore adjudicated and determined; second, to investigate and report to this court the relative priorities of all matters heretofore adjudicated, the priorities of which have not been declared by this court; third, to ascertain and report any items of indebtedness under the present receivership; fourth, to ascertain and classify as nearly as possible all interventions, claims, judgments, etc., referred to and passed upon by him, and report the aggregate amounts as classified; and, fifth, to make report of his acts and doings thereunder at the earliest practical time."

In obedience to this order of reference, the special master set February 23d for beginning the hearing of the matters involved, gave due notice thereof by publication, and personally served the attorneys of record with notice of the hearing. The solicitors for the complainant and for the committee of the first mortgage bondholders, on behalf of these parties, filed written objections against the consideration of any of the indebtedness of Mason Young, as receiver, in

the case of the American Construction Company against the defendant railway company, on the ground that the complainant and the bondholders never intervened nor were made parties to that suit, and that the orders of the court in transferring the claims and interventions to this cause were irregular and without authority of law, and upon the further ground that all of the claims were subsequent in point of time to the first mortgage, and subordinate in dignity thereto. After a somewhat protracted and very full hearing on all the matters embraced in the reference, the master made his report. It was exhaustively excepted to by the solicitors for and on behalf of the complainant and of the committee of first mortgage bondholders. The exceptions were all overruled, and the report of the master confirmed by a decree passed November 11, 1897, from which this appeal is taken.

The assignments of error are, substantially: (1) That the court had no authority to transfer the matter of claims against Mason Young, receiver, from the stockholders' suit to the bondholders' suit; (2) that the court had no authority to adjudicate the indebtedness of Mason Young to be a first lien on the railroad property; (3) that the court erred in finding that \$88,086.32, the unpaid operating expenses of Receiver Young, \$593.33 allowed Johnson & Wilson, \$484.56 allowed the Sanford & St. Petersburg Railroad Company, \$1,600 allowed Special Master King, \$97.23 allowed Snodgrass & Field, and \$191.20 allowed John G. Christopher, are a first charge on the property, and the \$500 allowed J. R. Parrott has a lien prior to the second mortgage.

It is apparent from the record that immediately after the passing of the decrees on April 7 and 8, 1893, Receiver Young surrendered to Receiver Durkee all the property of the defendant railway which was covered by the first and second mortgages, including \$22,648.27 cash on hand to the credit of that estate at the time of the surrender. It also appears that he duly filed his accounts as receiver of that estate. He surrendered the properties of the Florida Southern Railway Company, including \$47,558.95 to its credit, to the owners thereof, in compliance with the order of April 7, 1893; and they committed it to their general manager, Robert B. Cable. In the order of July 23, 1892, appointing Cable receiver, it is provided, among other things, that he is authorized to pay the indebtedness of the railway company heretofore incurred for expenses of operation during the ——— months next preceding the date of the order. In the decree passed August 4, 1892, in the stockholders' suit, after the bondholders' bill had been exhibited, and simultaneously with the order staying proceedings under that bill until the further order of the court, Young was appointed receiver of the property (both the bills and all the proceedings thereunder being fully before the court, and full consideration having been given thereto), and was thereby authorized and ordered to pay all indebtedness of the railway company theretofore incurred for expenses of operation, including repairs, supplies, material, labor, and services which had been incurred within the period of six months next preceding the date of the order. In the decree of April 8, 1893, appointing Durkee receiver, it is provided, among other

things; that he is thereby authorized to pay the indebtedness of the railway company theretofore incurred "for expenses of operation during the six months next preceding the date of the order heretofore made appointing a receiver in this cause"; that is to say, next before July 23, 1892. At this time the property had been in the custody of the court more than eight months, operated and controlled under the authority and direction of the court, by its hand, Receiver Young, maintaining the same, discharging its duties to the public with conscientious regard to the interest of creditors and stockholders. While certain issues between these creditors and the stockholders with reference to the properties were being submitted to this court and to the supreme court, certain court costs, to the amount of a few hundred dollars, had been incurred, and were adjudged against the stockholders. In the same decree it was provided, among other things, that all persons having claims or demands arising out of the operation of the property by Receiver Young "are required to file the same with the clerk of the court, to be referred to a special master, to be hereafter designated, for investigation and report to the court." It is clear that the chancellors passing these decrees had in mind all the parties to the bills in both of these suits, and recognized, from the very necessity of the case, that persons who had contributed to the operation of the road during this period of the receivership were entitled to the same protection that they would have been entitled to receive if they had extended the same credits during the same period of time to Receiver Cable, had he been permitted to hold and operate the property. It seems to us that what we have thus far advanced shows that the first and second assignments of error are not well taken.

The item of \$88,086.32, balance remaining unpaid of the operating expenses of Receiver Young at the date of the master's report, and of the decree confirming it, is only a little more than one-half of such expenses (\$165,236.34) that remained unpaid at the date of the discharge of Receiver Young, after which Receiver Durkee paid thereon \$77,150.02 "upon orders of court and upon the consent of counsel," leaving the unpaid balance of \$88,086.32. Of this indebtedness (\$165,236.34), the master's report says that, without exception, it consisted of actual necessary operating expenses, such as any receiver, or any other management of the railroad properties, must have incurred in the maintenance and operation of the property. Of the item of \$595.35 adjudged in favor of Johnson & Wilson, and the item of \$484.56 adjudged in favor of the Sanford & St. Petersburg Railroad Company, the master says that these items come under the same general head of operating expenses. The record does not contain any evidence, or show that any was offered before the master or before the court, tending to contradict the master's findings as to the just amount and character of these expenses. Touching the item of \$1,600 adjudged in favor of John King, it appears that he was appointed special master in the stockholders' suit to examine and pass on the accounts of the receiver, and to make reports to the court thereon; that for the period of about eight months he, with the assistance of a clerk, did regularly examine the reports and vouchers

of Receiver Young, and in due time make his report thereon to the court; that after the discharge of Receiver Young this special master made application to the court to be allowed compensation for his services, which application was referred to John E. Hartridge, Esq., as special master, to examine into the matter, and to report thereon, in obedience to which reference Master Hartridge made report on April 7, 1896, finding that the sum of \$1,600, exclusive of salary to his clerk, would be a reasonable compensation for Special Master King for the period for which he served, and recommending that he be paid that amount. This report was excepted to by the parties, and it, with the exceptions thereto, came on to be heard July 1, 1897, when the exceptions were overruled, and the report confirmed. The practice in this circuit, until the adoption of our recent rule in the circuit courts in reference to reports of receivers in charge of and operating railroad corporations and properties pending foreclosure proceedings, authorized, if it did not require, the current discharge of such services as Special Master King performed. The item of \$500 adjudged in favor of J. R. Parrott figures in Master Adams' report, in the stockholders' suit, as compensation of counsel for Receiver Young, not allowed as an independent intervention, but approved as an allowance to the receiver for unpaid balance on compensation of J. R. Parrott as his counsel. It has been, and still is, customary, and we think necessary, to allow such receivers to employ counsel; and Receiver Young having been discharged, and the property and the balance of funds remaining in his hands having been ordered to be surrendered to the owners, it was not improper to adjudge this unpaid balance due the attorney as a charge in his favor against the property prior in rank to the second mortgage. It appears from the report of Master Adams that, under orders of the court, large sums of money, exclusive of the proceeds from the sale of receivers' certificates, have been expended by the receivers in the payment of interest on the bonded indebtedness, and for additions, betterments, and permanent improvements to the mortgaged properties, and that the amounts thus appropriated greatly exceed the amount remaining unpaid of the operating expenses and charges adjudged in the decree to have a lien on the corpus of the mortgaged property. We deem these suggestions sufficient to support our conclusion that the assigned errors embraced in our third grouping are not well taken.

Having carefully examined the record touching all the matters affected by the assignments of error not withdrawn on the hearing of this appeal, we find no ground for reversing the decree of the circuit court, and it is therefore affirmed.

STRANG v. RICHMOND, P. & C. R. CO. et al.

(Circuit Court, E. D. Virginia. March 22, 1899.)

1. SPECIFIC PERFORMANCE—RAILROAD CONSTRUCTION CONTRACT.

A court of equity will not decree specific performance of a contract to build a railroad, though the object of the suit is but to allow complainant to complete a construction contract, and to restrain the company from

making other conflicting contracts, and disposing of securities pledged to him for the work contracted for.

2. **EQUITY—JURISDICTION — INADEQUATE LEGAL REMEDY—DEFENDANT'S INSOLVENCY.**

Equitable jurisdiction on the ground of inadequate legal remedy cannot be sustained on the mere allegation of defendant's insolvency.

3. **SAME—DAMAGES AT LAW—RECOVERY.**

Equity will not take jurisdiction of a suit to restrain a railroad company from making contracts for the building of its road, in contravention of a contract made with complainant, and from disposing of collaterals pledged to him to secure payment of the work, where it does not appear that damages commensurate with the injury cannot be recovered at law.

4. **SAME—CONTRACTS—UNCERTAINTY.**

Where a railroad construction contract was uncertain and inadequate in many particulars, and subjects were left open upon which irreconcilable differences between the parties might arise, specific performance thereof cannot be decreed in equity.

This is an application for an injunction, on a bill filed in the circuit court of the United States for the Eastern district of Virginia.

The case set forth is substantially this: That the defendant railroad company, under a charter acquired under the laws of the states of Virginia and North Carolina, was engaged in constructing a line of railway near Richmond, in the state of Virginia, to a point near Ridgeway, in the state of North Carolina; that on or about the 11th of September, 1897, it mortgaged its line of railway to the defendant the Mercantile Trust Company to secure \$2,300,000 worth of bonds, for the purpose of building its railroad, the acquiring of terminal facilities, rights of way, depots, etc., along its route, and particularly in the cities of Richmond, Manchester, and Petersburg; that after the said railroad company had constructed about 20 miles of its railroad south of the city of Petersburg, on or about the 18th day of October, 1898, it entered into a verbal agreement with the complainant, whereby said complainant agreed to construct, furnish, equip, and build a road from a point on the Raleigh & Gaston Railroad near Ridgeway, N. C., and the Hermitage road, on the line of the Richmond, Fredericksburg & Potomac Railroad, near Richmond, Va., a distance of about 103 miles, including the 20 miles built as aforesaid, together with the necessary depots, water stations, section houses, buildings, and terminals, in consideration of an amount of the mortgage bonds aforesaid from which would be realized a sum not less than \$1,800,000, or that sum in cash, and that the said road was to be turned over to the said complainant, including that already built, together with the right to issue bonds secured by said mortgage, as therein provided, and complainant was to reimburse the defendant railroad company the sum of \$460,000 expended by it in the construction of the 20 miles of road theretofore built by it, and in the acquisition of rights of way, terminals, etc., evidenced by proper vouchers therefor, and further to pay to the Colonial Construction Company the sum of \$100,000; that the said complainant was to have full control of the engineering for the said railroad, the construction thereof, and the right to purchase all lands necessary therefor, as well as materials and supplies of all kinds used in its construction, and that defendant railroad company was to furnish all necessary plans, specifications, drawings, engineers' reports, surveys, and data then in its possession; that, upon making said contract, complainant entered in and upon the line of the said railroad as aforesaid, and is in possession thereof, and is and has been engaged in preliminary work and construction thereof; that defendant railroad company refused to deliver to complainant the plans, specifications, etc., referred to, whereby he was greatly inconvenienced, and prevented from proceeding with the work; that the defendants said railroad company and De Witt Smith were about to cancel the mortgage above referred to, and the bonds secured thereby, upon which complainant relied as security for the payment of the construction of said road; and that they were about to enter into a contract with some other person to construct the same. And complainant asked that the said defendants and the defendant the Mercantile Trust Company be enjoined and restrained from canceling the said bonds or the mortgage, or any

of them secured by the same, which were to become complainant's property upon the completion of the road, or from in any manner interfering therewith; that the defendant railroad company be enjoined from interfering in any manner, pending the hearing and determination of this cause, with the complainant's possession of said railroad, and be required to fulfill its contract on its part; that the bonds secured by the mortgage aforesaid be decreed to be a fund for the payment of the construction of said railroad, and that defendant be required to issue and deliver said bonds, and the defendant the Mercantile Trust Company to certify the same, as required by the terms and provisions of said mortgage. And the said complainant further averred the insolvency of the defendant railroad company, the lack of an adequate remedy at law, and prayed for general relief, etc.

The defendants the railroad company and De Witt Smith appeared and demurred to the complainant's original and amended bills; and the said railroad company answered, denying generally the allegations of the bill, and particularly the existence of any contract with complainant, and that he was in possession of its line of railroad, or any part thereof, or that he was building, or had ever built, any part of its road, or that it had ever had any dealings or transactions with him, and alleging that, on the contrary, the building of its road had been regularly let to the Colonial Construction Company months before the alleged contract with complainant to build the same, and that the construction company was proceeding with the work on the road. The company further denied complainant's right to, interest in, or lien upon its said mortgage bonds, or any of them, or upon any of its property or estate of any character whatsoever, and averred its entire solvency. Each side filed affidavits on the motion for an injunction, and the case now comes up for hearing upon that motion, and upon the demurrer to the original and amended bills of complainant.

John Larkin and D. Lawrence Groner, for complainant.

Henry & Williams and W. R. McKenney, for defendants.

WADDILL, District Judge (after stating the facts as above). In the condition of the pleadings, it will be necessary first to dispose of the demurrer to the bill; and, in the view the court takes of that question, it will be unnecessary to pass upon the merits of the motion for an injunction. Upon the demurrer it becomes material to inquire whether the case made by the bill is one in which a court of equity will decree specific performance of a contract, and upon this the following questions arise: (1) Whether a court of equity will entertain a bill to decree specific performance of a contract to build a railroad; (2) or for the specific performance of a contract to deliver railroad bonds issued, or to be issued, in aid of the construction of a railroad; (3) whether or not the complainant has a complete and adequate remedy at law, and such as, therefore, disentitles him to relief in a court of equity; and (4) whether, conceding the remedy in equity, and that the court should entertain a bill for the specific performance of a contract such as is sought to be enforced, there really exists such a contract as the court should enter upon the performance of.

That courts of equity will not decree specific performance of contracts to build railroads is now too well settled to admit of discussion. A leading case on the subject in this country is that of *Ross v. Railway Co.*, 1 Woolw. 26, Fed. Cas. No. 12,080. This case was decided by Mr. Justice Miller, sitting on circuit, and has since been approved by the supreme court of the United States in *Railway Co. v. Marshall*, 136 U. S. 393, 407, 10 Sup. Ct. 846. To the

same effect is the decision of Judge Dillon, of the United States circuit court. *Fallon v. Railroad Co.*, 1 Dill. 121, 125, Fed. Cas. No. 4,629. And the supreme court of Virginia has likewise held in the recent case of *Ewing v. Letchfield*, 91 Va. 575, 579, 22 S. E. 362. These authorities would seem to be conclusive of this question.

Complainant, however, insists that this case is not necessarily controlled by these authorities, because, as he contends, its object is not to require the building of a railroad, but to allow him (complainant) to complete the building of one upon which he has entered, and to enjoin and restrain defendant from in the meantime interrupting him in his work, making other contracts in connection therewith, and from parting with its securities pledged to him for the work to be performed by him. This contention, while quite ingenious, is fallacious, for the reason that one of the objections to courts of equity entering upon the enforcement of such contracts at all is that complete relief cannot be given by a specific decree, or by several decrees carrying out a given direction. For instance, under the mortgage in this case the issue of bonds is contemplated upon the completion of certain divisions or sections of the road. This would require independent action of the court, to be had at different times and under different circumstances, and necessarily dependent upon many conditions, which it would be next to impossible to anticipate or foresee. Another principle governing suits for specific performance, and specially applicable to this case, is that the remedy to be afforded by the court must be mutual; that is to say, that the court shall not afford one party relief, and not the other. *Cathcart v. Robinson*, 5 Pet. 264; *Marble Co. v. Ripley*, 10 Wall. 339, 359; *Anson v. Townsend*, 73 Cal. 415, 15 Pac. 49; *Cooper v. Pena*, 21 Cal. 403; and 2 *White & T. Lead. Cas. Eq. p. 1107*, note. To restrain the defendant railroad company from interfering with the complainant in the construction of this road, and to take from it the control of its securities, amounting to \$2,300,000, and hold them for the benefit of complainant, and to cause their payment and delivery to him upon such terms and conditions as the court might impose, would be manifestly improper and unjust, unless coupled with the requirement of performance on complainant's part of what entitled him to this relief; and that would involve the building of the railroad. In other words, to adopt this theory the court would be indirectly attempting to do what it could not directly do. Besides, it would necessarily involve the specific performance of a contract for the delivery of railroad bonds, which is, of itself, one of doubtful propriety, and upon which the court ought not to enter,—certainly not under the circumstances of this case. 2 *Story, Eq. Jur.* §§ 717, 717a, 718, 724a; *Pom. Spec. Perf. Cont.* 24, 27; *Ross v. Railway Co.*, *supra*, and cases there cited; *Cuddee v. Rutter*, 6 *Eng. Ruling Cas.* 641, and note page 646. Complainant comes into this forum because of alleged inadequacy of relief at law. This, in a large measure, depends upon the character of the relief to which he is entitled, unless it be that upon the mere allegation of insolvency he is entitled to redress in a court of equity. This is not my understanding of the law. Something more than an apprehension that a judgment, if obtained, will not prove availing, on account

of insolvency, is necessary, to justify a court of equity in reaching forth its hand to give relief. Serious consequences may result by this action on the part of the court. The right of trial by jury is denied the parties, and courts of equity should only intervene where the remedy at law is plainly inadequate; that is to say, where, by ordinary legal procedure, the merits of the controversy, according to right and justice, cannot be gotten at, and relief afforded. 1 Story, Eq. Jur. § 33, and note; *Hyer v. Traction Co.*, 168 U. S. 471, 480, 18 Sup. Ct. 114; *Fallon v. Railroad Co.*, 1 Dill. 125, 126, Fed. Cas. No. 4,629.

There is no apparent reason why damages, commensurate with the injury done, cannot be recovered at law for the breach of the alleged contract in this case, arising either from failure to allow the work to go on, or to pay for the same when built. Assuming, however, that equity has jurisdiction, should the court enter upon the enforcement of such a contract as is set up by complainant in his bill? Indeed, could the court undertake to enforce such a contract without at once finding itself involved in making contracts, as distinguished from enforcing them? The alleged contract is in many respects vague and uncertain. It does not, with any degree of certainty, fix the point at which the road is to begin or to end. "Complete a road between Ridgeway, North Carolina, a point on the Raleigh & Gaston Railroad, and Hermitage road, Virginia, on the line of the Richmond, Fredericksburg & Potomac Railroad, a distance of about 103 miles." This is exceedingly uncertain, and the question of the point of the location of the terminus of the railroad on the line of the Richmond, Fredericksburg & Potomac Railroad Company, near Richmond, or on the line of the Raleigh & Gaston Railroad, near Ridgeway, N. C., might be a most material question, both as to the matter of the cost of the location, and the value and desirability of terminals. The route of the road, further than through the cities of Manchester, Petersburg, and Richmond, does not appear, or the number and kinds of depots, station houses, etc., to be erected on the road, nor the character or location of the bridges contemplated to be built over the waterways to be spanned; and the time within which all this is to be done is not determined. Indeed, thousands of dollars might, and in all probability will, be involved in a controversy over the erection of a single bridge, or a slight difference in the location of the line, none of which a court could undertake to intelligently determine between the parties when they themselves had left the matter open. In the nature of things, many changes would necessarily have to be made in the execution of the work, and irreconcilable differences would stare the parties in the face at every step. Unless the terms of the contract sought to be enforced can be ascertained with reasonable certainty, a court of equity ought not to enter upon its enforcement. *Preston v. Preston*, 95 U. S. 200, 202; *De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816; *Atwood v. Cobb*, 26 Am. Dec. 657, and note page 661. In the *Ross Case*, *supra*, will be found reference to a number of English and American authorities of special interest on this point. A decree may be entered dismissing, with costs, the bill of the complainant, as a consequence of which the motion for an injunction fails.

SILVER PEAK MINES v. HANCHETT.

(Circuit Court, D. Nevada. March 20, 1899.)

No. 639.

MINING RIGHTS—INJUNCTION—VIOLATION BY COMPLAINANT.

As ancillary to an action at law, the owner of a mine filed a bill for injunction against one claiming the right of possession; and defendant was enjoined not to operate the mine, or interfere with the mining property, or commit trespass, waste, or nuisance. Subsequently an agent of defendant in charge of the premises turned them over to complainant. Complainant afterwards extended a tunnel for the purpose of performing the annual assessment work, the ore so extracted remaining on the dump; and, to avoid forfeiture of a policy of insurance covering a quartz mill, complainant kept a watchman on the premises. *Held*, that the acts of complainant tended to preserve the property, and hence the injunction would not be dissolved on the ground that complainant had abused the process of the court in doing the acts which it had caused defendant to be restrained from doing.

This is a bill by the Silver Peak Mines, a corporation, against L. J. Hanchett. An injunction issued as prayed, and defendant now moves to dissolve the same.

M. A. Murphy, for complainant.

Reddy, Campbell & Metson, for defendant.

HAWLEY, District Judge (orally). On the 22d day of May, 1897, the complainant filed its bill in equity, as ancillary to an action at law commenced by said Silver Peak Mines against the defendant, L. J. Hanchett, asking for the restitution and possession of certain mining property and premises situate at Silver Peak, Esmeralda county, Nev. On the same day complainant obtained an injunction against L. J. Hanchett, which reads as follows:

"And it is further ordered by this court that until the further order of the court, or the judge thereof, in the premises, you, the said L. J. Hanchett, the defendant above named, and all your attorneys, agents, assistants, servants, employés, and all persons acting for you or on your behalf, and each and every one of you, do absolutely desist and refrain from mining or extracting ores in or from the mines mentioned in the complainant's bill of complaint on file herein, or from removing or working the same, and from removing or working any ores now extracted or being on the dumps of the said mining claims, and from removing any of the earth, tailings, or slimes on the land or premises mentioned in the complainant's bill of complaint, or from working the same and extracting the gold and silver therefrom, and from running or in any manner using the quartz mill mentioned in complainant's bill of complaint, and from disposing or removing any of the machinery belonging to, or in any manner connected with, said quartz mill, or situate therein, or * * * upon or connected with said premises mentioned in said complainant's bill of complaint, and from committing any trespass, waste, or nuisance whatever on said premises."

On March 10, 1899, notice thereof having been previously given, the defendant, L. J. Hanchett, moved the court to dissolve said injunction, and for an order directing the complainant "to restore to the defendant the possession of all the real and personal property in the bill of complaint herein described, and all the personal property thereon and appurtenant thereto," upon the following grounds, viz.:

"(1) That the complainant itself has, through its agents, servants, and employes, since the issuance of said injunction and restraining order, violated the same, and entered upon the mining ground, lands, and premises in said complaint mentioned, and mined and extracted gold and silver bearing ore, rock, and earth therefrom, and took and converted the same to its own use. (2) That the complainant has, since the commencement of this suit, and the issuance of the injunction and restraining order, forcibly entered upon the mining ground, lands, and premises in complaint described, and ousted and ejected defendant therefrom, and has ever since, and does now, by force hold possession thereof, and exclude defendant therefrom. (3) That the complainant has abused the process of the court, and has itself not respected and obeyed said injunction and restraining order. (4) That complainant has, by means of said injunction and restraining order, and under the protection thereof, forcibly and wrongfully taken from defendant possession of all the property in said bill of complaint mentioned."

This motion was made upon affidavits filed by the respective parties, and upon the papers and pleadings on file and of record in the suit.

Underlying all the points herein raised is the question whether L. J. Hanchett has any such interest in the property as entitles him to make the motion. His interest, if any, or whatever it may be, is derived by virtue of a written contract or agreement for the purchase of the property by him from the Silver Peak Mines, entered into between the parties on the 7th day of September, 1894, and an extension of the time for compliance with the original agreement, entered into on the 12th day of November, 1895, extending the time until the 12th day of August, 1896, and the acts of the respective parties in regard thereto. The question as to Hanchett's interest is important. It is raised and presented in the law case, which is soon to be tried. No opinion in regard to this matter will be expressed or intimated on this hearing. The motion will be disposed of on other grounds.

It will be noticed that the injunction issued in this case is only against the defendant, L. J. Hanchett. The effect of the injunction was to restrain him from the commission of the acts mentioned in the injunction. It did not restrain the complainant from the commission of any act. There are, however, numerous and well-considered cases where the courts have held that, although the complainant was not restrained, he could not "with impunity do the acts which at his instance the defendant has been restrained from doing," and that, where the evident object and purpose of the writ are to preserve the existing status of the property involved in litigation until a final trial and adjudication can be had, "it is a gross abuse of the process of the court for the complainant to disregard his own injunction, after having, by means thereof, tied the hands of his adversary." *Vanzandt v. Mining Co.*, 48 Fed. 770; *Haight v. Lucia*, 36 Wis. 355, 361; *Mowrer v. State*, 107 Ind. 539, 543, 8 N. E. 561; 10 Am. & Eng. Enc. Pl. & Prac. 1104. There is no doubt, therefore, that upon a proper showing to the effect that a complainant is not acting in good faith, and has either sought for and obtained, or uses, an injunction for the purpose of enabling him to obtain an undue advantage over the opposing party, the court could and should interfere to prevent the commission of any act by the complainant having that tendency by restraining him, as well as the defendant, from doing such acts, or any act that would materially disturb the existing status

of the property in litigation; or, as is held in some of the authorities above cited, the court might dissolve the injunction against the defendant. But in connection with the rule above mentioned the law is equally as well settled, as stated in 10 Am. & Eng. Enc. Pl. & Prac. 1104, that "an order of injunction, prohibiting any disturbance of or interference with the status of property pending litigation concerning it, does not prevent any party having an interest in such property from doing whatever is reasonably necessary for its preservation." *Behrens v. McKenzie*, 23 Iowa, 333, 341; *Mowrer v. State*, supra.

With reference to these general principles, the facts presented to the court will be examined. It is proper to state that there is a mass of irrelevant matter included in the affidavits on both sides that will not be noticed, and upon some of the other facts there is a direct conflict.

It appears, to the satisfaction of the court, that Hanchett was in possession of, and claimed to be entitled to the possession of, the property, after the expiration of the second agreement extending the time of his right or option to purchase the property; that, within a few months after the service of the injunction upon him, he left Nevada, and went to California, where he resides; that when he went away he placed one Louis Tietjen to act as his agent in charge of the mining property and certain mining tools; that said Tietjen soon thereafter left the premises, assigning as the reason therefor that he had not been paid by Hanchett; that the said Hanchett also placed Frank Gillespie and Fred Kelly in possession and charge of the stone house, assay office, and mill; that said parties, acting as Hanchett's agents, entered upon the possession of some or all of said property; that both of said parties, prior to the filing of the notice to dissolve the injunction herein, voluntarily went away from Silver Peak, and have not returned; that in October, 1898, the said Kelly notified S. R. Wasson, the agent of complainant, that he was going to leave Silver Peak, and, at the request of said Wasson, delivered to him the key to the stone building, which was occupied by Hanchett during the time he resided at Silver Peak (the house in which Wasson had been living being in a dilapidated condition, and not fit for further occupancy); that Wasson, with the assistance of Kelly, moved his furniture into the stone building, and stored most of the personal property therein belonging to Hanchett in a secure and safe place, and thereafter notified Hanchett that he would purchase the balance of the personal property, if Hanchett would sell the same for what it was worth, and that, if Hanchett did not wish to sell the same, he would see that it was properly packed up, and stored in a safe and secure place; that during all the time mentioned herein the said S. R. Wasson was, and for many years prior thereto had been, and still is, in the general charge of all the property of the Silver Peak Mines, the corporation complainant herein, as its agent to care for and protect said property against trespassers, etc.; that Hanchett, during his possession of the property under the contracts before stated, commenced the running of a certain tunnel, as he was authorized to do, and ran the same for the distance of 300 feet, or thereabouts; that Wasson, after Hanchett left the premises, went into said tunnel, and ran the same for a distance of 250 feet or more,

into the Drinkwater and Crowning Glory lodes, for the purpose of performing the annual assessment work upon the unpatented mines in the Silver Peak group owned by complainant, and which was necessary to be done in order to comply with the laws of the United States, in order to prevent a forfeiture of its rights in said mines, and subject them to a re-entry and location by outside parties; that no ore was extracted from said mines, except such as was necessarily taken out in the running of said tunnel, and all the ore that was extracted remains upon the dump; that no ore has been removed from the property, or converted by the complainant to its own use; that the mill upon said property is insured by the complainant, and, by a clause in the policy, the mill must be "continually watched, night and day," or the policy will be subject to forfeiture, and, to save the life of the policy, complainant has employed a watchman to care for and watch said mill.

I am clearly of opinion that the case, as presented, does not come within the first general rule, but does come within the second rule, hereinbefore announced. The case, in its facts, is essentially different from the cases cited and relied upon by defendant's counsel. One illustration is sufficient. In *Haight v. Lucia*, both parties claimed to be the owner of the land in dispute, which was chiefly valuable for the timber situate thereon. After the plaintiff obtained an injunction against defendant from committing any waste on the land, he, immediately after the service of the injunction upon defendant, entered upon the land, with a number of employes, and cut down a large quantity of timber; thus destroying the substance of the estate. The acts performed by the complainant in this case tended to preserve, instead of to injure or destroy, the property. The evidence falls far short of establishing the fact that Hanchett has been, by force or otherwise, ejected from the premises, or any part thereof. In this respect the present case is clearly distinguishable from *Vanzandt v. Mining Co.*, *supra*. Moreover, the complainant is the unquestioned owner of the property described in the bill of complaint herein. It certainly has the right to protect and preserve its own property, and prevent any loss thereof or injury thereto. Hanchett does not own the property. He has no title thereto. All he claims is the right of possession which he obtained by virtue of the contract or contracts giving him an option to purchase the property, within the time specified therein, at a stipulated price. He did not comply with the covenants on his part agreed to be performed, and in his answer claims that he was prevented from so doing by various acts of the complainant. The question whether, after the time specified in the contracts, Hanchett was in possession of the property by virtue of said contracts, or other agreements or conduct between the parties thereto, as claimed by the defendant, or was simply allowed to remain in possession of said property by the mere sufferance of the complainant, as claimed by it, will arise upon the trial of the action at law, where all the evidence in regard thereto can be fully presented, heard, and determined; and it will not, therefore, be here discussed.

From the facts presented on this hearing, it is clear that the defendant is not entitled to any relief upon this motion. The motion is denied.

GUNN v. EWAN.

(Circuit Court of Appeals, Eighth Circuit. March 20, 1899.)

No. 1,114.

1. PARTNERSHIP—COMMISSIONER TO SETTLE PARTNERSHIP ESTATE—COSTS OF ACCOUNTING.

A commissioner was appointed in a suit for the settlement of a partnership, and empowered to take charge of all the partnership property, collect the assets, pay the debts, and divide the remaining property between the partners. On the making of his final report, after nearly 10 years, a reference became necessary to state his accounts. *Held*, that the costs of such reference, including the fee of the master, should be borne by the commissioner.

2. SAME—POWERS OF COMMISSIONER.

A commissioner appointed by the court to settle a partnership estate, which consisted of a large amount of real estate and over \$25,000 of bills receivable, has power to employ and pay the necessary assistants to enable him to properly look after and handle the property, as well as to procure such legal services as are reasonably required, although he is himself a lawyer; and his employment of his partner as attorney is not objectionable.

3. RECEIVERS—LIABILITIES—EMBEZZLEMENT BY CLERK.

A receiver, or a commissioner with the powers of a receiver, is personally liable for the embezzlement or misappropriation of the funds of the trust estate by his clerk or employé.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

George Gillham (C. F. Greenlee, on the brief), for appellant.

John J. Hornor and E. C. Hornor, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. In October, 1888, a suit was pending in the United States circuit court for the district of Arkansas between the appellant, John Gunn, and one William Black, for a dissolution of the partnership existing between them, for an accounting, and for a distribution of their property or its proceeds. On October 26, 1888, the appellee, Parker C. Ewan, was appointed a commissioner in that suit by the circuit court, and was empowered to take possession of all the property of the partnership, to collect the notes and accounts, to lease the real estate, and to collect the rents, pay the taxes and debts of the firm, and divide the property that should remain between its members. He entered upon the discharge of his duties on November 3, 1888. On December 1, 1897, the court ordered him to file with its clerk an account of his receipts and disbursements from the date of his appointment to that time, referred his account to the clerk, and directed him to hear evidence, to restate the account, and to report it to the court. In due time the clerk reported that there was due to the commissioner from the partnership, Gunn & Black, a balance of \$957.79. Exceptions to the report were filed and overruled, and a decree was rendered that the commissioner was entitled to receive a balance of \$957.79; that Bena Black, as ad-

ministratrix of the estate of William Black, had paid her proportion of this amount; that the commissioner, Ewan, should recover of John Gunn \$478.89; that a fee of \$250 should be allowed to the clerk for taking and stating the account; that all costs should be paid, one-half by the appellant, Gunn, and the other half by the administratrix of Black; and that the commissioner should be finally discharged. This decree is challenged by the appeal of John Gunn. As no appeal has been taken by the administratrix of Black, we shall assume that a settlement has been made between her and the commissioner, and consider the accounting only as it affects the appellant, Gunn.

It is assigned as error that the clerk and the court below omitted from the accounting all the receipts and disbursements of the commissioner between November 3, 1888, and July 3, 1889. The record discloses the fact that the appellee received and disbursed moneys as commissioner during this time, that evidence regarding these receipts and disbursements was introduced before the clerk, that the order for the accounting expressly included these receipts and disbursements, and that the clerk entirely omitted to consider or state them in his report to the court. This was a plain error, and this assignment is sustained.

The objection that the costs of the commissioner's accounting ought not to be assessed against the appellant is also well taken. The commissioner was appointed and paid to collect and disburse the funds, and keep the accounts of the parties to this litigation; and they should not be required to pay the costs of obtaining a correct account of these receipts and disbursements, especially in view of the fact that the commissioner claimed that there was a balance of \$2,287.51 due him, when the clerk found that there was only \$957.79, and the truth seems to be that he was not indebted to them in any amount.

The other assignments of error are not tenable. The evidence does not warrant a reversal of the findings of the clerk and of the court that the \$1,000 which Gunn paid to Ewan was paid him for his services as an attorney, and not on account of his services as a commissioner. Since Gunn had never paid him any part of the \$4,000 which the court had allowed him for his services, there was no error, as against Gunn, in crediting the commissioner, in his account, with this allowance.

The clerk properly allowed to the commissioner the item of \$1,207.22 on account of his payment of the Ida Brown note. That note was signed by Gunn & Black, and that partnership was bound to pay it to Ida Brown. It was one of the debts which that firm owed, and which the commissioner was authorized to pay by the order which appointed him.

The contention that the commissioner had no authority to employ and pay the salaries and traveling expenses of clerks and assistants has no foundation. The record shows that he was vested with the usual powers of a receiver,—to take all the property of this partnership, to wind up its business, and to distribute to the partners the property or proceeds which remained after the

debts of the partnership were paid. There were more than 14,000 acres of land; there were town lots and houses; there were notes and bills receivable which amounted to more than \$26,000. The commissioner had ample power to obtain the necessary assistants to handle and dispose of this property, and the evidence fails to show that his expenditures on this account were either unnecessary or excessive. The presumption is that they were fair and judicious.

The objection to the allowance of the amounts which he paid for legal services is equally weak. In the conduct of the business of this partnership, and in the course of the discharge of his duties, the commissioner appears to have expended \$515.50 for the services of attorneys at law. On the face of the case, this certainly was not an unreasonable or excessive amount to apply to such a purpose in winding up and distributing so large an estate. The suggestion that he had no right to employ counsel, because he was a lawyer himself, is entitled to no consideration. He was not appointed commissioner to try the lawsuits of Gunn & Black with strangers. Nor was the employment of his partner to perform these services objectionable. It was his duty to employ a man of learning and ability, in whom he had confidence, and no better evidence of the wise discharge of that duty occurs to us than the fact that he employed a man in whom he had so much confidence that he had formed a partnership with him years before.

The fee of \$250 which the court allowed the clerk for hearing the evidence, examining the vouchers, and stating the accounts was not excessive. It was fair and reasonable.

The result of a consideration of all the evidence in the record is that the decree below must be reversed. But we hesitate to refer this case back to the trial court for another accounting. While the vouchers are not included in the record before us, and it is difficult, perhaps it is impossible, to accurately state the account between the commissioner and the appellant, and to find the exact balance, yet the evidence in the record has satisfied us that the indebtedness of the commissioner to the partnership, or of the partnership to the commissioner, is a very small amount, in any event, and must be less than the expense of another trial of this issue. This accounting has remained unsettled for more than 10 years. The most important witnesses are dead. The former clerk of the commissioner, whose acts and accounts present the most serious questions in the case, passed away years ago. Mr. Black is dead. Mr. Ewan, the commissioner, has been attacked by disease, and so weakened that his memory is much impaired. It seems probable that, the longer this litigation is continued, the more difficult it will become to reach a just and accurate result. In view of these considerations, we have concluded that the interests of all parties will be best subserved by the rendition of a definite decree which will conclude this litigation. To this end, we have carefully examined and considered all the evidence in the record. It conclusively shows that one of the

clerks of the commissioner received \$1,162.37 of the moneys of Gunn & Black, for which neither he nor the commissioner have ever accounted to them. This man was one of the clerks for whose salary we have allowed the commissioner, and for whose acts and omissions he became responsible when he intrusted to him the duty of receiving and accounting for the trust funds which the court had appointed him to watch and preserve. There are other items of the account whose allowance is debatable, but, on the whole case, our conclusion is that if this sum of \$1,162.36 is charged against the commissioner, in addition to the charges contained in the account stated by the clerk, the result will be substantially right and just to all the parties to this controversy. As the account stated by the clerk shows a balance of \$957.79 in favor of the commissioner, this charge will bring him in debt to the partnership in the sum of \$204.57, and to the appellant in one-half of that amount, or \$102.28. The order of this court will accordingly be that the decree of the court below be reversed, and that the case be remanded to that court with directions to enter a decree that, except as therein adjudged, the exceptions to the clerk's report are overruled; that in the account of the commissioner, as stated by the clerk, an additional charge against him must be made of \$1,162.37, the amount which was collected by his clerk and was not accounted for; that the true statement of his account is that he is indebted to Gunn & Black in a balance of \$204.57; that he shall pay to the appellant, John Gunn, one-half of this amount, or \$102.28; that he shall pay the costs of the accounting between himself and Gunn & Black, and the \$250 allowed to the clerk; that, in case of a failure to make such payments within 60 days after the entry of the decree, the parties entitled to these amounts may have execution to collect them; and that when their payment is made the commissioner shall be discharged. The costs in this court will be assessed against the appellee.

INTERSTATE COMMERCE COMMISSION v. WESTERN & A. R. CO. et al.

SAME v. CLYDE S. S. CO. et al. (two cases.)

(Circuit Court of Appeals, Fifth Circuit. March 21, 1899.)

Nos. 750-752.

1. ACT TO REGULATE COMMERCE—LONG AND SHORT HAULS.

Competition is a factor to be considered in determining whether shipments of freight to different points on the same line of railroad are made under substantially similar circumstances and conditions, so as to come within the long and short haul provision of the fourth section of the act to regulate commerce (24 Stat. 379); and if such competition is real and controlling as to the rate charged to one point, while it does not affect rates to another, it creates substantially different circumstances and conditions, as between the two, and such section has no application.

2. SAME—UNDUE PREFERENCE AS BETWEEN DIFFERENT POINTS.

Where a lower rate charged for the carriage of freight to a longer-distance point results solely from the controlling influence of competition at such point, which renders the circumstances and conditions substantially

dissimilar from those existing at an intermediate point, so as to exclude the application to the case of the fourth section of the act (24 Stat. 379), and such competitive rate is not so low as to be unremunerative to the carrier, it cannot afford basis for a claim of undue and unreasonable preference or advantage in favor of the competitive point, or of unreasonable prejudice or disadvantage against the intermediate point, within the inhibition of the third section.

3. SAME—UNJUST AND UNREASONABLE RATES.

Rates to a noncompetitive point cannot be held unjust and unreasonable in themselves, and therefore unlawful, under the first section of the act (24 Stat. 379), where they are made up of the rates charged to the nearest competitive point through which the shipments pass, which are low rates, forced by severe competition, combined with the local rates fixed by the state railroad commission between such point and the point of destination, thus giving the noncompetitive point the full benefit of whatever reduction in rates competition has effected on the line of the shipment, and where the total rates so charged are relatively just, as compared with those to other points in the state, on other lines of road, and similarly situated.

Appeals from the Circuit Court of the United States for the Northern District of Georgia.

L. A. Shaver and J. Ward Gurley, for appellant.
Ed. Baxter, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

McCORMICK, Circuit Judge. The three above-styled causes present substantially similar questions of fact and questions of law. They were heard together in the circuit court and in this court. They were severally originated by petitions filed before the interstate commerce commission against the respective appellees by the railroad commission of Georgia. These petitions were filed on October 22, 1891. The gravamen of the petition in the first-named of the above cases was that the appellees charged, collected, and received for freight transportation, by continuous carriage, from the city of Cincinnati and other Ohio river points to the towns and stations of Marietta, Acworth, Cartersville, Kingston, Adairsville, and Calhoun, on the Western & Atlantic Railroad, a greater amount than the amount charged and received for freight carried through the towns and stations just named to the city of Atlanta; that the rate of freight charged to the shorter-distance points is unreasonable and discriminating in its nature, and is in direct violation of section 4 of the act of congress entitled "An act to regulate commerce" (24 Stat. 379),—and it prays that the defendants therein (appellees here) may be required to answer, and, after due hearing and investigation, an order may be made commanding them to cease and desist from the violations of the act to regulate commerce. In the second suit the same charges and prayer are made as to the rates of the defendants (appellees) from New York and other Eastern cities to points on the Georgia Railroad between Augusta and Atlanta, to wit, Greensboro, Madison, Social Circle, Covington, and Stone Mountain, being the shorter-distance points in that case, and Atlanta, the longer-distance point. In the third complaint the same charges and prayer

are made as to the rates of the defendants (appellees) from New York and other Eastern cities to points on the Atlantic & West Point Railroad and the Western Railway of Alabama between Atlanta and Opelika, to wit, Newnan, Grantville, Hogansville, Lagrange, and West Point, being the shorter-distance points in that case, and Opelika, the longer-distance point. The interstate commerce commission, after due service of these complaints on the defendants therein, and after testimony taken and argument had in behalf of all parties in interest, made its report and decision November 11, 1892, in which it held, in substance, in each of the cases, that all of the carriers, as presented in the cases, are subject to the act to regulate commerce, and to the jurisdiction of the interstate commerce commission as to through shipments from Cincinnati, New York, Philadelphia, Boston, and Baltimore, or from any Ohio river or Mississippi river point, or any Atlantic port north of Charleston, and that they had no right to put in the higher rate for the shorter distance upon their own motion, but should have made application to the commission for relief under the provisory clause of the fourth section, and are technically not now entitled to make defense to the complaints. After discussing the facts in the first case, the commission says:

"In view of these facts, and others shown in the statement of findings, we hold that the defendants are not, upon the evidence, justified in making the greater charges complained of in this case. But this being the first case, since the Louisville & Nashville decision, in which the commission has been called upon to specifically hold that relieving orders must be applied for in this class of cases, we think the carriers should have an opportunity in this case of applying for relief under the proviso of the fourth section, and, if possible, of bringing forward voluntarily, as applicants instead of defendants, additional evidence that may be admissible under such a proceeding as indicated in this opinion. The order will therefore be that the defendants in this case cease and desist, within 20 days after receiving a copy thereof, from charging or receiving any greater compensation in the aggregate for the transportation of a like kind of property from Cincinnati, or other points called and known as 'Ohio River Points,' for the shorter distance, to Calhoun, Adairsville, Kingston, Cartersville, Acworth, or Marietta, than for the longer distance over the same line in the same direction, to Atlanta (the shorter distance being included within the longer distance), or, that the defendants make and file with the commission within the time above specified an application or applications, as the case may require, as provided in the proviso of the fourth section of the act to regulate commerce, for relief from the operation of that section in respect to the prohibition therein contained against charging or receiving any greater compensation in the aggregate for the transportation of like kinds of property from Cincinnati and other Ohio river points to the shorter-distance points above mentioned, than for such transportation over the same line in the same direction for the longer distance, to Atlanta, and show cause within 60 days after service of the order why such application for relief should be granted; and upon such application the evidence already taken in this case may be used. In case the application for relief shall be denied, the order to cease and desist shall stand, and compliance therewith will be required within twenty days after service of the order denying the application."

A substantially similar finding and order was made in each of the two other cases. The appellees did not apply for relief as permitted by the order, and did not change their tariff or rates to the shorter or longer distance points named.

On May 27, 1893, the bills in these cases were exhibited in the circuit court for the Northern district of Georgia, and, by appropriate

averments therein, the proceedings had before the commission, and its decision and order thereon, and the failure of the appellees to comply therewith, were presented to the court; and prayer was made that such action and orders be taken as were necessary to secure a speedy hearing and determination of the matters and things stated, and that pending the proceedings a writ of injunction, or other proper process, mandatory or otherwise, to restrain the defendants, their officers, servants, and attorneys, from further continuing in their violation of, and disobedience to, the order of the commission, be granted, and that upon final hearing such injunction may be made perpetual. The cases did not come to a speedy hearing. On July 6, 1898, a decree was entered in each case by which the relief sought was refused, and the bill dismissed. 88 Fed. 186. From those decrees these appeals are taken.

It is manifest from the report and opinion of the interstate commerce commission that these cases were considered and decided by it as cases presenting violations of the fourth section of the act to regulate commerce. The commission was not, therefore, called upon to find whether the respective rates in question were reasonable and just, or not. For the same reason, it was not called upon to find whether the rates charged to the shorter-distance points gave an undue or unreasonable preference or advantage to the longer-distance points, or subjected the shorter-distance points to an undue or unreasonable prejudice or disadvantage in any respect whatever. As underlying the provisions of the fourth section, the relative effect of the respective rates is more or less discussed in the report and opinion of the commission; but it does not appear to have made, nor to have intended to be understood as making, any finding of fact in reference to these rates that would affect their relation to any section of the act to regulate commerce, other than the fourth section, on which its opinion and decision proceed and rest. Without conceding this, counsel for the appellant contended in the circuit court, and contends in this court, that on applications like these the courts are not limited to a review of the grounds on which the commission acted, but have, and should exercise, jurisdiction of the whole subject-matter, and, on the law and facts, determine whether the tariff of rates complained of is reasonable and just, or not, and whether it gives any undue or unreasonable preference to the longer-distance points, or subjects the shorter-distance points to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The appellees contend that their tariff of rates complained of does not violate the fourth section, because the circumstances and conditions under which they carry freight to the shorter-distance points and to the longer-distance points are not substantially similar, but are substantially dissimilar. They contend, further, that their tariff of rates does not violate the third section, for substantially the same reason as exempted them from the operation of the fourth section, and that any preference the tariff gives to the longer-distance points, or prejudice or disadvantage in any respect whatsoever to which it subjects the shorter-distance points, is not undue or unreasonable, but the just and reasonable result of the substantial dissimilarity in conditions

and circumstances under which the freight is carried and delivered to the different points, respectively. They also deny that the rates complained of are unreasonable or unjust, and insist that they are in themselves reasonable and just.

In the case of *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, the supreme court say:

"That competition is one of the most obvious and effective circumstances that make the conditions under which a long and a short haul is performed substantially dissimilar, and, as such, must have been in the contemplation of congress in the passage of the act to regulate commerce, has been held by many of the circuit courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. 315; *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, Id. 862; *Interstate Commerce Commission v. Atchison, T., etc., R. Co.*, 50 Fed. 295; *Same v. Cincinnati, N. O. & T. P. R. Co.*, 56 Fed. 925; *Behlmer v. Railroad Co.*, 71 Fed. 835; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409. * * * But the question whether competition, as affecting rates, is an element for the commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court. * * * To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases—that in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of the like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, competition which affects rates is one of the matters to be considered—is not applicable to the second section of the act. * * * In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the questions of undue or unreasonable preference or advantage, or what are substantially similar circumstances and conditions. * * * We are unable to suppose that congress intended by the fourth section, and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the commission shall authorize them so to do. Much less do we think that it was the intention of congress that the decision of the commission, if applied to, could not be reviewed by the courts."

The commission's report says that the present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from the competing markets, like St. Louis, Baltimore, Cincinnati, etc., and, with some modifications occurring from time to time, has been in effect for a considerable period. While it makes no similar finding with reference to Opelika, showing whether or not the adjustment of rates to that point is the outcome of severe competition, either between carrier and carrier or between market and market, its recitals of what the proof shows as to conditions there are to that effect; and the testimony of numerous credible witnesses is clear and pointed to the effect that the adjustment of rates to Opelika is the outcome of controlling competition. It is true that with reference to both points the force of this competition has been recognized by the respective appellees, and its influence has by agreement between them been so adjusted as to fix the rates to each of these points; but witnesses, showing thorough competency to testify to the fact,

state that this adjustment of the rates has been brought about and is maintained by the force of the competition bearing upon those points. It is argued by counsel for the appellant that by this agreement as to rates the carriers have contracted to not compete. But it is not shown or reasonably suggested on what ground, or for what consideration, the competing carriers consented to accept a lower rate to these longer-distance points than they charge to the shorter-distance points, if they could just as well have agreed and contracted to charge as great or greater rates to the longer than to the shorter distance points. A careful consideration of the circumstances and conditions shown by the proof constrains to the conclusion that the difference in the circumstances and conditions has caused the difference that is complained of in the rates. The commission, in its report, says, "Competition has not forced rates down at Kingston, Marietta, and Cartersville." These are junction points, reached by more than one railroad. No railroad other than the Western & Atlantic runs to Calhoun, Adairsville, or Acworth. Some of the shorter-distance points between Augusta and Atlanta and between Atlanta and Opelika have more than one railroad reaching them; but the proof shows that at none of them is there such competition as affects rates, or, to use the language of the commission, "as has forced rates down." In these cases the circuit court found that the rates complained of do not violate the fourth section of the act to regulate commerce; that the lesser charge to the longer-distance point results from dissimilar circumstances and conditions, brought about by competition, and does not give a preference which is undue and unreasonable to the longer-distance point; and that there is nothing whatever in the evidence or in the record from which it can be justly concluded that the rates to any of the local points named are not reasonable and just. 88 Fed. 186. The most careful consideration of the testimony brought up in the records in these cases does not disclose any evidence that was offered by the appellant in the circuit court tending to show that the rates, separately considered, to the respective points, are not reasonable and just; and the replies that were drawn by a most skillful cross-examination from the witnesses called by the appellees do not show, or tend to show, that the rates to the respective points are not reasonable and just. On the contrary, the great volume of testimony given by these witnesses (who show full competency to testify) is directly and clearly to the effect that the rates are reasonable and just. One witness gives as a reason for this opinion (for the subject is hardly susceptible of better proof than the opinion of experts) that the rates are fixed upon the lowest obtainable combination of the rates to competitive points, with the local rates therefrom to the noncompetitive points, so that the traffic to the noncompetitive stations has the benefit of whatever reduction competition has effected in the adjustment of rates to the competitive points, and that the rates are lower than prevail in some of the other sections of the country, and lower than can be obtained by any other means of transportation, and are not higher than are charged from other points of distribution to stations on other railroads under similar circumstances and conditions. And another wit-

ness says the rates are "just and reasonable, in that they are not unjustly or unreasonably high. They are lower than the rates at which the property can be transported by any other means of transportation. They have not prevented the shipment of freights. Traffic has been shipped with profit under these rates. They are just, relatively, to rates to other points in the state of Georgia similarly situated. These rates are based upon rates to Chattanooga, which are controlled and fixed by competition, and added to the rates from Chattanooga to the several stations, which are the same for the same distance as the rates fixed by the railroad commission of Georgia." These reasons do not convince the counsel for the appellant, but appear to us to have weight. The testimony also shows (and it has become largely a matter of common knowledge) that competition between carriers, whether by rail or by water, not only affects the rate for which freight can be carried, but also substantially affects the circumstances and conditions under which the transportation of freight is conducted. By way of illustration, one witness says that it will and does require a road to run trains at a high rate of speed. It requires the carrier frequently to have cars loaded to a less weight per car. It often requires the carrier to take a part of a car load without waiting to fill up the car. It will frequently require the road to be less rigid in resisting the payment of claims made against it, the payment of which the company might successfully resist, and would stoutly contest at a noncompetitive point. The doing of all of these things, and many more like them not necessary to be done in the absence of competition, is rendered necessary by the presence of such competition, to the degree in which it is present, in order that the carrier may get its share of the business at the competitive point. The testimony shows that the rates of freight from Ohio river points to Atlanta are entirely controlled by competition. The points between Chattanooga and Atlanta get the benefit of the strong competition at Chattanooga, but there is not at those points the same force of competition which controls the rates at Atlanta. The testimony of the witnesses and the report of the commission show that Opelika is not situated on any water course, and is at the intersection of only two railways, but that it is affected by certain conditions which happen to exist at that point, and which are not to be found at ordinary local stations, or even at ordinary junctions. With its two railroads as terminal carriers, it is connected at comparatively short distances with numerous and extensive systems of rail and water carriage, which make it possible for freight to reach Opelika from the Northern and Eastern ports, and from Ohio river points, by many different routes, the strong competition between which different carriers comes to a focus at Opelika. Counsel for the appellees concedes that, in taking into consideration competition as one of the circumstances and conditions affecting transportation, care must be had to keep within reasonable limits. He submits that in these cases the reasonable limits are three: (1) That the rates charged to the shorter-distance points must not be unjust or unreasonable, within the purview of the first section of the act to regulate commerce; (2) that the competition at the longer-distance points must be such

as subverses the public interest; it must also be real, and such as to compel the acceptance by the carriers of the rates which they do accept to those points; and (3) that the rates to the longer-distance points must yield a profit, though it may be very small, over the additional cost of the movement of the competitive traffic. He contends that, if the rates to the shorter-distance points are just and reasonable, the appellees ought not to be required to reduce them, even though such reduction may be necessary to place the shorter-distance points upon a "rate equality" with the longer-distance points, because such a reduction in rates to the shorter-distance points involves a serious reduction in the revenue which the appellees derive from the present rates to those points. If the competition at the longer-distance points is real, and such as to affect rates, the carrier must accept those rates, or abandon the competitive traffic. If the competitive rates are something more than the additional cost of the movement of the traffic, it is to the interest of the carrier and to the interest of the public that the carrier should be allowed to compete for the traffic. The profit, however small, to the extent that it inures, increases the revenues of the carrier, and has a tendency to reduce local rates and to improve the local service. There may be a wide difference between a rate or amount of compensation that would give full remuneration for the service in carrying the competitive traffic, and that remuneration therefor which the competitive conditions will allow the carrier to receive. The full measure of reasonable remuneration to the appellees for the carriage of competitive freight to Atlanta would require a rate sufficient to pay, not only the additional cost of moving the competitive traffic, but also that proportion of operating expenses, fixed charges, and reasonable profit to the owners of the carrier lines which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier. And that rate would doubtless be applied and enforced if the circumstances and conditions permitted it to be done. But, as no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances and conditions, it is manifest that it cannot be applied to traffic that is subject to severe competitive conditions.

There is in these cases no complaint by the appellant, or by any of the witnesses whom the appellant called, that the rates to Atlanta, Opelika, Chattanooga, Augusta, and other competitive points are too low. There is a suggestion by the commission that the average of the rate per ton per mile tends to show that such complaint could not well be made, and that these rates are at least reasonably high. And the testimony offered by the appellees shows that, considering the competitive conditions in operation at those points, the rates to those points are reasonably remunerative. On the basis of this evidence, it is earnestly contended by counsel for the appellant that the rates at the longer-distance points being shown to be reasonably remunerative, and the rates at the shorter-distance points being admitted to be higher, the latter must, of logical necessity, be found to be unreasonably high, and therefore unreasonable and unjust, and such as give an undue preference to the longer-distance points, and sub-

ject the shorter distance points to an undue and unreasonable prejudice and disadvantage. It will be perceived that this argument excludes all consideration of the force of competition, and ignores its presence at the longer-distance points and its comparative absence from the shorter-distance points. What is a reasonable action, or a reasonably remunerative rate for carriage, at a given time and place, necessarily has relation to the circumstances and conditions bearing upon the actor or upon the carrier at the time and place. The appellant does not say, and the railroad commission of Georgia did not say, and none of the witnesses called by the appellant in the cases have said, that the rates at any of the points, considered separately, are too high or are too low, or are not reasonable and just. The burden of their complaint is that the relation between the rates is wrong. It is not insisted, or even suggested, that the rates to the longer-distance points should or can be raised. Nor is it now asked that the rates to the shorter-distance points shall be lowered. It is asked only that the appellees shall be required to cease and desist from charging more for the shorter than for the longer haul. This requirement seems to have possible relation only to the fourth section of the act. It cannot adequately meet the requirements of the first and third sections, if either of them is violated by the conduct from which the appellees are required "to cease and desist." If the mere charging of a greater rate for the shorter than for the longer haul gives an undue and unjust preference to the longer-distance points, and subjects the shorter-distance points to any undue prejudice or disadvantage, it is difficult to see how the charging exactly the same rate for the shorter haul that is charged for the longer shall escape condemnation. The appellees are held to be subject to the act, and to the jurisdiction of the commission, because, by express or implied agreement, they have consented to carry freight on through bills of lading from points beyond the state of Georgia to points within that state. The sixth section of the act to regulate commerce, as originally passed and as since amended, recognizes the existence and validity of such contracts or agreements, express or implied, and makes certain provisions with reference to the action of the connecting carriers parties thereto. The act does not, however, require such connecting carriers to enter into such agreements. Nor does it authorize the commission to require through routing and billing, or to establish and fix through rates over connecting lines. *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 52 U. S. App. 732, 30 C. C. A. 142, and 86 Fed. 407; *Railroad Co. v. Platt*, 7 Interst. Commerce Com. R. 323. It does not authorize the commission to fix rates in any case. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700. The railroad commission of Georgia is authorized and required to fix rates. Acts Ga. 1878-79, pt. 1, tit. 12, No. 269, § 6. And that commission has fixed a schedule of just and reasonable rates, which is called the "Standard Tariff." Only three roads—the Western & Atlantic, the Rome Railroad (operated by the Western & Atlantic), and the Georgia Railroad—are required to observe this standard tariff of rates. All of the other roads in the state are allowed certain percentages of increase, except on classes C, D,

F, J, and P, and are allowed to charge rates from 10 to 50 per cent. higher than the standard tariff rates. The Western & Atlantic Railroad, extending from Chattanooga to Atlanta, does not lie wholly within the state of Georgia, but, being owned by the state of Georgia, and now operated by the Western & Atlantic Railroad Company under a lease from the state, is subject throughout its whole extent to the rates imposed by the Georgia commission. The competition which affects rates is at least as severe at Chattanooga as it is at Atlanta. Some of the witnesses depose that it is stronger at Chattanooga, by reason of the influence there of the Tennessee river. Various systems of connecting lines lying north and west of Chattanooga are affected by this strong competition, which has its controlling influence throughout the whole length of their lines from Ohio river points to Chattanooga, on all freight carried to that point, or to be carried through it; and hence they cannot claim more, or be forced to receive less, for carriage to that point than the competitive conditions there require. For like reasons, the Western & Atlantic Railroad Company cannot obtain more for the carriage of this competitive freight from Chattanooga to Atlanta than the difference between the rates to Chattanooga and the rates to Atlanta, which have been fixed by competition beyond the control or appreciable influence of the Western & Atlantic Railroad. Therefore, as to that competitive traffic, this road has no option as to the rate at which it will take the traffic, and must either decline to receive the freight, or must accept for its carriage the difference between the two rates which are fixed by the controlling competition. As to the intermediate stations on the Western & Atlantic Railroad, that carrier is under not the same duress, but feels its force to the extent that, for carrying the competitive freight in question from Chattanooga to Marietta, it cannot charge the full rate allowed by the Georgia commission; for, if it insisted on doing so, the freight could and would go by another route to Atlanta, and thus, instead of getting a haul of 117 miles, the distance from Chattanooga to Marietta, the Western & Atlantic could get only a haul of 21 miles, the distance from Atlanta to Marietta. Therefore, in fixing the rates to these intermediate points, the through rate to that competitive point, which, combined with the local rate from the competitive point to the point of destination, will give the lowest through rate to the noncompetitive point, controls. As the noncompetitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points, and as the carriage of the competitive traffic to the respective competitive points is remunerating to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the noncompetitive points are subject to any undue or unreasonable prejudice or disadvantage by this scheme of rate-making. Our conclusion is that the circuit court did not err in refusing to enforce the orders of the commission in these cases, and therefore the decrees of that court from which these appeals are taken are affirmed.

PLEASANTS v. SOUTHERN RY. CO.

CENTRAL TRUST CO. OF NEW YORK et al. v. RICHMOND & D. R. CO.
et al.

(Circuit Court of Appeals, Fourth Circuit. March 30, 1899.)

No. 296.

1. MASTERS IN CHANCERY—POWERS OF COURT IN FIXING COMPENSATION.

Equity rule 82, requiring the compensation of a master in chancery for his services in any particular case to be fixed by the circuit court in its discretion, "having regard to all the circumstances thereof," contemplates that such compensation shall not be finally determined until the services for which it is allowed have been rendered and all the circumstances are known; and an order made during the pendency of a railroad foreclosure suit, fixing the compensation of a master therein at a certain sum per year until his discharge, and directing that the amount earned at that rate up to a certain date, prior to the date of the order, be paid by one of the parties, does not constitute a contract as to future services binding upon either the court or the parties, but is merely an interlocutory order, subject to revision; and if the services subsequently required of the master are of less value than those previously rendered, and upon which the order was based, the court may, on or after his discharge, reduce the amount to be allowed him therefor.

2. SAME—ESTOPPEL OF PARTY TO ASK REDUCTION OF COMPENSATION.

A party is not estopped by failing to ask that the compensation of a master be reduced, after it has been fixed by an interlocutory order at a certain sum per month until his discharge, nor by failing to move for his discharge before further services are rendered, from asking that the allowance for such services be reduced on final settlement of his account after his discharge.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This is an appeal by one of the special masters from an order of the circuit judge entered May 19, 1898, determining the final compensation of the special masters appointed in the consolidated causes of Clyde and others against the Richmond & Danville Railroad Company and others, and the Central Trust Company of New York against the same defendants. By an order entered August 16, 1892, Messrs. M. F. Pleasants and Thomas S. Atkins (Pleasants being the clerk of the court) were appointed special masters to hear evidence and take the necessary accounts, and report to the court the amount and nature of all the indebtedness of the Richmond & Danville Railroad Company, and whether secured by mortgage, pledge, or other lien upon any portion of the corporate property. On November 21, 1892, upon petition of these special masters, the court ordered that the receivers of the railroad property should pay to each of them \$125 per month from the date of their appointment, on account of their services, their full compensation being reserved for future consideration. On November 12, 1895, the railroad property having been sold under a decree of foreclosure entered in the cause, upon the application of the special masters to have their compensation fixed it was ordered that they be allowed, from the date of their appointment, at the rate of \$6,000 a year each, until finally discharged by the court; and, it appearing that they already had received on account at the rate of \$125 per month each, the Southern Railway Company, the purchaser of the railroad property, was directed to pay to each the sum of \$13,500, in full of the balance due to them up to August 16, 1895. The Southern Railway Company afterwards paid them \$6,000 each up to August 16, 1896, and continued to pay them \$125 per month each to the date of their discharge. In a decree passed May 12, 1897, the special masters were finally discharged, and Thomas S. Atkins, as sole special master, was directed to report what amount was due to the special masters.

under the decrees theretofore entered. On July 14, 1897, Atkins reported that the compensation of the special masters had been fixed at \$6,000 each per annum, and that they had been paid in full up to August 16, 1896, and that afterwards they had each been paid \$125 for 8 months, and there was due to each the balance for 8 months and 27 days, to May 12, 1897, the date of their discharge, amounting to \$3,445.06 each. On the filing of the foregoing report, the Southern Railway Company, the appellee, being the party under the terms of its purchase chargeable with the payment of such sums as the court might adjudge to be prior in lien to the mortgage foreclosed, filed its petition and exceptions, protesting that the amount claimed by the masters was disproportionate to the services rendered by them, and prayed that the amount might be reduced to a fair and reasonable compensation. The appellee, in its petition, charged that since August 16, 1895, owing to the fact that the questions of law upon which the allowance of some of the contested claims depended were pending upon appeals, and the fact that large numbers of contested claims had been settled by compromise, the masters' duties had required very little work, and further showed that the appellant had, in addition to his emoluments as clerk of the court, been allowed in this case liberal compensation as a master to make sale of the railroad, and also for services in reporting on special debts incurred by the railroad for operating expenses, so that he had already received, since his appointment as special master, over \$32,000 as compensation under different appointments in connection with the case; and the appellee insisted that the fact that the appellant's duties as special master had not prevented him from earning these sums, besides his emoluments as clerk of the court, should be considered in fixing his final compensation as special master. The matter of the petition of the appellee came on to be heard, and, after argument, the circuit judge, on May 2, 1898, filed a memorandum of his conclusions, in which he held that the masters should have been discharged earlier, and the judge supposed that they had been discharged some time before the order to that effect was actually signed; that their duties for some time before their discharge had been comparatively light; and that the appellant had been paid, besides allowances for other services in this case, at the rate of \$6,000 a year for four years from August 16, 1892, to August 16, 1896, and at the rate of \$125 per month from the last-mentioned date to May 12, 1897, the day of their final discharge. Taking into consideration the sums already paid to them, the circuit judge concluded that the special masters had already been sufficiently paid, and that no further allowance should be made to them, and the court so decreed. From this decree the appellant, Pleasants, has appealed.

C. V. Meredith, for appellant.

Willis B. Smith, for appellee.

Before MORRIS, BRAWLEY, and WADDILL, District Judges.

MORRIS, District Judge (after stating the facts as above). The contention of the appellant is: (1) That the court having, by its order of November 12, 1895, fixed the compensation of the appellant at \$6,000 a year from the date of his appointment, August 16, 1892, until finally discharged, it was thereafter beyond the power of the court to reduce that rate of compensation as to time which had already elapsed, and as to services which had been already rendered; and (2) that the Southern Railway Company, the appellee, was estopped from contesting the allowance because it was before the court when the rate of compensation was fixed, and knew of it, and afterwards paid it from August 16, 1895, to August 16, 1896, and also knew that the appellant was acting as master with the expectation of continued payment in accordance with the order until discharged. The argument in behalf of the appellant is that the order of November 12, 1895, resulted in a contract, either between the appellant

and the court, or between the appellant and the appellee, analogous to the employment of an accountant at a fixed salary, which neither party could set aside as to services performed, and which order had the effect of fixing the rate of compensation without regard to the value of the actual service performed. It is obvious that the appellant must fail in this contention unless he is able to show that he was serving under an order which the court was without power to modify at the time when the final order was passed. There is no rule or practice regulating the compensation of masters in chancery except that contained in equity rule 82, which provides that:

"The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court."

This rule contemplates that the services of the master shall be completed, and his report prepared, before his compensation is fixed, and that the court is to fix the compensation for his services, "having regard to all the circumstances thereof." The intention of the rule is that the compensation to be allowed shall remain in the discretion of the court until the work is completed, and all the "circumstances thereof" can be considered. The master accepts his appointment with the full knowledge that his compensation is to be fixed, not by any arbitrary standard or usage, but by the court's opinion, after the services are completed, of what is a fair compensation which the party to be charged should be required to pay. It is true that the duties of the special masters appointed to pass upon claims in railroad foreclosures and receiverships, in which their duties may continue for several years, are peculiar, and it has been found convenient to allow them a salary by the month or year, rather than for each special service; but the convenience of this practice is not to destroy the control which the equity rule requires the court shall exercise, to the end that the circumstances of the service shall regulate the compensation, and that the parties who are to pay shall be charged only with a fair allowance for the service. The original cause in which the present appeal arises was instituted in 1892, and the special masters were appointed in that year. The property was sold June 15, 1894, and the order fixing the masters' compensation at \$6,000 a year each from the date of their appointment was entered November 12, 1895, three years and three months after their appointment, and by that order the Southern Railway Company was decreed to pay their allowances up to August 16, 1895. The court had before it then the facts upon which to ascertain that the services to that date were fairly worth the amounts allowed. The court further ordered, but without decreeing who should pay it, that the \$6,000 a year to each master should continue until they were finally discharged. Probably it was in the mind of the court that as nearly a year and a half had already elapsed since the sale of the property,

and over three years since their appointment, the discharge of the special masters would not be long delayed, and the court undertook to fix the compensation of the special masters for the services they might thereafter perform until discharged, basing the allowance upon the character and amount of services which prior to that date had been required of them; but not determining who should pay, because it could not certainly be determined in advance by whom it should be borne. Could it be successfully contended, if immediately after the entering of that order all the claims which the special masters were to report upon had been compromised and settled, and they never had another sitting or made another report, and by an oversight they were not discharged for a year and a half, that they would be entitled to ask the court to decree the Southern Railway Company, or any one else, to pay to the two the full compensation at the rate of \$12,000 a year for that year and a half? Surely, this would not be consistent with justice, nor with the rule which requires the court to fix the compensation, having regard to all the circumstances of the service. In the present case, what happened was that, although the special masters performed some service, it was not at all the difficult and responsible work in passing upon contested claims for large amounts which was contemplated when the order of November 12, 1895, was under consideration by the court, and it also happened that the discharge of the special masters was delayed, and they were continued in office by an oversight. The circuit judge who signed the final order now appealed from was the same judge who signed the order of November 12, 1895, and who signed the decree of foreclosure, and by whom all the proceedings from the year 1893 were directed. The whole case was within his knowledge; and when he determined that the masters should have been sooner discharged, and that their labor had been comparatively light, and that, all the circumstances considered, \$125 per month to each from August 16, 1896, to the date of their formal discharge, on May 12, 1897, was sufficient compensation, and refused to decree that any party to the cause should pay them anything more, he was acting upon facts which were within his own knowledge, and was doing what equity rule 82 required him to do, viz. fixing the compensation for their services, "having regard to all the circumstances thereof."

But the appellant contends that the order of November 12, 1895, fixing the compensation for the future, was a final order, which, after the term, the court could not disturb. When the amount of compensation for a service to be performed by an officer of the court is to be fixed by the court in its discretion with reference to the special circumstances, it must be a very clear case indeed which deprives the court of the power to modify the compensation, if it should turn out, before it is paid, that the circumstances which determined the court's judgment were not the actual ones. In the present case we do not think the order of November 12, 1895, bound the Southern Railway Company as to the future, without some further order of the court. It is not a decree *inter partes*. It is true the order allowed the special masters \$6,000 a year each until discharged, but the Southern Railway Company was directed to pay them only up

to August 16, 1895. It seems to us that, before the Southern Railway Company could be compelled to pay any further compensation to the special masters as part of the costs to be borne by them, there was required a decree adjudging that they were chargeable with it. The order was not, therefore, in a strict sense final, because a future decree was necessary before execution could be had. It was in its nature interlocutory, and was so regarded by the judge who signed it. Even in a doubtful case of this nature, the doubt should be resolved in favor of the way in which the order was treated by the court which entered it. *McGourkey v. Railway Co.*, 146 U. S. 536-550, 13 Sup. Ct. 170. Upon a rehearing after interlocutory decree, the whole matter is open to revision, and is under the control of the court, to be dealt with according to its better informed judgment. *Fourniquet v. Perkins*, 16 How. 82-86.

It is further urged on behalf of the appellant that the appellee is estopped from resisting the allowance claimed, because, by its conduct, it acquiesced in the continued effect of the order of November 12, 1895, and failed sooner either to ask to have the special masters discharged or their yearly allowance reduced. It is difficult to apply the principles of the doctrine of estoppel to this case. The special masters were not appointed or continued in office at the instance of the appellee. They were appointed by the court to assist it, and performed services because of their duty to the court. They exercised quasi judicial powers, and it was as much their duty as that of any party to the cause to ask their own discharge, whenever it became apparent that their continuance was not required. The appellee did not seek their continuance; on the contrary, the circuit judge, in the memorandum for a decree, makes this statement:

"It is proper to state that on application of the Southern Railway, by counsel, made some time before the entry of the decree of May 12, 1897, discharging the masters, the court had directed that such an order be entered, and was under the impression that it had been filed with the clerk; but it was made to appear at the date of said last-mentioned decree that because of the illness of counsel theretofore, but not now, representing said railway company, it had not been done."

It is not at all evident that the special masters did or refrained from doing anything by reason of any conduct of the appellee, or how, by its conduct, the court should be withheld from exercising its judgment as to what is a proper compensation for the actual service performed. If it be once shown that at the date of the order of discharge the court had a right to consider the circumstances of the service of the special masters, and what would be a proper compensation for their actual services, there can be no question of the entire reasonableness of the order refusing to decree that the appellee should pay any further sums to them. Allowances to a master during the progress of the cause are never considered as conclusively estopping him from asking and obtaining further allowance at the end of the cause, if he can show to the court that he has been, all things considered, insufficiently compensated. It is not unusual for the court, upon the petition of the master, at the winding up of the litigation in a railroad foreclosure cause, to review the services the

master has rendered, the time which he has devoted to it, the interruption to his own business, the interference with opportunities for other earnings, the amounts involved, and the assistance he has given to the court and to the parties interested in the fund, and upon all the facts, many of which are generally within the knowledge of the judge from his dealings with the cause, to increase the master's compensation. It was just this class of facts which it appears the circuit judge took into account in deciding that the appellant had been sufficiently compensated. He considered the small amount of work which the special masters were called upon to do for some time before they were discharged, the trifling nature of the claims which, towards the last, they were required to pass upon, the fact that the appellant's regular occupation was not interfered with, the fact that he had been most liberally paid for other services in the same case, and the fact that the special masters might have been earlier discharged without detriment, and should have been discharged, but still were paid \$125 per month each until discharged; and, considering these facts, it is, we think, impossible to say that the circuit judge did not do right in refusing to decree that any party to the cause should pay the appellant any further compensation. Affirmed.

PATTING v. SPRING VALLEY COAL CO.

(Circuit Court, N. D. Illinois. March 7, 1899.)

No. 23,932.

POWER OF FEDERAL COURT TO DIRECT VERDICT—FAILURE OF PLAINTIFF TO APPEAR.

Involuntary nonsuits not being allowed in the federal courts where a plaintiff fails to appear when his case is called for trial and the state practice in such case is to enter an involuntary nonsuit, the proper procedure is to impanel a jury, and to direct a verdict for defendant for want of evidence to sustain plaintiff's cause of action.

On Motion to Vacate Judgment.

J. D. Springer, for plaintiff.

Alfred A. Greenwood and Henry S. Robbins, for defendant.

SEAMAN, District Judge. When this cause was reached for new trial under the mandate from the circuit court of appeals, the plaintiff failed to appear. Counsel for defendant announced that he had personally notified one of the counsel for plaintiff that the case was about to be called, and that a trial would be demanded, and was informed, in effect, that the plaintiff would probably not appear, in view of the mandate and decision by the circuit court of appeals. Thereupon the plaintiff was called, and, not appearing, a jury was impaneled on demand of the defendant, and on motion a verdict of not guilty was directed in favor of the defendant for want of evidence in support of the declaration. Counsel for plaintiff now moves to vacate the judgment entered thereupon on the ground "that the court had no jurisdiction or power to submit the case to a jury, or to render any judgment other than that of dismissal or nonsuit." Coun-

sel for defendant offered consent to such order if the plaintiff would take a voluntary nonsuit instead, but such offer was not accepted, for the reason stated that submission to a voluntary nonsuit would subject the plaintiff to the bar of the Illinois statute of limitations. No authorities have been brought to my attention which indicate the procedure to be observed in a federal court where the plaintiff fails to appear at the trial after issue joined. The doctrine is well established, however, that peremptory or involuntary nonsuits cannot be allowed in such courts. *Elmore v. Grymes*, 1 Pet. 469; *De Wolf v. Rabaud*, Id. 476; *Crane v. Morris' Lessees*, 6 Pet. 598; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172; *Insurance Co. v. Folsom*, 18 Wall. 250; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. As stated in *Crane v. Morris' Lessees*, 6 Pet. 598, it is "not now open to controversy" that the court "had no authority whatever to order a peremptory nonsuit against the will of the plaintiff." *Coughran v. Bigelow*, 164 U. S. 301, 17 Sup. Ct. 117, is not applicable, as it relates to the provisions of a territorial statute, and the question arose on error to the territorial supreme court. In view of the rule thus settled, I am of opinion that the numerous decisions cited by counsel for the plaintiff from the state courts, and from the English courts, to the effect that the judgment in such case must be "as of nonsuit," and not upon verdict, are not applicable here. This distinction is pointed out by Mr. Justice Field in *Oscanyan v. Arms Co.*, 103 U. S. 261-264, remarking: "Had the case been pending in a court of some of the states, or in an English court, a nonsuit would have been ordered."

* * * Involuntary nonsuits not being allowed in the federal courts, the course adopted [directing a verdict] was the proper proceeding." The contention that the failure of the plaintiff to appear and prosecute his action constitutes an election to take a voluntary nonsuit, is not consistent with the avowed purpose of the plaintiff to avoid such effect by nonappearance, and is not in accord with the definitions of the two classes of nonsuit recognized in the state practice, as given in *Holmes v. Railroad Co.*, 94 Ill. 439-443, namely: "A voluntary nonsuit is said to be an abandonment of a cause by a plaintiff, and an agreement that a judgment for costs be entered against him. But an involuntary nonsuit is where a plaintiff, on being called when a case is before the court for trial, neglects to appear, or where he has given no evidence upon which the jury could find a verdict." The nonsuit is imposed because of the plaintiff's failure, and is not by consent, but compulsory. In the absence of some controlling statutory provision, I can find no ground for distinction between the case of entire failure to produce proof and the failure to furnish sufficient proof. The declaration is unsupported in either event, and the defendant seems equally entitled to a verdict. So, in *Oscanyan v. Arms Co.*, supra, a verdict was sustained when it was directed upon the opening statement of counsel for plaintiff, without permitting the introduction of the proposed evidence. The question is important, and I should feel disposed to leave it for determination by the circuit court of appeals on this simple record, even if doubtful as to the proper practice. Under the English practice it has been held in such

case that the error was not jurisdictional, and that it was within the discretion of the court, on an application to set aside the verdict, to permit it to stand, unless the plaintiff "consent to a nonsuit being entered." *Hodgson v. Forster*, 1 Barn. & C. 110. Following that precedent, the offer was made and refused in the case at bar. I am satisfied that it would be unjust to afford advantage to the plaintiff upon this motion which he would not have had if present at the trial. The motion is denied.

HOLMES et al. v. CLEVELAND, C. & C. R. CO. et al.¹

(District Court, N. D. Ohio. July 17, 1861.)

1. CORPORATIONS—ACTS AMOUNTING TO DISSOLUTION.

The Connecticut Land Company was organized in 1795 for temporary purposes, the object being to obtain and perfect the title to the lands known as the "Western Reserve," and to survey and partition the same in severalty between the stockholders. In 1809 the objects of the company had been accomplished, and on final partition and division of the property a resolution was adopted at the stockholders' meeting that such partition should be conclusive, and "no after-allowances claimed on account of any error in cost, measure, or otherwise," and should be final, "unless further property belonging to the company be discovered." The meeting then adjourned without day, and no further meeting was ever held, either of stockholders or directors. *Held*, that such action must be regarded as practically a dissolution of the company and a final settlement of its affairs, and that a suit could not be maintained in its behalf or in behalf of its stockholders, 50 years later, to recover a small parcel of land on the lake shore in Cleveland, the town having been laid out by the company, which parcel was of little or no value at the time and for many years thereafter, until the making of improvements by the defendants and the public authorities rendered it valuable; that the company must be presumed to have known of the land, and to have intended to abandon it to the use of the public, or as worth too little to be taken into account.

2. DEDICATION OF STREET—REVERSION—ABANDONMENT BY PUBLIC.

There is no abandonment of the rights of the public in a street which has been dedicated to public use by reason of a temporary interruption of its use by an outside cause, such as the washing away of a portion of it.

3. SAME—NATURE OF USE.

Where a use made by a city of a street is by express legislative authority, it is presumed to be for the benefit of the public.

4. EVIDENCE—PRESUMPTIONS FROM LAPSE OF TIME—RECORDING OF CITY PLAT.

Where it is shown beyond question that a plat of a town or city was made and left for record in the proper office, and was always recognized and used, whenever required, as the official map of the survey, its proper recording will be presumed after the lapse of 50 years.

5. DEDICATION—STREET BORDERING ON SHORE LINE OF NAVIGABLE WATER—ACCRETIONS.

When the town of Cleveland was laid out by the proprietors of the land, the Connecticut Land Company, in 1796, Bath street was laid out as bounded on the north by the lake, and was so shown on the plat, which was always recognized by the company. The street was used by the public to a greater or less extent; and after a number of years, owing mainly to improvements made in the harbor, the shore line was extended

¹ Erroneously reported in 8 Am. Law Reg. (O. S.) 716, as a decision of the "supreme court of Ohio."

northward by accretions until nearly 20 acres of land was added. In 1844, the city, under authority of an act of the legislature, subdivided and platted the ground, and leased portions not needed for travel, for dock purposes. Afterwards certain parts were acquired from the city by the five defendant railroad companies for terminal purposes, and they expended large sums in improvements thereon. *Held*, that by the action of the land company it dedicated as a street the land to the shore of the lake, which included the easement as a landing as well as for travel; and that, after the property had been used by the city and its grantees for more than 50 years, a suit in equity to recover either the original land or the accretions could not lie by those claiming to be the successors in title to the land company.

6. EQUITY—LACHES.

In such case equity will refuse relief, if for no other reason, because of the laches of those claiming adversely to the city in not sooner asserting their claims.

7. SAME—LACHES—RULE GOVERNING COURTS.

While a court of equity will, under ordinary circumstances, follow the statute of limitations as to questions of laches, it is not bound to do so, and will be governed by the peculiar circumstances of each case.

This was a suit in equity by Henry Holmes, Julius C. Sheldon, and others, brought on behalf of themselves and the other heirs of the stockholders of the Connecticut Land Company, to recover a parcel of land in the city of Cleveland. The defendants were the Cleveland, Columbus & Cincinnati Railroad Company, the Cleveland & Pittsburgh Railroad Company, the Cleveland & Mahoning Railroad Company, the Junction Railroad Company (the Cleveland & Toledo Railroad Company), the Cleveland, Painesville & Ashtabula Railroad Company, and a large number of others, including the state of Connecticut. The bill was filed October 6, 1853, in the circuit court of the United States for the district of Ohio, and was transferred to the Northern district of Ohio January 8, 1857, where it was tried. Only the railroad companies defendant answered.

Matthew Birchard and Mason & Estep, for plaintiffs.

S. I. Andrews & Bishop and Backus & Noble, for defendant Cleveland, C. & C. R. Co.

Moses Kelly and Bolton & Griswold, for defendant Cleveland & P. R. Co.

Bishop, Backus & Noble, S. F. Vinton, and Moses Kelly, for defendants Cleveland & M. R. Co. and Cleveland & T. R. Co.

S. I. Andrews & Bishop and Backus & Noble, for defendant Cleveland, P. & A. R. Co.

McLEAN, Circuit Justice. The complainants claim in this case to be the owners in equity, in common with others, unknown, and too numerous to be made parties if known, of a parcel of land in the city of Cleveland, bounded north by the dividing line between Lake Erie and Canada and the United States, east by Water street in said city, south by the north line of lot 191, and west by the Cuyahoga river as it ran in the year 1796, and by a line from its mouth parallel with the east line. They also allege that said land originally belonged to the stockholders of the Connecticut Land Company, which owned the entire Western Reserve, and that they and their heirs are the representatives of such stockholders, and that the lands of the reserve were

conveyed to mere naked trustees for the benefit of such stockholders; that on March 23, 1836, one Thomas Lloyd fraudulently procured a deed from said trustees, conveying the land claimed in this suit, and that defendants are in possession of said lands under a title made from said Lloyd, with notice of the trust and fraud. The prayer of the bill is to set aside said fraudulent deed, dissolve said trust, and have a partition of said land, and an account of the rents and profits thereof received by the defendants.

The defendants insist that the title to all of said land covered by the water of Lake Erie is in the public, and not in any trustee for them; and as to the residue of said land rely for a defense upon the equitable bar furnished by lapse of time, want of title in equity in the complainants, and upon a dedication of said land to the public by the Connecticut Land Company as early as 1796, accepted immediately thereafter, and ever since used in accordance with the purposes of the dedication. They deny that they are in possession under the title derived from said Lloyd, and aver that they are in possession, under the authority of a statute of the state of Ohio, in pursuance of a license granted by the city of Cleveland, and using the same in a manner consistent with the original dedication.

The leading historical facts of this case are believed to be accurately and succinctly stated in the defendants' brief. The Connecticut Land Company was organized in Connecticut in 1795, and became the owner of the Connecticut Western Reserve, and issued to its stockholders certificates of stock for their respective interests therein. This title was made to the state of Connecticut by the United States under the act of April 28, 1800, and was vested in trustees for the purpose of partition and conveyance to purchasers. The company caused all its lands east of the Cuyahoga and the Portage Path to be surveyed into townships in the year 1796, and also selected for sale six townships, including the city plot, which were immediately (except the city plot) surveyed into 100-acre lots, and the whole put in market. In the year 1798, by mutual arrangement between the proprietors of said land company, in pursuance of the original association, partition was made of all the company's lands surveyed as aforesaid except the six townships and the city of Cleveland, and the legal title was secured to the stockholders in severalty. The company, by its agent, continued to control the land in said six townships and the city plot until December, 1802, when, having caused the unsold land thereon to be resurveyed, they in like manner distributed the same among their stockholders, and reserved the legal title to each, and in said partition avowedly included all that remained unsold in said townships and city. In April, 1807, they in like manner divided all their land west of the Cuyahoga and the Portage Path. Soon after this, it was discovered that, by reason of omission in the surveys, a small piece of land, not connected with the city or the six townships, had been omitted, and this, called "surplus land," was surveyed into lots in the city and in the six townships which had been under contract, and become forfeited; whereupon, at a meeting of the stockholders of said company, held according to its constitution, at which they were fully represented, on the 4th January, 1809, it was

resolved "that the company divide in severalty among the stockholders all their property, consisting of notes, contracts, bonds, and land, according to their plan of partition previously adopted," and that the partition made should be conclusive upon the proprietors, and "no after-allowances claimed on account of any error that may have happened in cost, measure, or otherwise. But said division shall be final, unless further property belonging to the company be discovered." The company thereupon proceeded to make the partition, and reserve the title to the stockholders in severalty, as proposed; and thereupon, on the 4th January, 1809, it was voted "that this meeting be adjourned without day." Up to that time the company kept full records of its proceedings, but since which time there never has been a meeting, either of its directors or stockholders, up to the commencement of this suit.

The first plot and survey of the city of Cleveland was made in 1796 by Augustus Porter and Seth Peare, who were the authorized surveyors of the Connecticut Land Company, and who superintended the surveys of the entire reserve east of said Portage Path. This survey is called "Peare's Survey," and the original field notes and maps are in evidence. On this map was marked "Bath Street," connecting Water street with the river, and bounded north by the lake, and south by lot 191, and varies in width from 80 to 200 feet. In describing the lots east of Water street, the length of the lines above the bank only are given; but on the map they extend to the lake. In March, 1802, the trustees of said land company conveyed three of said lots—Nos. 1, 2, and 3—lying next east of Water street to Samuel Huntington, bounding them on the north by the lake. This deed also recognized the lake as the north boundary, and it was also the northern boundary of other lands and lot 191. On December 6, 1800, the territorial legislature of Ohio passed an act entitled "An act to provide for the recording of town plots," and in 1801, Turpland Kirtland, being then the agent of the company, undertook to make a plot of said city, to be made, proved, and recorded as required by that act, the effect of which would be to vest the streets and other public grounds in trust for the purposes therein expressed. Amis Spafford, a surveyor, made a survey of the city, which he called field notes and minutes of the survey of the outlines, lands, and squares of the city, for the land company, in 1796. Both Peare's and Spafford's plots and surveys—Peare being the first one—have been recognized from their origin to the present by the members of said land company, and the map of Peare was regularly recorded on the proper record for Trumbull county by the agent of the company. In the year 1833, River street, being nearly parallel with the river, was opened, and terminated at Bath street, about 140 feet distant from the river; and thereafter the latter was used as a thoroughfare from Water street to the river and the lake.

In 1827, the United States, in improving the harbor, cut a new channel for the mouth of the river, running directly north from a point near the northwest corner of lot 191, and thereby left on the west side of the river a small portion of Bath street,—perhaps one-eighth of an acre. Immediately after the construction of the har-

bor, the accretion commenced on both sides of the river, and has continued to increase, particularly on the west side, until one-eighth of an acre has increased to seven or eight acres. After a few years the accretion so increased as to prevent the washing of the bank, and it ceased to cave at the intersection of Water and Bath streets, and thereupon, about the year 1830, the corporate authorities repaired said streets, and again opened the connection between them, since which time Bath street has been one of the principal thoroughfares of the city. In 1840, in pursuance of authority given by its charter, the city council caused the exact boundaries and fronts of all the lanes and streets of the Cuyahoga river below Vineyard's Lane to be surveyed and ascertained, of which survey a report was made August 4, 1841, which was accepted, and thereby the city council established the boundaries and fronts of said streets and lanes according to said survey, which designated the entire territory between lot 191 and the lake at Bath street, and fixed its boundaries accordingly. On December 21, 1844, the legislature of Ohio, by statute, authorized the city council to lease any portion of the streets adjacent to the lake and river, needed for public use as docks and wharves, for a term not exceeding 10 years; the rents arising therefrom to be appropriated to the repairs of the streets and of the public wharves. February 4, 1845, a subdivision and plot of the territory called "Bath Street" east of the river was made, designating for public use certain streets thereon, and also certain lots by number, several of which lots were soon after leased by authority of the city council, under the limitations stated in said statute, and possession was taken by the tenants. They were used almost exclusively for the storage, sale, and shipment of coal. Against these tenants suits in ejectment were commenced in favor of Lloyd's lessee, which were defended by the city. Pending these suits, in 1849 or 1850, the railroad companies, or some of those now occupying the land east of the river in pursuance of the authority conferred by the statute under which they were incorporated, finding it necessary, in the location of their roads, to occupy said grounds, instituted the requisite proceedings for appropriating the same. After the instrument of appropriation was filed, under the authority of the same statute, they agreed with the city upon the terms and manner of occupying the same for railroad purposes, and also, to avoid annoyance from Lloyd and his assigns in the use of such portions of Bath street as they now require for their roads, purchased out of the asserted claims of said Lloyd or his assigns, and since have expended over \$450,000 in improvements upon said land, and in reclaiming the same from the lake by means of piling and filling, and thus the accretion has been greatly extended.

The articles of association did not contemplate a permanent organization of the Connecticut Land Company, but were entered into for the better and more convenient accomplishment of certain necessary and temporary objects, which could not be effected except by a joint action of all the proprietors in some form. These necessary objects, but temporary in their performance, were the extinguishment of the Indian title, the survey of their lands, and the par-

tition of them in severalty among the proprietors. It was the policy and intent of these articles that this trust should continue until the partition could be had, and no longer; and they directed a survey of the whole territory within the term of two years, and that the trustees should convey the whole in severalty to the purchasers and shareholders. The parties to the articles of association, viz. the proprietors, the board of directors, and the trustees, proceeded to carry them into execution. The Indian title was extinguished, the country was surveyed, the directors sold so much of the land as they were required to sell; and in January, 1809, all things being now ready, the proprietors, at a regular meeting, made a final division in severalty of all their lands, and all outstanding claims for lands sold by the directors, and, in a word, all of their common property of which they had any knowledge. The resolution directing the partition declares that the division then made shall be conclusive upon each proprietor, and that it should be final, unless further property belonging to the company should be discovered. There is no averment in the bill, nor any attempt to prove, that the existence of the land now in dispute was then unknown to the proprietors. This resolution shows, in a very pointed manner, that it was the understanding and intention of the proprietors that the division then made should stand as a full, complete, and final execution and accomplishment of the articles of association, and of every and all of its objects, saving only the contingency of the after-discovery of property then unknown to them; and that such property, if any, as was unknown, and which, because it was regarded by them as worthless, or for any other cause they did not think it worth dividing, they abandoned, or left it to whoever was or might become the occupier or possessor of it. That the proprietors understood this should be a final dissolution of the company, subject alone to that one contingency, is evidenced from the fact that the proof shows that prior to this time they held regular meetings, and that no meeting of the company was ever held afterwards.

Nearly 50 years have transpired since this association was dissolved. The proof shows that a quarter of a century afterwards the land referred to was of little or no value. None has been imparted to it by the associates or their descendants. But a very great and permanent value has been given it by the terminus of the canal from the Ohio river to Lake Erie, and by a large amount of money expended by the United States and by railroad companies on this land, in improving the harbor of Cleveland, which last has caused it to be made the common termini of five important railroads, which have expended upon it more than half a million of dollars in erecting depots, freight and passenger houses, wharves, etc., for the benefit and convenience of trade and travel. This final action on the affairs of the Connecticut Company must be considered as conclusive. In 1809 the town was limited, and its business prospects were small. It was deemed a proper time to close the concerns of the Connecticut Company before its affairs became complicated, and its rights were misunderstood or misrepresented. It is not alleged that any part of the matters were overlooked or forgotten.

Some things may have been deemed too unimportant to attract attention; some lands, perhaps, that at that time would not pay the expense of their reclamation. These were all matters of examination and reflection, and must have been duly considered. Those only that were unknown to the party could come before them for review, unless on a charge of mistake or fraud. Everything else was settled,—finally settled. This was understood, and solemnly assented to. Under no other circumstances could a final adjustment be made. This was the object of the association. In no other mode could the desired object be ascertained.

There was a peculiar fitness and propriety in this company adjusting, as it did, all matters of account. Their shares were numerous, and consisted in minute pieces of property, in some instances scarcely susceptible of division. Speculation had not then got to work, and a division was not found sufficient. A general interest was felt for a rising village, and each individual was willing to contribute what he could, in reason, to its prosperity. It may be fairly presumed that there was a disposition to give up the shreds and patches to the public for the advancement of the general interest. This was seen in the action of the city council, and, at a future period, that of the government of the United States, in the streets and harbor, to adapt them to a rising commerce. But the most persuasive action was that of declaring that they abandoned everything known to the association at the time, and there is reason to believe that this was done with the view of imparting to the public such commercial and other advantages as might be useful. The entrance of the canal into the lake at Cleveland, and the public works on the wharves and the water line of the lake, were at first gradually extended, and afterwards rapidly, to meet the growing necessities of commerce.

It is not essential that ground intended for public use should be formally so dedicated. It is enough if the public shall take possession of the ground, using it for public purposes; and, if it shall continue to do so for a long term of years, the public right will be presumed. This would depend upon a longer or shorter time, according to the circumstances of the case. It is a well-known principle of law that every owner of property, whether personal or real, may abandon it. *Cholmondeley v. Clinton*, 2 Jac. & W. 59; *Kinsman v. Loomis*, 11 Ohio, 479. In *Corning v. Gould*, 16 Wend. 543, it is observed that "a man shall be held to intend what necessarily results from his own acts." Consequently, when property is abandoned under such circumstances as to leave no doubt of the fact, no one who has taken possession of it can be required to relinquish it. In *Kirk v. King*, 3 Pa. St. 436, an abandonment and nonclaim for seven years was held sufficient. Whether there be an abandonment is a question of fact, to be determined by the circumstances of the case (*Ward v. Ward*, 14 Eng. Law & Eq. 414); and, when this is done, the right is extinguished (1 *Browne*, Civ. & Adm. Law, 33, 166, 237, 239-241; *Hillary v. Waller*, 12 Ves. 264). Where a person considers an article worthless, and casts it away, he thereby divests himself of his title, and cannot complain if any other person takes possession of it. The fact

of abandonment is sufficient. *McGoon v. Ankeny*, 11 Ill. 588. *Taylor v. Hampton*, 4 McCord, 96, 102, is a strong case of abandonment. *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Wright v. Freeman*, 5 Har. & J. 467; *Picket v. Dowdall*, 2 Wash. (Va.) 115. Some of the leading decisions on this question are *Beckford v. Wade*, 17 Ves. 98, 99; *Bonney v. Ridgard*, 1 Cox, Ch. 145; *Bergen v. Bennett*, 1 Caines, Cas. 19; *Prevost v. Gratz*, 6 Wheat. 481. But it is unnecessary to multiply authorities on this point. It is a doctrine too well established to be controverted.

When the town of Cleveland was laid out and surveyed, the property in dispute was dedicated by the Connecticut Land Company. The evidence is conclusive. It is proved by both Peare's and Spafford's maps, and by the minutes of the survey of the town plot. And that it was used from the earliest settlement of the town, both for a street and a landing, was established by all the witnesses acquainted with the town at that early period. This fact of dedication is too plain for contradiction. The use of Bath street by the public is proved beyond doubt from 1800 or 1801 down to the time when the travel along some part of it was interrupted by being entirely cut away by the action of the lake. Where there is an interruption to the enjoyment of a part of the street, and as soon as the interruption is removed, and the public right is resumed, the cause is sufficiently explained. There is no abandonment of the right. The law works no loss to the public under such circumstances. The act complained of was an abuse which the law corrects. But it is said that this right to Bath street was abandoned by the city of Cleveland in laying out a street 100 feet wide, and selling or leasing the land adjoining the street. This was done under express legislative authority. This, it is supposed, the legislature had the power to do. The idea is a just one that an act done by authority of law must be presumed to have been done for the benefit of the public. The act of May 1, 1800, required town plots to be recorded, under a penalty of \$1,000. This was done to avoid litigation. Spafford, one of the surveyors of the company, in 1801 resurveyed the streets, alleys, and public grounds of the town or city. He vacated one or two alleys made by Peare, and added the land to the adjoining lots, and also opened one new alley. Beyond this he made no change in the streets, alleys, and public grounds; consequently made no change in Bath street. Spafford's survey was deposited by the company's agent with the recorder of the county for record, and was in part recorded by him. The deposition of Mr. Cafe proves that this was done, to comply with the recording act of 1800. The minutes and field notes of the survey are found on record, but the map, it is alleged, made by Spafford, is not found in the records. But this is a mistake. The testimony abundantly proves that the authority of Spafford's survey and map has been invariably recognized. Under the circumstances the court will presume this map to have been recorded, if the fact were not shown. The evidence that the map was made and left for record, and was used in all cases where necessary and proper, and this after the lapse of more than half a century, by which the surveys of the town have been regulated for the above period, and on which so many important in-

terests depend, and known, too, so intimately by every one, is too palpable to be doubted by any one. No court can stultify itself so as to question the fact. A mere failure of a ministerial officer to record a map is a matter which will be presumed under far less stringent circumstances than those above referred to. *Ingersoll v. Herider*, 12 Ohio, 527; *King v. Kinney*, 4 Ohio, 79; *Marbury v. Madison*, 1 Cranch, 161.

The grant to Lloyd does not assert that the grantors had any title to the land conveyed. It is a naked quitclaim to what is declared in the deed to have been an unknown and doubtful right. The grantees from Lloyd entered into possession of the premises in their own right and behalf, and not for or in behalf of the trustees of the land company, or of their *cestuis que trustent*. The defendants are not estopped from showing and claiming that the legal title to Bath street had passed from the trustees to the county or corporation of Cleveland in trust to the public before the date of their deed to Lloyd, and, consequently, Lloyd took no title by that conveyance. And if this be so, where is the trust relation between Lloyd and the proprietors of the reserve? Suppose the trustees of this land, instead of selling to Lloyd, had themselves taken exclusive possession of Bath street under claim of title, what could they do? They, as the dedicators of this street, could file their bill in behalf of the public to correct this abuse; but they could maintain no suit to appropriate the property to themselves on the plea that it reverted to them. In the appropriate language of one of the counsel for the complainants, I would say:

"Lloyd is not in as a purchaser from the original proprietors, those who held the beneficial interest in the land before the dedication, or those who would be entitled to it if the dedication should be avoided. He went to trustees who had a mere naked trust in behalf of the original proprietors, and took from them a release of their trust estate. The deed which they gave would, indeed, pass the trust estate. It could do nothing more. Not a scintilla of beneficial interest was passed by it; and, if there should be recovery in ejectment, the plaintiff would merely stand as the trustee for the original land company, to hold it as their trustee for their benefit. He has nothing but a trust. The deed itself tells the whole story of its inception and consummation."

It is said that an easement, only, passed by the dedication of 1796. An easement under the authority of law remains until the law shall be changed.

It is said that a dedication, if in written terms, cannot be enlarged or altered by parol. A dedication may be made by parol. The books are full of such cases. The Pittsburgh Case is an evidence of the fact, and the Cincinnati Common. But where a dedication is made more than a half a century, evidenced by a map and other terms of description, which have served as guides fixing the plan of the town, designating its streets, its alleys, and its lots, and which maps and written papers have, by universal consent, been referred to as establishing for more than half a century the demarkations of the property of the town, including the streets owned by the public, the private rights of individuals can never be doubted by any court which regards the rights of property as permanently settled.

The counsel, in the defense, argues that the property in controversy was dedicated to the public, or abandoned; and this, it is insisted, is neither good logic nor good law. The argument, as understood, was in the alternative, and was certainly good to show that, if the property had been dedicated or abandoned, the right was not in the complainants.

The land sought to be recovered is now very valuable, and, including the alluvial formation which has been added, embraces 20 acres of soil above high water, exclusive of streets and the lake shore. It is claimed as having been dedicated as Bath street of Cleveland. The original survey of this property was a street by Seth Peare, September 16, 1795. By this survey and map, and the sales made by the proprietors between 1796 and 1800, it was claimed to have been dedicated as a street. This is shown by Peare's map and minutes and the record of the Connecticut Land Company. Happily, the original of the minutes and the map have been preserved in the form they were when the Cleveland Land Company began to act upon them in selling lands in 1797. And to this day there has never been any other survey or field notes made by any one. Spafford's map made new traces of old lines, and placed more permanent monuments on the ground. In Peare's map a space of lot 191, and west of Water street, and south of the water's edge of the lake shore, is left unsurveyed into lots, and is marked on the map, "Bath Street." A great number of statutes, from time to time, were passed to establish and regulate the streets of Cleveland, and certain lots were authorized to be leased for various purposes for the public service, and this policy seemed to have been continued for a great number of years where such lots were not required for other purposes. In 1841 the council of Cleveland made an interesting report in regard to certain streets, in which they say of Bath street that all land westerly of Water street, east of Cuyahoga, and northerly of lot 191, bounded southerly by a line south, 64 deg. west, was included in Bath street. And they say: "The committee are of opinion (Anson Haysen dissenting) that all the land lying northerly of lot 191, as subdivided, and the northerly part thereof located and extended northerly to Lake Erie, is included in Bath street, and is a legal highway."

In *Barclay v. Howell*, 6 Pet. 512, the court say:

"Where a part of a strip of land adjoining a river had been used as a way, and the residue was not in a condition to be so used without grading, etc., and the public authorities from time to time improved more and more of it, and the proprietors had made no claim for thirty years, and their agent declared when the town was laid out that it was reserved for a street, held, that the jury would be warranted in finding a dedication of the whole strip, and, if so dedicated, the proprietor could not recover."

And that an agent in laying out a town returns a plan, afterwards acted on by the principal, and, while engaged in the work, declares to the effect that a certain slip of ground was reserved for a street, is admissible to prove a dedication of the land to that use.

And in the case of *Godfrey v. City of Alton*, 12 Ill. 30, the court say:

"When a street is laid out bordering on a navigable water, it will be presumed that it was intended to be dedicated both for a highway and a land-

ing. The navigable water is a highway; and when, in contact with this, the easement of a street or highway is granted, the very location of the latter shows that it was designed for the purpose of loading and unloading freight, and landing passengers from the water. The dedication of the banks of the water unites the two easements, each of which is essential to the full enjoyment of the other."

Every one knows that the accretions on the shores of our lakes, in most cases, rapidly increase, and that they are claimed as generally belonging to the owner of the fee. This has long been the doctrine of our courts, and it applies as well to the civil as the common law. But I am not sure that the doctrine may not have been carried too far, where the accumulations have arisen, in a considerable degree, from the improvement of the ports and landing places. In regard to a general commerce, or a more limited one, where the expenditure is necessarily incurred by the public, it should exercise control for the protection and interest of commerce.

It may be necessary to inquire how far this alluvial formation may be followed when the person bounded by it has been subjected to no expense, and when it may become inconvenient to the public. How shall the limit be fixed? It is indispensable that there should be a regulation which should be just to all parties interested in it, and should protect the symmetry and convenience of the port. It would seem that where the lot of the occupant was bounded by a street which formed the water line of the shore he was limited by the street, and could not claim beyond it. But where the street did not limit the boundary, the owner of the soil is obliged to protect his shore, and for this purpose he may claim the alluvial formation. So, in regard to the common at New Orleans; it was enlarged by deposit, and to preserve the commerce of the city the made land was protected to prevent the city from being cut off from the river.

Independently of the dedication of Bath street, extending to the line of the lake in 1801, and the abandonment in 1809, after the surveys were completed and the Indian title was extinguished, the objection remains that by the progress of time the claim had become stale, and not a proper subject of relief in equity. In the case of *Smith v. Clay*, 3 Brown, Ch. 642, note, it is said by Lord Camden:

"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

By analogy to courts of law, chancery will apply the act of limitation. In *Hovenden v. Annesley*, 2 Schoales & L. 638, 639, the doctrine of the court is "that, in cases where the statute does not afford a direct analogy, the court will proceed according to its discretion, and this discretion will be governed by considerations of public policy, in view of the circumstances of the particular case." In a certain class of cases a court of equity, acting on its own original principles, will refuse its aid under the special circumstances of the case; and

under other circumstances will give relief in less time than required by the statute. The chancellor, under ordinary circumstances, will follow the statute. But he is not bound to do so, but will be influenced by the peculiar circumstances of each case. This doctrine is laid down in almost all the leading authorities, and especially in *Beckford v. Wade*, 17 Ves. 98, 99; *Bonney v. Ridgard*, 1 Cox, Ch. 145; *Bergen v. Bennett*, 1 Caines, Cas. 19; *Prevost v. Gratz*, 6 Wheat. 481; *Hughes v. Edwards*, 9 Wheat. 489; *Miller v. McIntyre*, 6 Pet. 61; *Piatt v. Vattier*, 9 Pet. 405; *Bowman v. Wathen*, 1 How. 189.

Vigilance is required in the prosecution of claims, and it has been the policy of all governments to bar claims if not prosecuted within a limited time. More than half a century has transpired since the affairs of the Connecticut Company were said to be finally adjusted. All claims known to the company at that time were settled in regard to debts due and the distribution of property. Great particularity, it is said, was observed in the exactness of this adjustment. The first and second generations of this large Connecticut company have gone to their account. I now speak of the shareholders of the original company. But a small portion of them can now be living. If they had left no other record of their lives and deaths, we should have looked for them among the memorials of the dead. But the papers of this suit contain some of the names of the descendants of the shareholders, if not some of those who belonged to the company originally. It is a well-established principle, that a mere quitclaim deed, without covenants of warranty, does not estop the grantor from showing that no title passed by such deed, and that, consequently, by the principle of reciprocity, it cannot estop the grantee from denying the title of the grantor at the date of the deed. The defendants, then, are not estopped from showing and claiming that the legal title to Bath street had passed to the trustees of the county or corporation of Cleveland, in trust for the public, before the date of their deed to Lloyd, and that, consequently, Lloyd took no title by that conveyance.

In their bill, the complainants charge that the conveyance by the trustees of the Connecticut Land Company to Lloyd of the land now in dispute was made by a fraudulent combination between the parties to that deed, in violation of the trust with which the land was charged, and with the design of depriving the complainants of their rights; that Lloyd had notice of the trust, and that the conveyance to him was fraudulent and void, seems to be clear. The original shareholders never authorized the trustees to make the assignment to Lloyd, it is believed, in any form, which seems to be apparent from the deed. They incurred no responsibility, nor were they authorized to assume any. The purchaser hoped to make something out of property which resulted from the labor of others, knowing that he could lose nothing. The prospect was a prospect of gain on the one side without loss on the other. Whether Lloyd had any interest in any original share in the company is not known. Whether he paid anything to the trustees is not known. The presumption, from the face of the quitclaim deed, is that, if any consideration were paid, it must have been a nominal amount only.

More than 27 years had transpired since the final adjustment of all claims by this company in 1809; and it would have been forgotten, or, rather, it would not have been brought again into view, had not the purchaser's hopes been quickened by a speculation. He is charged with fraud in procuring from the trustees the deed. Twenty-seven years the claim remained dormant, and there is no reason why its sleep should be disturbed at this late date. Its resuscitation now can impart no vitality to the claim so deliberately abandoned in 1809, nor can it explain the dedication of Bath street in 1801; and, least of all, can it excuse that staleness which now rests upon it. Until 1842, no one took possession of the claim; but at this late period can the new claimant hope to connect it with the deliberate abandonment of 1809, when it was disclaimed by the original shareholders?

The case does not rest upon the statute of limitations, in the opinion of the court, but upon those great principles of equity which are exercised under its own rules by a court of chancery. It is a case not fitted for technical rules and special pleading. The association was formed on liberal principles and on enlarged plans. Immense sums of money have been expended in the construction of railroad depots and other improvements in this city, whose benefits have been extended not only through Ohio, but throughout the West. Having deliberately considered the leading facts of the case, and the law which applies to them, I am brought to the following conclusions:

1. That in 1795 the Connecticut Land Company made a large purchase in the Western Reserve, and issued to the stockholders certificates of stock for their respective interest therein, which was divided into shares; that this stock was vested in trustees, for the purpose of partition and conveyance to purchasers; that the lands were surveyed and distributed among the shareholders.

2. That the town of Cleveland was laid out, and the plot of the town was made into streets and squares, and that Bath street was laid out as the street bordering on the lake, and included the original street on the water line; that it was dedicated as including the land to the lake on the north.

3. The articles of the association were designed as temporary; and that the surveys having been completed, the Indian title extinguished, the shares were distributed among the stockholders in 1809, and a final settlement of their affairs was made of all matters between them; and it was agreed that there should be no other adjustment of their accounts which were then known, and only those which might afterwards be discovered should be examined. None such, it is understood, have been discovered, and any matters known should be considered as abandoned.

4. The claim is alleged to be a stale one, growing out of the beginning of the present century, and will not be aided in equity.

5. That the defendants have expended vast sums of money in the construction of five railroad lines and their depots, at the expense of near a million of dollars, on land made between Bath street and the lake, all of which, or nearly all of which, is now covered by

railroads, depots, and other buildings, for the accommodation of commerce.

6. Under these circumstances and facts I am compelled by a sense of duty to say that I do not think the claim set out in the bill is sustainable in equity in favor of Lloyd or his assignees, or in favor of the Connecticut Land Company. It is therefore dismissed, with costs.

CITY OF CLEVELAND v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

(Circuit Court, N. D. Ohio, E. D. March 1, 1899.)

No. 5,730.

1. EJECTMENT—WHEN IT LIES—RECOVERY OF POSSESSION OF STREETS BY CITY.

Ejectment will lie by a city to recover possession of streets in which the public has an easement.

2. COURTS—FOLLOWING PRIOR DECISIONS.

Defendants, claiming as licensees of a city, in a suit by adverse claimants, set up and successfully maintained the right of the city to certain land under a dedication for street purposes. *Held* that, in a subsequent action by the city against the defendants, the evidence being practically the same, the former decision, as to the validity of the dedication as claimed by the city, would be followed on the principle of stare decisis, though the city was not a party to the adjudication.

3. MUNICIPAL CORPORATIONS—ABANDONMENT OF STREET—INTENTION.

Where a city had granted, or attempted and assumed to grant, the right to defendants to use ground it claimed as a street, its acquiescence in such use, for any length of time, will not operate as an abandonment of its claim to the property.

4. ESTOPPEL—ACTS IN FAIS—CONSTRUCTION OF PARTY'S CONDUCT.

The conduct of a party, sought to be made the basis of an estoppel against him, must be viewed in the light of the understanding he then had of his rights, and not in the light of such rights as they may be thereafter determined.

5. SAME—ACTS OF CITY.

In 1849 the city of Cleveland entered into a contract with certain railroads, by which it granted them the right to use a portion of a tract of land claimed as a street. Not long afterwards, in a suit against the railroads by an adverse claimant, the defendants alleged their interest in the land to be that of licensees of the city, and successfully defended on the city's title under a prior dedication. *Held*, that the city, by permitting the railroads to remain in undisturbed, or even exclusive, possession of the ground for 45 years, and to expend large sums in the construction of improvements thereon without objection, was not estopped, as against them, to claim any rights in the property consistent with the contract, according to the construction and meaning given it by the defendants in their pleading in the former suit, where they had never given notice of any other or different claim.

6. LIMITATION OF ACTIONS—EJECTMENT—NATURE OF DEFENDANTS' POSSESSION.

Nor can the defendants in such case successfully plead limitation against an action by the city, whatever may be the true construction of the contract under which they took possession, or the nature of their rights otherwise acquired, as by their own admission, in a sworn pleading, their holding was not adverse to the city, and it had the right to rely on such admission until notified that they claimed under a different tenure.

7. SAME—ADMISSIONS IN PLEADINGS.

A formal allegation in a petition in ejectment that, on the date it is filed, defendants unlawfully keep the plaintiff out of possession of the property, is not an admission that defendants' possession is adverse,

which will support a plea of limitation, on proof that they have held in the same right for more than the statutory length of time.

8. RAILROADS—RIGHTS TO PUBLIC GROUNDS—CONSTRUCTION OF CONTRACT WITH CITY.

Under the constitution of Ohio of 1802, the only restriction upon the exercise of the power of eminent domain by the legislature was the provision that money compensation should be made for private property when taken for public use, and by the railroad act of 1848 (46 Ohio Laws, p. 40) railroads companies were given power to construct and maintain railroads between the points named in their respective charters, and to appropriate streets or other public grounds to their use when necessary, either by agreement with the public authorities, or, such agreement failing, by a decree of a court. *Held*, that a contract made in 1849, while such act was in force, between a city and a railroad company, by which the city granted, "as fully and absolutely" as it had the power or legal authority to do, the right to the "full and perpetual use and occupation" of a portion of a street required by the railroad company for terminal purposes, did not reserve to the city any rights in, or control over, the property described, but that the railroad company took from the state, under the statute, and not from the city, an easement of a perpetual and exclusive use.

This was an action of ejectment by the city of Cleveland against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Lake Shore & Michigan Southern Railway Company, the Cleveland & Pittsburgh Railroad Company, and the Pennsylvania Company, to recover possession of ground claimed as a street, and accretions thereto, which was occupied by defendants, with their terminal buildings and tracks. The action was tried to a jury, and at the conclusion of the trial the court charged the jury in favor of the defendants, and also filed an opinion upon the legal issues involved.

Geo. L. Phillips, James Lawrence, and M. G. Norton, for plaintiff.

John T. Dye and John H. Clarke, for defendant Cleveland, C., C. & St. L. Ry. Co.

M. R. Dickey and John H. Clarke, for defendant Lake Shore & M. S. Ry. Co.

Squire, Sanders & Dempsey, for defendants Pennsylvania Co. and Cleveland & P. R. Co.

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CHARGE.

HAMMOND, J. Gentlemen of the Jury: The first thing in order is the apology that I owe you and counsel in this case for the delay

which I have caused. But to give the case proper consideration, in view of its vast importance and interest, I felt that it was necessary that I should not slur it in any respect, but should take whatever time was necessary.

Now, gentlemen of the jury, having said that much, the plaintiff having shown no right of recovery in this case, it is my duty to direct your verdict for the defendant railroad companies, and the clerk will furnish you with a form of verdict to be signed by your foreman.

This, technically, is all I need say to you, and we might close this case here. But I shall file with the record an opinion to justify this action, and will now read it in your hearing, that you may understand why it has been done, and justify me, if you may, by your judgment of agreement with that of the court in this method of disposing of the case. I adopt this plan to avoid an unnecessary and erroneous practice, when the reasons for directing the verdict are given in the form of a charge to the jury, of taking exceptions to the reasoning of the court as a basis of error. Exception to the instruction to the jury to find a verdict for the plaintiff or the defendant is all that is necessary in that behalf.

STATEMENT OF FACTS.

HAMMOND, J. Referring to the case of *Holmes v. Railroad Co.*, 8 Am. Law Reg. (O. S.) 716, 93 Fed. 100, where Mr. Justice McLean, in his opinion in that case, relates the historical facts that have been proven also in this case, it is only necessary to further state that at the time of the dedication, in the year 1796, by the original proprietors of the Western Reserve, known as the "Connecticut Land Company," Bath street extended about 1,000 feet from Water street, westward to the Cuyahoga river, with an irregular width, ranging from about 60 feet to 200 feet, extending to the low-water mark of the waters of Lake Erie. The topographical character of the locus in quo was that of an almost impassable roadway, except along the sands of the beach, and with such crude excavations and gradings as had been made from time to time, until 1849, when the contract mentioned in the opinion of the court was made, except that in 1827 the government of the United States constructed a pier extending out to the then existing harbor line of deep navigation. This cut off a part of Bath street, and left it on the west side of the mouth of the Cuyahoga river, as reconstructed. The building of this pier exercised a very considerable influence on the topography of the surrounding locality, by immediately causing sand deposits and other accretions east of the pier, and at the edge of Bath street, which grew continuously. At the making of this contract, in 1849, Bath street, as it then existed, was split longitudinally from the pier eastward to Water street, leaving 132 feet south of the line for the use of the city as a highway, which strip was renamed "Front Street," as the 100 feet before laid off had been named "Bath Street." All north of it, to the waters of the lake, was included in the contract of 1849 between the city and the railroad company. Immediately after the contract, or a little before, one of the railroad companies had commenced to lay its tracks upon the part assigned to them, it being

necessary to drive piles to support the tracks and keep them from being overflowed by the water,—indeed, they ran somewhat into the water when the waters of the lake were high, through winds or storms; and the structures then built—the freight houses and depots—were also built on piles extending into the lake, under which the waters were constantly found. The purpose of the railroad companies, which had combined together for the common object, was to use this strip of ground for the location of their terminal facilities in this city. For this land the railroad company paid to the city, under the contract, \$15,000 in their stock.

Prior to that time the heirs at law of the original proprietors, Camp & Lloyd, vendees of the three trustees appointed by the Connecticut Land Company, were disputing with the city about its rights of ownership and the validity of the dedication, and also with the railroad companies, as is shown in the opinion of the court. There were also some nine ejectment suits that had been brought by lessees of these rival claimants against the city, for the recovery of all of Bath street, including the 132 feet assigned to the city for a road-way and street. By the contract the railroad companies assumed the defense and settlement of all these suits and rival claims, not only to the part which they had acquired under the contract, but also to that part which had been assigned to the city; and they were finally, at the expenditure of very considerable sums of money, amounting, indeed, to over \$50,000, paid to these claimants in one way and another, settled by the railroad companies. The railroad companies immediately commenced to improve the property by driving piles in the water and filling the ground sufficiently to construct thereon their stations, machine shops, and other structures necessary for the operation of their railroad at its terminus.

At the time Judge McLean decided the Holmes Case, these reclamations of land from the waters of the lake, with the natural accretions, amounted to about 20 acres. This was in 1853. Now, in 1899, it is shown, by the proof and maps in this case, that it has increased to 51 and some tenths acres, upon which the railroads have constructed, with solid foundations of pilings and stone, their most important terminal tracks, and the necessary facilities for their use, in the way of round houses and freight houses, and piers constructed for the landing of the vessels engaged in the navigation of the lake, to receive therefrom the freights which they carry up and down the lakes. The city spent no money in all these years for the improvement of that part of the street, and substantially it ceased to be a highway for the public, except in a casual and very limited way, for those who were engaged in fishing or otherwise above the waters of the lake. Indeed, from almost the beginning, the use of the railroad companies became almost exclusive of that part of Bath street lying next the lake, which they had acquired by the contract. Neither did the city take any control of any kind over the street, or in any wise pay that attention which owners of those jointly possessing a parcel of ground might be expected to do, who were claiming the use of it. The railroad companies spent largely over half a million of dollars in redeeming the land from the lake, and largely more

than a million of dollars in the improvements put upon it,—the buildings, and tracks, and all manner of terminal structures.

This suit was brought by an action of ejectment, in the court of common pleas, in August, 1893, and removed from that court, on the ground of local prejudice, in the year 1898, upon the claim that the contract of 1849 was an invalid exercise of power by the then existing city government, which had no authority to transfer its streets for any such purpose as that disclosed by these operations of the railroad company. It was not denied that they had the power to authorize the railroad companies to lay their tracks longitudinally on the street, to the extent of their main tracks, for the purpose of making connection with other roads, or passing their roads through the land upon which the city is situated to the places beyond to which they desired to go; but it was denied that they could transfer it for any other purpose, or that there could be anything else than a joint occupation by the public as a highway and the railroad companies as a highway, with a paramount municipal control of the city over the whole territory from the waters of the lake to the southerly boundary of Front or Bath street; that any grants by the city of any facilities for the use of the property beyond that were utterly void, for want of express legislative authority.

The defendant companies filed answers, setting up the defense of the general issue or denial; that the dedication was insufficient to convey title; that they held a paramount title through purchases from Lloyd and Camp and others, claiming from the original proprietors a better title than the city had by the dedication; that the street had been vacated or abandoned by the city; the statutes of limitations through adverse possession for 21 years; estoppel by reason of the silence of the city for nearly 50 years, during which time no objection had been made by the city to the vast improvements, and sums of money expended in the improvements, by the railroad companies; and that ejectment would not lie to recover the possession of the street, under the circumstances of the case, or under the statutes of Ohio regulating an action to recover land.

The other essential facts will appear in the opinion of the court, and in that of Mr. Justice McLean as reported in 8 Am. Law Reg. (O. S.) 716, 93 Fed. 100.

OPINION.

EJECTMENT.

HAMMOND, J. It must be conceded to the plaintiff city that ejectment lies for the recovery, by a municipal corporation, of the rightful possession of its streets. This was held when deciding the motion for "judgment on the pleadings," as it is called in Ohio practice, and the court then reserved the filing of an opinion to support that ruling, which has been prevented by the arduous duties of the trial, but may yet be done. It is sufficient now to refer to the case of *Village of Fulton's Lessee v. Mehrenfeld*, 8 Ohio St. 440, where such an action was sustained; 9 Am. & Eng. Enc. Law (2d Ed.) 82, note 1; 2 Dill. Mun. Corp. (4th Ed.) § 662; Newell, Ej. pp. 32, 49, 53; Elliott, Roads & S. 485, 486, 490, 493, 495, 501, note 2; Cooley, Torts, 437.

These authors cite the conflicting cases, and Mr. Newell remarks that "the current of modern authority, in regard to easements of right of way, etc., is strongly in favor of upholding the right to recover in ejectment the land, subject to the easement." Newell, *Ej. p.* 53, § 51. This author cites *Barclay v. Howell*, 6 Pet. 498, as do counsel here, against this ruling, but that is a misapprehension of that case, in my judgment. That was ejectment, by claimants from the original owner, involving streets of the city of Pittsburg, under circumstances very much like some of those we have here. See same case in the court below (*Fed. Cas. No. 975*), where the facts more definitely appear. The supreme court did say that, if the dedication had been for a particular purpose, and the city had appropriated the ground for an entirely different purpose, it might afford ground for resort to a court of equity to compel a specific execution of the trust, by sustaining the use or removing the obstructions. But it did not say that "ejectment would not lie," even in that case; only that, the use still remaining in the public, it would be a good defense, presumably either at law or in equity; that, under the supposed circumstances, the land would not revert to the original owner, and he could not recover it in ejectment, not because ejectment would not lie, but because, there being a good defense, it must fail, as the court said the proposed bill in equity would fail, and for the very same reason,—that the plaintiff could have no cause of action, the land not belonging to him by reversion. And that action of ejectment was remanded for a new trial because, *inter alia*, the court below had given erroneous instructions on that point to the jury. What the court means is that one having only a claim to a reverter when the easement has terminated must, before its termination, confine the use of the easement within its limits by a resort to equity, as he is not entitled to possession; and it never meant to hold, and does not, that if the right of possession already has accrued ejectment would not lie; far less that if the plaintiff has a right of joint possession or of qualified possession, in *præ-senti*, he cannot bring ejectment, but must go into equity.

I have no doubt that either of the parties to this suit would feel more comfortable in a court of equity, the one in prosecuting its claim where there is more elasticity of remedy, and the other a wider range of defense. But, while it is a very rigid rule of our federal jurisprudence that one having an adequate remedy at law cannot go into equity, there is no requirement that, if his remedy at law be inadequate, he must go into a court of equity. He is permitted to go, but not compelled. And it is somewhat a reversion of the rule to suppose that, because one may go into a court of equity, he shall not go into a court of law, where his remedy is embarrassed. Under the influence of modern improvements, authorizing a court of law to model its judgments and conform them to the exigencies of the facts, much of the embarrassment is relieved. It is held in many cases that this extends to our modern forms of action to recover land, and the verdict and writ of possession may be thus framed to suit the case. *City of St. Louis v. Missouri Pac. Ry. Co.*, 115 Mo. 13, 21 S. W. 202, is an example of these cases. And in the

case of *Irwin v. Dixon*, 9 How. 10, it was held that the remedy by injunction to redress the violation of the public's right in a highway is not a favored remedy. See *Rapalje's Ed.* and notes. At common law, the king's remedy was by criminal information or indictment, possibly also by civil information, and either the king or an individual might, without judgment at law, abate a nuisance in the highway by directly removing it by the strong hand, without breach of the peace, and under special circumstances a bill for injunction would lie. The owner of the legal estate could always bring ejectment, and now Mr. Dillon says, to encourage that remedy, a municipality is treated as having a legal estate for that purpose, although the naked legal title may be outstanding.

Mr. Justice McLean, in the case of *Holmes v. Railroad Co.*, 8 Am. Law Reg. (O. S.) 716, 93 Fed. 100, where the facts of this case were involved, seems to hold that the city acquired the fee of Bath street by the dedication, which, if so, would relieve all technical objection to this action of ejectment. Counsel for the city hesitate to adopt that view, and suggest that, under the statutes of Ohio, it is, if a statutory dedication, in the county; if only a common law dedication, then in the state, or the descendants of the original proprietors, but only as a bare legal estate, which is of no consequence in this case. This view might possibly avoid a full disseisin, by operation of the statute of limitations in favor of the defendants, and confine that operation to the lesser estate of an easement, the city not holding or claiming any greater estate, but this point may be reserved until we consider that defense in disposing of this case. On the point of the right to bring ejectment, I should be inclined to hold, with Mr. Justice McLean, on the facts, that originally, by the dedication and abandonment of the Connecticut Land Company, the legal estate, as well as the easement, passed to the city. Whether the legislation subsequently had in Ohio divested the legal estate, and lodged it in the county of Trumbull, and by succession it has passed to the county of Cuyahoga, is another question. Either way, on the authorities, I have no doubt of the right to bring ejectment. The trouble is that the plaintiff does not claim full possession of the locus in quo, but only a somewhat indefinitely defined and qualified possession, which it is proposed to regulate by the form of the judgment, which the defendants think to be impossible, while the city is willing to take judgment for the possession of the street *qua* street, subject to whatever superimposed easement the defendants have established by the proof here, or may establish hereafter by proper proceedings to that end.

The case of *City of Cincinnati v. White's Lessee*, 6 Pet. 431, refers to the impracticability of the plaintiff's taking possession of a soil burdened with a highway, and argues very strongly against the availability of an action in ejectment, even by the owner of the soil in fee burdened with an easement; but it does not decide against it, and certainly does not decide that the city may not bring ejectment to recover its easement of a public street. That case decided, and was so treated by the supreme court in *Dickerson v. Colgrove*, 100 U. S. 578, and other cases following it, "that a title by dedica-

tion operated, by estoppel in pais, to preclude the owner of the soil, although he might have the naked legal fee, from maintaining ejectment, because he had dedicated irrevocably the right of possession; that, since that ordinary accompaniment of the legal fee had been cast off by the act of dedication, the owner of that fee had denuded himself of the right of possession." Manifestly, that case has no application here, where the city, which the owner had thus clothed with the right of possession, is suing for it. Besides, this action, as we have shown, is sanctioned by the local law of Ohio, and that governs here. *Village of Fulton's Lessee v. Mehrenfeld*, supra.

Believing, as we do, that ejectment, inadequate as it may be, in respect of the kind of judgment to be rendered and writ to follow, is a remedy to which the plaintiff has a right to resort, the special request of the defendants to instruct the jury to find for them, because there is no evidence tending to show that the city ever had any other estate than an easement, and as an easement in a public street is not a legal estate of which the city is entitled to possession, within the meaning of section 5781 of the Revised Statutes of Ohio, the action cannot be maintained, is refused. That section is not different in that respect from the common-law action of ejectment, brought in *Village of Fulton's Lessee v. Mehrenfeld*, supra.

DEDICATION.

On the authority of the case of *Holmes v. Railroad Co.*, 8 Am. Law Reg. (O. S.) 716, 93 Fed. 100, it must be conceded that the city of Cleveland had a complete right of possession to the land in controversy in this case when the indenture of September 13, 1849, was executed by the city to the Cleveland, Columbus & Cincinnati Railroad Company, the same defendant in that case and in this. Whether that right to possession was a title in fee, or only an easement for the use of the land as a street and a public landing, it is perhaps not essential to here decide, though its determination might relieve the case of some of its other perplexities.

Mr. Justice McLean, on the proof before him, seems to have thought that the quantum of ownership held in trust by the city for the public use included the fee or legal title as well as the easement, upon the ground that the easement had been effectually dedicated to the city for the use of the public, and the fee, having been abandoned by the Connecticut Land Company, was acquired by the city as the first taker. There may be technical difficulties in thus picking up a lost or abandoned legal title or fee without grant, deed, or other paper title, but there can be none, under the operation of the statute of limitations, by adverse possession. So that when that case was tried, and now, it might be held, in an action at law, that the city, by operation of that statute, had acquired the fees in support of the easement already obtained by the dedication, just as it was then held in a court of equity to have been acquired by laches. But in this place it is not necessary to further consider that question, and only to decide that the city had, in 1849, that ownership of the locus in quo which would entitle it to possession, now, and in this

action, unless that right of possession has been transferred to the defendants by the indenture above mentioned or otherwise.

It is not deemed necessary to support this determination by a relation of the facts or any citation of the authorities used in the argument, other than the Holmes Case, above cited. The technical record of that case is in evidence before us for a special purpose, to be hereafter mentioned, but, of course, not the proof used on either side, upon which Mr. Justice McLean acted. And we have had on this trial a repetition of the proof the parties have at hand, as if that case had never existed; and necessarily so, because, the city not being a party to that suit, there could be no estoppel of the defendants by record, upon the doctrine of *res judicata*. Yet it almost amounts to that, in practical effect, if not in technical legal consequence. The issue there and here on this point was and is precisely the same; between the defendants here and other parties, it is true, but none the less the same issue. There the character and extent of the city's ownership was in judgment and determined upon quite the same, if not the identical, proof we have here, judging by Mr. Justice McLean's statement in his opinion of the conclusions of fact that he reached in deciding that case, and making allowance for the lapse of time since then, and the difficulty of procuring precisely the same evidence of those facts which he had before him. The defendants here make no better case against the city's title than Holmes and his associates did when the defendants took shelter behind that title, and so successfully defended it. The city aggressively makes here substantially the same case, as to the city's right of possession, that defensively the defendants did there. Upon the principle, therefore, of *stare decisis*, if not *res judicata*, that adjudication, in favor of the city's right of possession, should control our judgment here, even if that case had been wholly between strangers to this suit.

It having been one in which the defendants here were defendants there, and in which they set up and relied upon the validity of the city's title or right of possession, that principle should be all the more readily applied to them here, even if it be not technically an estoppel by record, as it is agreed it is not. Moreover, that case decides against the Lloyd title set up here by the defendant the Pennsylvania Company, that company having bought it in even before the Holmes Case was decided. Holmes and his associates, as the heirs at law of the original proprietors, known as the "Connecticut Land Company," claiming the locus in quo by their inheritance, attacked the Lloyd title for fraud in its procurement by purchase from the three trustees of the original proprietors. It was decided that the purchase was, indeed, fraudulent, but also it was decided that the title of the original proprietors had been alienated by them, so that their heirs at law took no title by inheritance; and this, because the city had acquired that title from the proprietors by dedication and abandonment, as above mentioned. Therefore the trustees of the proprietors held nothing to convey to Lloyd; which being so, the proof in this case of that title cannot avail the defendant the Pennsylvania Company as a defense to this action. It does not show a better or paramount title, reaching behind that which the city has

shown. The Holmes Case, *supra*, settles this invalidity of the Lloyd title, and upon its authority as a precedent, as well as upon our own judgment on the facts here, that point must be ruled in favor of the city. Nor is it at all necessary or proper to submit either the validity of the city's right as above determined, or the validity of the Lloyd title, as a defense to the jury, since there is no disputed fact relating to either worth their attention. The lawyers dispute about it, but there is no conflict in the evidence to be settled by the jury.

ABANDONMENT.

The defense of abandonment, set up by the defendants, apart from any bearing it may have on the special plea of the statute of limitations, also must be ruled in favor of the plaintiff city. Mr. Justice McLean had before him in the Holmes Case, *supra*, a bill in equity, with the widest scope for the operation of the principle of the equitable doctrine of estoppel by laches and nonaction, not only in analogy to the legal defense of the statute of limitations, but beyond that, in the sense of a stale claim; and what he says about "abandonment," as a defense, must be taken in view of that freedom which a court of equity has in such a case. The facts he had before him were very, very peculiar, and there is not the remotest analogy on this point to those we have here. The city did not deal with Bath street at all as the original proprietors dealt with the remnants of the Western Reserve by their dispersion from the Connecticut Land Company, so called, and it is a distortion to associate that case with this in respect of the alleged abandonment. The authorities he cites in his opinion, and those used in the argument here, have not been examined to determine whether such a defense is possible in a court of law and in an action of ejectment and on the general issue, as has been claimed here. For my own part, I doubt it; but that is immaterial now and here. The evidence relied on was pertinent alike to the legal defense of the statute of limitations and to the special defense of estoppel set up by one of the replies of the defendants, to be hereafter considered; therefore the evidence was admitted, and we must now consider it only in its bearing under the general denial. Conceding that it is relevant to that general issue as an independent defense in an action of ejectment, yet the defense is not upheld by the proof.

The always present, indispensable, and fundamental element in any abandonment is the intention of the owner to abandon his property,—to desert it,—with a willingness that its ownership may go to the first or any taker, he not caring what becomes of it. That was the case Mr. Justice McLean had before him, as he found from the peculiar facts related in his opinion, and also shown in the trial here by the same evidence he had before him. It turned upon the final meeting of the Connecticut Land Company, when they dissolved their voluntary association, abandoned everything then known and not apportioned or divided among themselves, deliberately and confessedly with the intention of making a finality of the whole business, as graphically described by Mr. Justice McLean. There is no evidence in this case tending to show any such intention of abandon-

ment of Bath street or any part of it by the city, and nothing to submit to the jury on that issue. There is evidence tending to show neglect to sue for a part of the street in possession of others, the effect of which, by statute, may be fatal to this action under certain circumstances, but it is a misnomer to call that abandonment. There is evidence, by the contract between the city and the defendants of 1849, tending to show a sale of the whole or a part of the street or a license to use it, possibly exclusively, but the intention manifested by that act is one to alienate and transfer the property to another, or to attempt to do that thing; but this is a wholly different intention from that of abandonment, and it is a distortion to call it so. There is evidence of extraordinary silence for an extraordinary length of time, while others were using the property; but taken with the fact that the city had, or thought it had, granted some kind of permission for that use, the silence does not signify abandonment, whatever else it may imply by way of a denial, in a court of law or of equity, to the city to reclaim its aforesaid possession, because of the misconduct of silence, under certain circumstances. In a certain lexical sense, these facts may indicate abandonment, but not in a legal sense. They may be wholly consistent with an enduring claim of ownership, however unavailable in suits to assert it, and whenever there is a continuing claim of ownership there can be no abandonment in fact; the intention to abandon is wanting. As one of the learned counsel for the plaintiff said, one does not abandon one's land by nonuser or nonclaim, though he may lose it because of these, under certain defined circumstances prescribed by law, but it is the act of the law which deprives him of his property. It is not lost by abandonment, as when one throws away his jackknife, to use the illustration of one of the learned counsel for the defendants. Land may be so abandoned, according to the Holmes Case, but the casting away must be as patent in evidence as the ejection of the jackknife.

ESTOPPEL.

The supreme court of the United States, seemingly, loosened its ancient moorings, upon the subject of the admission of equitable defenses in actions at law, by the judgments in *Dickerson v. Colgrove*, 100 U. S. 578, and *Kirk v. Hamilton*, 102 U. S. 68. See, also, *George v. Tate*, Id. 564, 570; *Wythe v. Smith*, 4 Sawy. 17, Fed. Cas. No. 18,122; *Berry v. Seawall*, 13 C. C. A. 101, 65 Fed. 742; *Jackson v. Harder*, 4 Johns. 202; *Campbell v. Holt*, 115 U. S. 620, 622, 623, 6 Sup. Ct. 209; *Stoddard v. Chambers*, 2 How. 284; *Railroad Co. v. Paine*, 119 U. S. 561, 7 Sup. Ct. 323; *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129; *Rev. St. U. S. § 723*; *Drexel v. Berney*, 122 U. S. 241, 7 Sup. Ct. 1200; *City of Cincinnati v. White's Lessee*, 6 Pet. 431; *Allen v. Seawall*, 17 C. C. A. 217, 70 Fed. 561; *Boggs v. Wann*, 58 Fed. 681.

A careful reading of these cases, and others that might be added, in comparison and contrast with the first two that are cited, will show that the ratio decidendi of this apparently new departure in our federal practice is that the title "inures" to the defendant by the operation of the estoppel in such a way that it will either main-

tain ejectment for the land or furnish a defense when pleaded at law, notwithstanding any apparent or supposed disturbance of the statute of frauds, and that this "inurement" may be necessary to save the new practice from any infringement of the federal constitution, by uniting legal and equitable remedies in the same action; also these cases will show just what estoppels may and what may not be pleaded at law; and, as to land or any interest in it, the estoppel pleadable at law is that which results when one stands by in silence and sees another, holding his land adversely, improving it. That particular estoppel has been added by these cases to the list of common-law estoppels in pais, mentioned by Lord Coke in the extracts cited from him in some of the cases.

At first I was inclined to think that the estoppel pleaded here was, neither in form nor substance, that justified by the foregoing cases, notwithstanding the similarity, if not identity, of the culpatory facts set up in the plea, nor am I now quite sure of it; but, in the view I have taken of the facts, it is, perhaps, unnecessary to scrutinize them in this regard.

Taking the pleading as good in all things, and the facts for all they are worth to the defendants,—they being substantially undisputed, and furnishing no conflict of evidence to be submitted to the jury,—and, in my judgment, the alleged estoppel has not been established by the proof. It has its foundation in that memorable contract between the city and the defendant railroad companies of September 13, 1849, which so pervades every nook and cranny of this litigation. The "inurement" of title, as it is called by Mr. Justice Swayne, or, if you please, any lesser estate, by estoppel in pais, or any deprivation of right, by whatever name you call it, has not attached to the defendants as a defense perforce of the alleged culpable conduct of the plaintiff, because the contract of 1849, and that which both parties have done under it, during all the years of silence on both sides, until this suit was brought, in 1893, has neutralized the otherwise potential effect of the facts proven in favor of the plea. One of the learned counsel for the defendants somewhat humorously remarked that there is about a set-off as to the "admissions" by the parties concerning proper construction of that most ambiguous and indefinite instrument, which will be reproduced in the margin of this opinion.¹

Following the suggestion, it may be said that there is likewise a set-off as to the long-continued and culpable silence about the respective conduct of the parties under it.

It must be remembered that this estoppel, as now claimed, was not set up in the original answers, nor for a long time afterwards,—a significant indication of continued silence even after this suit was brought, and an implication that it is an afterthought. This, of course, is not in derogation of any right to set up the estoppel, soon or late, but it may be fairly taken as evidence of the state of mind of the defendants on the matter of the city's long-continued silence as to its rights under the contract, and how far the defendants' con-

¹ See ("A") at end of this opinion, page 139.

duct was at all influenced by that silence, while making their improvements and spending their money, of which they now complain. It tends to show that they had not relied on the silence of the city at that time, or they would not have been so long in pleading it after suit was brought; and the other circumstances of the case confirm the suggestion of the plaintiff that reliance on that silence in spending the money is an afterthought, long after the improvements were made, and never considered before.

The most remarkable feature about this case, as it appears to any impartial mind, is the reprehensible silence of both parties upon the subject-matter now in litigation, if they were ever dealing with each other on the respective footings of either the petition or the answers. If the city has ever, at any time since 1849, claimed to have any "control" over, or right of "possession" to, the locus in quo, as a street, why did it wait until 1893 to set it up for the first time? It has seen the railroad companies taking "exclusive" possession,—a word not in the contract,—or assuming an "exclusive" use; has seen what Judge McLean said in the Holmes Case was about 20 acres of accretions grow into over 51 acres now; and has seen the companies occupy that vast area, and use it exclusively, all this time. Yet it has never exercised or demanded any kind of possession or control for itself or the public, other than its uses by the public for the railroad traffic. Not by any act, syllable, or suggestion has the city indicated that the companies were usurping larger rights or uses than they had under the contract; and all this, for nearly 50 years. On the other hand, the defendant railroad companies, in 1853, four years after the contract, in the Case of Holmes, before cited, defined their understanding of the contract, and by their sworn answers admitted that they held only as licensees of the city. One of these answers, which are all substantially alike, will be copied in the margin, so far as it relates to the admissions of the city's title.²

Mr. Justice McLean thus states his construction of these answers:

"The defendants insist that the title to all of said land covered by the water of Lake Erie is in the public, and not in any trustee for them; and, as to the residue of said land, rely for a defense upon the equitable bar furnished by lapse of time, want of title in equity in the complainants, and upon a dedication of said land to the public by the Connecticut Land Company, as early as 1796, accepted immediately thereafter, and ever since used in accordance with the purposes of the dedication. They deny that they are in possession under the title derived from said Lloyd, and aver that they are in possession under the authority of a statute of Ohio, in pursuance of a license granted by the city of Cleveland, and using the same in a manner consistent with the original dedication."

Measured by what is now claimed by the defendant companies, who set up an absolute title, by the contract, by estoppel, by the statute of limitations, etc., the construction then given to the instrument is noticeably narrower than is now urged upon us. Indeed, these answers quite disclaim any other construction of the contract than that which the city now gives it by the bringing of this suit. They certainly then admitted that the contract is only a license; that the city, after the contract, continued in the rights of licensor and

² See ("B") at end of this opinion, page 141.

owner of the street, and they acquired only the rights of a licensee. That was then the mutual interpretation of the instrument, or the view of their rights taken by the defendants.

The plea of estoppel, the proof and argument in favor of it, now assume the broader construction of the instrument set up in this litigation in favor of the defendant companies; that the city is a vendor of the whole estate, or, possibly, it would be conceded, minus the naked legal title; and that the companies are the vendees thereof, all by deed of grant sufficient to convey this much-enlarged estate from any that was ever claimed before. Obviously, however, the question of estoppel in pais by silence, etc., is to be governed by the conduct of the parties, judged by the interpretation which they themselves, at the time of the conduct complained of, gave the instrument, and not that legal construction by the courts which is first invoked some 50 years later. The coloring of the conduct of the city, alleged to be culpatory in this matter of estoppel, must, in law and in all fairness, be taken from the then state of mind of the parties, and not that which is subsequently established by the ultimate and conclusive adjudication of the courts. We do not yet know, by any judgment of a court, what is the proper construction of this contract, and how is it possible to impose on the parties a legal conclusion which is retrospectively to give coloring to their conduct in this matter by estoppel in pais. It seems to me impossible, however long the time elapsed, to work an estoppel under such circumstances.

It is said there was no obligation on the defendants to speak; that they might properly keep silent, and permit the lapse of time to cure whatever defects there may have been in their title. In some circumstances this would be true, but not those we have here. After the defendants, almost in the beginning of the contract, had, by their solemn oath of record, admitted that they were only licensees, and nothing more, the city might well rely on that admission and that attitude of the defendants towards the city's rights. It is indisputable that as licensees, under the very terms of the instrument, they might claim the right to spend all the money they did spend in laying tracks, etc., and in erecting costly and lasting structures. It was wholly consistent with that holding to do this. It might have been their folly to so improve, at the cost of immense sums, upon a mere licensee's title, if the license be revocable at the pleasure of the licensor, or at all, under any circumstances. Nevertheless, the formidable character of the improvements and the largeness of the cost, although, under ordinary circumstances, sufficient to put any rival claimant for ownership on notice, and potential enough to invoke the rule to speak up and claim his rights within a reasonable time, do not require him to speak, if he be not in fact a rival claimant, but one whose claim is at that time fully recognized as existing, and, in a certain sense, dominant. If a lessor have a contract with his lessee to improve the estate, the lessee cannot claim that the lessor is estopped by standing by, and seeing the improvements going on without objection, until after he has given notice that he shall claim more than the estate of a licensee, or unless there is something in the character of the improvements

themselves showing that they go beyond the contract, and thereby advise the lessor of a larger claim. There is nothing here of that kind. From the date of the Holmes suit, the railroad companies have never given a breath of notice that they should claim more than they claimed in the Holmes answers. Never, until their pleas in this case. Mr. Justice Field said on the circuit, in *Adams v. Burke*, 3 Sawy. 415, Fed. Cas. No. 49, that the possession must be hostile, which means adverse, of course, and that entry by permission of another, or with the admission of another's title, would not set the statute of limitations running,—no more will it set an estoppel running,—and that the recognition of another's title after the statute had begun to run, no matter for how brief a period, will avoid the statute. That, too, was the case of a complaint or pleading—"a sworn admission"—that the defendants did not hold the premises by a claim of title hostile to the title of the plaintiff, but with a recognition of that title. The truth is, both these parties have been contented all these years with this mutual construction of the contract, and have been silent accordingly. The question in my mind has been whether they are not now mutually estopped from denying this construction, and ever asking for another. *Topliff v. Topliff*, 122 U. S. 121, 131, 7 Sup. Ct. 1057; *Chicago v. Sheldon*, 9 Wall. 50, 54; *District of Columbia v. Gallagher*, 124 U. S. 505, 510, 8 Sup. Ct. 585. On the other hand, in the year 1851, in the case of *City of Cleveland v. Price* (*Price & Crawford Case*), in the supreme court of Ohio, not reported, but the record of which is in evidence here for the same purpose as that in the Holmes Case, namely, to prove the admission of the city as to its construction of this contract, the city's answer thus construed this contract:

"That, after the location of the railroad from Columbus to Cleveland, it became necessary, in the opinion of the directors, to obtain the whole of the tract of land called 'Bath Street,' and they made a formal appropriation of the same by resolution of the 12th of September, 1848. The entire title of that tract was involved in a controversy between the city and Camp & Lloyd. * * * A suit was already pending, which had been decided against the city, and was then depending on exceptions. * * * That the opinions, not only of people generally, but also of men professing to understand the legal questions involved, differed so much as to the probable result that it was impossible to anticipate the event. * * * That respondent wishes to get clear of all controversies, whether legal or otherwise, and for that reason respondent was unwilling to have said company obtain possession of said property by the power given them by their charter; * * * and that respondent believed it to be for the interest of all parties having any interest in said property to make an amicable arrangement, by which said company might be invested with all the rights of this respondent in said property. Upon these views, this respondent, being compelled to transfer to said company said property, and preferring to do so under negotiation, than to have it taken under and by virtue of said company's charter and appropriation, and desirous of avoiding all controversies with said company for the convenience and advantage of this respondent, the said negotiations and contract were made between said company and respondent. * * * Respondent admits that, by the terms of said contract * * * made on the 13th of September, 1849, said company took the interest of said city in said Bath street property, subject to all the rights and privileges of all other persons * * * which could be legally enforced against the property had the city continued to hold the same, * * * but because said company, as this respondent is informed and believes, succeeded to the rights of the city, and having by said agree-

ment with Camp & Lloyd compromised all matters in controversy, the city ceased to make further defense," etc.

The whole of this portion of the answer will be copied in the margin, to more fully exhibit it.³

The record explains that the plaintiffs, Price & Crawford, filed the bill against the city, Camp & Lloyd, and the Cleveland, Columbus & Cincinnati Railroad Company, with which the contract of September 13, 1849, was made. They held leases from the city, and alleged that there was a conspiracy between the defendants to deprive them of their property, by making the contract with Camp & Lloyd of August 8, 1849, by which the Camp & Lloyd ejectment suits against the city were compromised and dismissed, and by making the contract of September 13, 1849, by which the railroad company acquired the property according to its terms. They prayed to enjoin the writs of possession in the ejectment suits brought against them, and from disturbing their possession, etc. The bill was at last dismissed, and there was an appeal, and it was again dismissed.

Now, here is the construction by the city of the contract almost immediately after it was made. This and the Holmes suit are of themselves a practical construction by both sides, such as is referred to by the authorities last above cited, and show, beyond all possible question, the construction that both sides have had from that day to the bringing of this suit; neither one having given to the other any notice, by word of mouth, writing, or by act or deed, of any change in the state of mind of either party as to that construction, but, on the contrary, have acted in perfect harmony about it for about the period of 45 years.

These respective admissions were made of record and under oath. In the Holmes Case the defendants here were defending against a claim of title by the heirs at law of the original proprietors, and they set up, by their construction of the contract of 1849, a continuing title in the city, claiming themselves only as licensees, and that they were holding under the city as such. They might just as well have set up the larger title they claim now,—the absolute ownership,—and have defended it in the same way, but they did not. The city, in the Price & Crawford Case, was more liberal to the railroad companies in the construction it gave to the contract than the companies subsequently were to themselves in the Holmes Case. There is nothing in these admissions militating against a claim for that control of the street qua street which is demanded by this action, subject, as they now admit, to whatever easement in the street the railroad companies have acquired by the contract. But the admissions show that there was then quite an entire harmony between them as to the character of the holding of the locus in quo. Whatever quantum of right or title either had under the contract was left open, as the contract itself leaves it open, under its ambiguous and indefinite terms. But whatever other effect these admissions of record may have on the proper construction of the contract, if any, certainly, on the defense of estoppel, they preclude, under all the circumstances of this

³ See ("C") at end of this opinion, page 146.

case, every possible reliance on the intervening 50 years of silence, as an estoppel to deny the construction of the contract that the defendants now insist upon. The parties acted harmoniously, as to the holding of the property all this time, in a construction of the contract that may have been erroneous; and, if they be not bound irrevocably to that construction by mutual estoppel, certainly neither can take advantage of that silence, which the harmony produced, by any present complaint of it.

That these answers are evidence for that and other purposes in this case is settled by the authorities. *Jones, Ev.* §§ 206, 207; *Slat-terie v. Pooley*, 6 Mees. & W. 664; *Edgar v. Richardson*, 33 Ohio St. 581, as to the admissions concerning the doings of the Connecticut Land Company; *Jones, Ev.* § 236 et seq.; *Id.* § 241, citing authority that such admissions may operate, if proper foundation is laid, as estoppels in pais; *Id.* § 274 et seq., as to admissions in pleadings; and *Id.* § 277 et seq., as to when they operate as estoppels. And when under oath, as to their effect, see *Id.* § 298; *Pope v. Allis*, 115 U. S. 363, 370, 6 Sup. Ct. 69; *Railroad Co. v. Ohle*, 117 U. S. 123, 129, 6 Sup. Ct. 632; *Delaware Co. Com'rs v. Diebold Safe & Lock Co.*, 133 U. S. 473, 487, 10 Sup. Ct. 399; *Combs v. Hodge*, 21 How. 397, 404. And the admissions of the corporation are likewise binding on its successors by consolidation or other like devolution of corporate existence. *Railroad Co. v. Howard*, 13 How. 307. These admissions, however, even under oath, are subject to explanations, and thus to be relieved of the estoppel they might otherwise entail. *Jones, Ev.* §§ 274-277, 298. In a jurisdiction where the sternest rule of estoppel by oath, in aid of public policy and good morals, obtains, it was held that the admissions of an oath might be explained, and, if done, the estoppel does not arise. *Behr v. Insurance Co.*, 4 Fed. 357. No proof is offered in this case of any explanations of the admissions made under oath in the answers in chancery, but the explanations are found in the circumstances. The city and the railroad companies, being at that time harmonious, and altogether friendly, about the use of this street, and perhaps indifferent, so that the use was secured, how it was done or what title was acquired (except that the city said in its answer that it did not desire to have the railroad company take it by appropriation in invitum), were unaffected by any consideration as to the effect the statements then made in the answers would have in the future, as against each other, if they should fall out about the contract. They did not expect to fall out. The language used came of the then-existing harmony, but mutual doubt of the city's title and power to convey it. The answers were framed according to the professional strategy of the then employed counsel, who proceeded obviously of any prospect or expectation of conflict between the city and the companies as to quantum of estate, title, or right conveyed or received. The long time elapsing before any conflict did occur shows only the substantial quality of the amity and harmony on the subject, and has justified somewhat the reliance upon its strength as a factor of safety against any future denial of their mutual construction of the contract. Under such circumstances, no public policy or concern for morals justifies treating these answers as an

estoppel against either side. And the controlling influence of a practical construction of the contract, as shown in the above-cited cases on that subject, does not amount to an estoppel by oath or admission, as the cases themselves declare. The practical construction given by the parties has only a controlling influence under given circumstances, but is not always decisive of the point. Therefore I do not think the parties here are precluded from now resorting to the courts for an authoritative construction of the contract, even at this late day, particularly since the contract itself is so ambiguous, and confessedly describes the thing conveyed indefinitely, and only "as fully and absolutely as said city, or constituted authorities thereof, have the power or legal authority so to do."

It is convenient here to refer to the admission that the defendants held under a license from the city, and the mutual position on that point of both parties to the contract at that time, for the purpose of considering the effect of that construction on the rights of the parties, if it were then or now a proper construction of the contract. It is now argued for the city that the railroad companies hold a license to use and occupy, subject to the joint use of the same ground by the public as a street, and to the city's paramount control of it as yet a street, and that the defendants are estopped by their admission to claim more than that; also that any excessive use by the railroad companies beyond a joint use comes of an implied license, which is revocable, and has been now revoked, by the bringing of this suit. This assumes that the city had no power to grant more than a joint use of the same ground,—no power to split Bath street longitudinally, and assign an exclusive and perpetual use of one side to the railroads, and the other to the public as a highway; which is the very question here involved, and is not quite the position taken by the city in the Price & Crawford Case. It also assumes that a street ceases to be a street when exclusively used by a railroad, and not used by the public as a highway; which is by no means certain, as a proposition of law or fact. But assume the position to be correct, and is it not a mistake to treat the implied license as revocable, as has been done? The language of the contract is that the railroads shall have the "perpetual" use of whatever they have been licensed to use; and does not that imply irrevocability? No other license than this contract has been shown, verbal or written, as to any excessive use,—all implication of it comes from the contract. And if that be the proper relation of the parties to this ground, the railroad companies might be contented to occupy perpetually under this implied license, and having so occupied it for so long a time, without objection, it might operate as an estoppel in their favor for the excess under the license, while the facts, as already ruled, would not operate an estoppel as against the city to deny that the companies cannot claim to hold absolutely by a title of their own that which they use exclusively by license. So confined, the estoppel might be good, even for the excess. *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, where it was held that the city of Indianapolis was estopped, by its conduct in granting a license, from denying that the franchise extended 37 years, and

terminated at 30 years,—the 7 years being, according to the city's claim, an excessive grant, for want of power. It is not necessary to extend this consideration, for I am of the opinion that this newly-suggested construction is not more subject to estoppel, on the facts, than the other above considered. They both require us to give a retrospective construction as the foundation for the estoppel, not the one the parties gave at the time and on which their conduct proceeded; for it was not then construed as a grant or sale of that which was within the power and irrevocable, and a revocable license of that which was in excess of the power, but as a license to use all the city had the power to include. Besides, the contract especially allows the companies to erect all structures necessary to operate the railroad, and that there is any excess, as alleged, in doing that, is not so plain, whatever construction be given to the contract itself in other respects.

Again, the defense made by the city against the pleaded estoppel, that no lapse of time will sanction a public nuisance, and that the public rights of highway on the streets cannot be taken away by lapse of time, assumes, again, that the former construction of the contract was correct, and that the city's present construction is the proper one, and therefore the structures and excessive use are nuisances. If they be, by a proper and authoritative construction of the courts, within the contract, they are not nuisances, and therefore the position is not available until that construction has been had. And in the meantime heretofore elapsed anything authorized to be put in the street cannot be treated now as a nuisance, heretofore existing as such, within the purview of the estoppel rule by lapse of time, or of the rule of the statute of limitations, nor until the want of authority has been declared,—then only it becomes a nuisance. Heretofore it has not been, and therefore the lapse of time would operate upon the theory that erection of the obstructions was not unlawful. The truth is both parties are estopped from relying upon the retrospective operation of any new construction of the contract, as a foundation for their present claims, against the old and mutual construction regulating their conduct at the time; and the present appeal to the court for its authoritative construction must proceed upon the theory that what has passed, by mutual error or mistake, does not affect the construction now to be given, and it must be had as of the time when the contract was made, subject, of course, to the influence of the conditions established by the long-continued operation of the parties under their old construction, albeit no estoppels have been worked.

The result of this consideration of the defense of estoppel is that, not having been established by the proof, it cannot avail the defendants to defeat this action, either by way of inurement of title, or by any inhibition on the plaintiff to sue, whether the proposed estoppel be called legal or equitable.

STATUTE OF LIMITATIONS.

The very same reasoning just adopted as to the defense of estoppel applies with such force as it has equally to the defense of the statute

of limitations. The ambiguity of the contract, and the mutual reliance upon that practical construction the parties gave it at the time of entry, which has governed their contract ever since, until this suit was brought to challenge it, precludes the defendants from taking anything by operation of the statute of limitations. There has been no adverse holding to set the statute to running, at any time within 21 years before this suit was brought.

The bringing of the suit, and a refusal to yield to its demand, is the first manifestation of an adverse holding. If the position be sound that, upon the delivery of the instrument, an adverse holding began as to all the world, including the grantors, according to its terms, it is quite sufficient to say that the terms were ambiguous, and the holding since is entirely consistent with either construction that might be adopted,—that of a license for joint occupation and no exclusive use, as well as that for an absolute estate in fee or an irrevocable and perpetual easement for exclusive use. Soon after the entry the parties mutually adopted the former of these constructions by their respective sworn answers in chancery,—at least, the defendants did,—and since that time each has been as silent as the tomb concerning any possible construction of the contract, other than that, until this suit was brought, in 1893. If the original entry, therefore, set the statute running on the theory above mentioned, it was arrested in 1853, when the defendants filed their sworn answers in the Holmes Case, and has continued arrested ever since. *Adams v. Burke*, Fed. Cas. No. 49. There Mr. Justice Field said that “that complaint [a sworn statement] is an admission of the highest character that the defendants did not hold the premises by a claim of title hostile to the title of the plaintiff, but with a recognition of that title”; and that “it is too plain for argument that there was here no such adverse possession of the premises as is contemplated by the statute”; and in another place in the opinion that “the recognition of another’s title after the statute has commenced running, at any time within the 20 years, no matter for how brief a period, will destroy the continuity of the hostile possession, and avoid the bar of the statute.”

If, at any moment after the Holmes Case was ended, the defendants had notified the city that they had changed their minds as to the construction of the contract, and no longer recognized that the city had any joint use or joint control, or municipal control, of any kind, but that they had an absolute title or an exclusive use, then the adverse possession might have begun again; or if they had, by any substantive act, ousted the city, ejected its officials, if any were there, refused any demand, if any were made, for joint use by the public, or the like, the adverse possession would have begun again. But there is not a scrap of evidence that any such thing occurred. It is true the city does not show that it made any claim of joint use or municipal control in all those years, but, if its rights to this had been specifically or impliedly recognized by the construction given to the contract in the sworn answers, the fact that the exercise of joint use or control was not asked, or that the use lay dormant, does not impair the right or create adverse possession. The tomb-like silence, for so long a time, is remarkable, and almost incredible, but it was

mutual, as before mentioned. Nor does the fact that the city proves no such ouster, as above suggested, affect the question of its right of action. In ejectment, a denial of the plaintiff's right or title in the answers or pleas is, of itself, an ouster. *Grant v. Paddock*, 30 Or. 312, 47 Pac. 712; *Noble v. McFarland*, 51 Ill. 226.

A somewhat ingenious argument is made that since the petition in this case alleges that on August 17, 1893, when it was filed, "the defendants unlawfully keep said plaintiff out of the possession thereof, whereby said plaintiff is unable to perform the duty imposed by law, to keep the same open and in repair and free from nuisances," there is an acknowledgment of adverse possession on that day; and since the proof shows that the defendants have, for nearly half a century, held precisely the same kind of possession as on that day, the adverse possession to support the statute of limitations is thereby proved. No authority is cited for this, and it is not sound, in my judgment. Adverse possession is not proved by such technical allegation of wrongful withholding in the petition. It is a necessary allegation in every ejectment petition, but it is supported, as the above cases show, by a refusal of the defendant to surrender possession on the demand of the suit and making defense thereto. It is not intended to admit adverse or wrongful possession at any time prior to the filing of the petition, and this proof by analogy is not permissible. Besides, the proof does not show adverse holding, as we have endeavored to show, and the proof is not to be contradicted by this technical averment of the petition characterizing the holding as wrongful. Adverse holding may commence with a denial of plaintiff's title in ejectment pleadings, but it does not follow that it has preceded the suit. Indeed, since the statute of limitations forbids suit after 21 years of adverse holding, the implication to be drawn from the allegations of the petition is that the "wrongful withholding of possession" by the defendants commenced within the time prescribed, and the proof of the required character of the holding must be aliunde this formal allegation, not intended as evidence by comparison.

We do not overlook the difference between title by estoppel and that by force of the statute of limitations, which forbids suit after the 21 years' adverse possession, and thereby vests title in the plaintiff. But the adverse possession required in either is adjudged on the facts by the same circumstances.

This view of the defense made on the statute pretermits any requirement of a verdict from the jury on the question of adverse possession. The existence of the contract of 1849 is not disputed, and that which was done under it is not disputed. Therefore there is nothing to go to the jury on that issue, and we hold that the contract and the admissions of the Holmes answers are insuperable barriers to any claim of adverse possession by the defendants of the character required to support the plea, or of adverse possession of any kind.

CONTRACT.

In the constitution of Ohio of 1802, in force when the contract of September 13, 1849, was executed between these parties, I do not

find any provision similar to that of the constitution of 1851, adopted soon after that contract was made, declaring that "corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed." Article 13, § 2 (1 Swan & C. St. p. 50). And that section does not act retrospectively. 1 Swan & C. St. p. 50, note 4, citing *Bank v. Wright*, 6 Ohio St. 318. Nor could it do that so as to violate the constitution of the United States against impairing the obligation of contracts. Therefore, the act of February 11, 1848, regulating railroad companies, and under which the defendants here were chartered, could not be altered, amended, or repealed by any subsequent constitution of Ohio or statutes passed by the legislature regulating railroads; there being in the act of 1848 no reservation of that power to alter, amend, or repeal, except the reservation of section 1 of the act that the powers conferred might be modified by the special act incorporating the companies. See 46 Ohio Laws, p. 40; 1 Swan & C. St. p. 271.

Again, it has been argued that the construction of the contract is a matter of Ohio law, and to be governed by Ohio decisions in this court. Generally speaking, this is true, but there are exceptions. *Chicago v. Sheldon*, 9 Wall. 50; *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 334, 76 Fed. 296. In the first case it is said that "a contract having been entered into between the parties, valid at the time, by the laws of the state, it is not competent even for its legislature to pass an act impairing its obligation, much less could any decisions of its courts have that effect." In the second of these cases it is said that "the general rule touching the duty of United States courts to adopt and follow the construction of state statutes, announced by the highest court of the state whose statute is involved, is well settled," etc. "But there are certain well-recognized exceptions to the general rule. One of them is that, if the contracts and obligations have been entered into upon the faith of existing judicial constructions of state courts, the courts of the United States will not regard themselves as under any duty to conform to later decisions, reversing earlier opinions, upon the faith of which citizens of other states have acquired rights or assumed liabilities." Again, the decision affirms that another exception is that, if the contract has been made, and rights acquired, or obligations entered into, before there has been any judicial construction of the statutes upon which the contract depends, by the state court, a court of the United States, while "leaning to an agreement with the state court," may exercise an independent judgment as to the validity and meaning of the contract, and is not bound to follow subsequent decisions of the state courts construing the statute, if the decisions were made after the rights involved in the controversy originated or attached. In other words, such decisions do not act retrospectively, to establish a construction we are bound to follow.

Neither do I find in the Ohio constitution of 1802 any limitations whatever as to the exercise of the right of eminent domain, except, alone, that of article 8, § 4, that "private property ought and shall ever be held inviolate, but always subject to the public welfare, provided a compensation in money be made to the owner." 1 Swan & C. St.

pp. xix., xxv. The same provision substantially is made in the constitution of 1851. Const. art. 1, § 19 (1 Swan & C. St. p. 24, and notes); Const. art. 13, § 5 (1 Swan & C. St. p. 51, and notes). The cases cited in these notes show that the state courts have decided that the power of eminent domain is not specifically conferred by these constitutions, but is an indispensable incident of sovereignty, and goes with the general grant of legislative power (1 Swan & C. St. p. 24, note 3, citing *Giesy v. Railroad Co.*, 4 Ohio St. 308); also that public property may be appropriated without compensation, including streets and highways, consisting of a perpetual easement in the land covered by them, for all the actual uses and purposes of public travel (1 Swan & C. St. p. 24; *Id.* note 3, at page 26, citing *Road Co. v. Cane*, 2 Ohio St. 420).

This power of eminent domain is absolute in the legislature unless restricted, as it is not in the constitution of 1802, except as to required compensation for private property, not public. It is so absolute that, but for this inviolability of private property established by this single restriction, it could be taken also without compensation; otherwise the power of the legislature is supreme to do as it will for the public welfare, under the constitution of 1802.

Neither is there any restriction in that constitution as to the power to create corporations, railroad as well as others, though they were unknown, as railroads were unknown in 1802. The only corporations especially authorized were those for literary purposes, schools, academies, etc. Const. art. 8, § 27 (1 Swan & C. St. p. xxvi.). That constitution interfered very little with legislative supremacy; the people having more confidence in, and reliance on, the parliamentary principle of legislative supremacy then than now. And here it may not be improper to remark that, if any wrong was done the public or the city of Cleveland by the railroad act of 1848, when the city and this locus in quo were more like a wilderness than now, since the railroads have helped to develop it so enormously, the fault is in the want of provision of the pioneers, who were doing the best they could to develop the wilderness, not dreaming, perhaps, of magnificent cities to be grown in Ohio within a half century, to whom the franchises granted away would be valuable, if held ungranted until now. But then, perhaps, the cities which have largely been developed by the railroads might not have been so magnificent and prosperous. But these legislators could no more see present conditions 50 years ago than we can see accurately those to come 50 years hence.

That the legislature had the power to organize railroad corporations, and delegate to them directly—not to the cities, and, indirectly, through them, to the railroads—this power of eminent domain, there can be no question, and as absolutely as they chose, except as to restriction of compensation for private property taken. In the case of *Railroad Co. v. Adams*, 3 Head, 596, it was held that the right to appropriate and use absolutely streets, alleys, and highways was an implied power in a railroad company from its charter, granting generally the power to construct a railroad from a town or city to another town or city. It includes a right, without special grant, to enter the city and appropriate the streets. And, if there be no restrictions in the

charter, the only obstacle to the absolute occupation, exclusively, of any street, is found in the cost of the performance arising out of compensation to abutting property owners; that is, under the constitution of 1802, governing these defendant railroad companies.

One of the learned counsel for defendants, Judge Dickey, securely planted the taproot of the power of the railroad companies and the city to make the contract of 1849 in the second section of the railroad act of 1848, which, with the other sections pertinent to this controversy, will be copied in the margin.⁴

It was the exercise of the almost unrestricted power of eminent domain under the constitution of 1802 and the act of 1848, granted by section 2 of that act to the railroad companies. It was the fruition of that power, brought about by the exercise of it by the railroad company itself, and not the city. The city was only a subordinate agency in the transaction, with not the least power or right to obstruct or restrict the appropriation of the railroad company, on its own terms, as to the quantum of use or estate wanted, which it could take according to its wants; fixed, however, by agreement with the city or by a decree of a court of competent jurisdiction; but these were each only a *modus operandi* of appropriating by the company all it wanted, even to the absolute estate. However this may be, as to the constitution of 1851, and the legislation made subsequently in pursuance thereof, under that of 1802 and the act of 1848 the power of the railroad company was dominant, and not that of the city, as has been argued. If the contract had specifically reserved municipal control or any further interest in the part of the street appropriated or condemned by the railroad companies, it would have been a condition accepted and binding on them. But it cannot be implied as not granted or reserved through any notion that the city's title was paramount, and that it held as the grantor of the franchise. The state granted the franchise, not the city. And, under such circumstances, the contract must be construed liberally in favor of the state's grant, and most strictly against the city, as between them, however strictly, as against the railroad companies in favor of the state, in construing the statute granting the power of eminent domain. The state represented the trust of the public, and not the city, in such a case as this. All that has been said about the city's inability to grant away the public right to use the streets, because they are held in trust for the public, may be true when it is granting privileges or franchises municipal in their character; and yet the railroad companies are not bound by that restriction when exercising the right of eminent domain, under the act of 1848 and the constitution of 1802, as the law then stood.

The power exercised was that of section 2 of the act of 1848, and is not derived from sections 11 or 15,—neither of them. Those are mere regulations, and are scarcely restrictive of the power granted in section 2. If they are restrictive in any way, of course that restriction is a limitation on the power, but not otherwise. Section 11 is that which restricts the power of eminent domain exercised by

⁴ See ("D") at end of this opinion, page 147.

the railroad company here, if there be any restriction. Section 15 relates altogether to a different subject. It is, like the other, a regulation of the exercise of the power of eminent domain, but it involves only the crossing of highways, streets, and streams, and not the appropriation of a street wholly or in part longitudinally. Neither, however, is, under this act and the constitution of 1802, the grant or regulation of a license in or across the street, but the taking of it to the extent wanted by the railroad company under its right of eminent domain, subject to the respective restrictions of either section. Section 15 is more restrictive than the other, because it does not allow, in terms, anything but a joint use, and the occupation of the crossing must not interfere with its former use as a highway or stream. There is no such restriction in section 11, and the city cannot impose one by contract, as against the railroad company, longer than the railroad company chooses; for it may appropriate the whole, if it will. By this contract, it has done so by the very language of it, and the restrictions as to the quantum of use sought to be imposed by implication by the city it had no power to impose. Confessedly, the contract grants all the city had the power to grant. It had no power to grant anything, but only to agree with the railroad company what restrictions it would accept in its exercise of the power of appropriation. It wanted the exclusive use of about one-half of the street as it then existed, and took it, not under the contract from the city, but under the statute from the state, paying the city \$15,000, when it need not have paid a cent; for the statute and the constitution do not require compensation for public property. Neither the city nor the court of condemnation could have imposed compensation on the companies, because neither the act of 1848 nor the constitution of 1802 does that.

It is bootless to inquire what quantum of title or estate the railroad company acquired by this appropriation under its right of eminent domain. My own judgment is that it acquired the fee along with the easement of a perpetual and exclusive use, for reasons already intimated in a former part of this opinion; for if the city owned the fee it went with the rest, and was either sold by the contract to the companies or was appropriated by them,—I think the latter. But, if they have only the easement of a perpetual and exclusive use, it is just as effectual; for the legal title is a naked and useless thing, wherever outstanding. As riparian owners of either the largest estate railroads can acquire for railroad uses, or of only an easement for the same uses, the 51 acres of accretions and reclaimed land from the lake goes with whatever estate they have, and that is all-sufficient for the rightful and righteous security of that which they have created by the free and vast expenditure of their money, to enable them to successfully handle their part of the commerce, state and interstate, of this continent, thereby contributing, if not creating, the wealth, power, and usefulness of this great city.

I am not unmindful of the case of *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, and 68 N. W. 458, and of the able argument for its application here, but the circumstances are different as to the power. There it was ruled that the

legislature had no power to destroy land dedicated to a specific, limited, and definite public use, and could only conform its regulation to the purposes of dedication. Here the legislature of Ohio, as we think, under the constitution of 1802, had the absolute and unrestricted right of sovereignty and power of eminent domain wherewith it could take all the original owner ever had, all the owner of the easement had, all anybody had, by whatever title, dedication, general or special, and appropriate it to the great public use of promoting commerce; and, by the second section of the railroad act of 1848, that power was granted to these defendant railroad companies and exercised by them.

Nor am I unmindful of the case of *Wabash R. Co. v. City of Defiance*, 52 Ohio St. 262, 40 N. E. 89. Confessedly, that case was dealing only with a right acquired under Rev. St. Ohio, § 3284, corresponding with section 15 of the act of 1848, and all it says about Rev. St. Ohio, § 3283, corresponding with section 11 of the act of 1848, was obiter. Under a different constitution, a different railroad act, and modern legislation, it holds in favor of the plaintiff as to the construction of Rev. St. Ohio, § 3283, perhaps. I do not inquire whether the constitution of 1851, and the railroad and corporation legislation, would justify any different holding than under the constitution of 1802, and the legislation of 1848; for that case was treating these two sections as the source of the railroad's and the city's power under the municipal legislation regulating the power of cities over its streets, while here we are dealing with the state's power of eminent domain, granted to these particular railroad companies in 1848, and regulating by the law, as it then stood, the rights of these parties under their contract of 1849. In my judgment, the process is one of condemnation and appropriation, through the regulations of state statutes granting the power to the railroad companies, and not one of contracting by the city under its powers over its streets, for the use of them. The grant of the use does not come from the city, but only through it; it being only an instrumentality, like the court of condemnation is an instrumentality for the exercise of the power granted to it by the railroad company from the state. The city is a pure agent and trust holder of the public, from which the state may take its streets or public grounds for the use of railroad companies, if it chooses, wisely or unwisely, as the case may be, and the dedicator or original owner has no more power to restrict the state's power of eminent domain than other people, either by his dedication or otherwise.

Neither am I unmindful of the rule of strict interpretation in favor of the public, as ruled in these cases, and by Circuit Judge Taft in the *Detroit Street-Railroad Case*. That is a most useful and safeguarding rule in behalf of the public; but, taking the constitution of 1802 and the railroad act of 1848, strictissimi juris, and the rule sustains this judgment, in my opinion. No case in Ohio has been cited against this construction, unless the *Defiance Case* be against it; but, for reasons stated, I do not think it is in the way of this judgment, and certainly it is not binding, if it be against this reasoning and judgment.

With this view of the matter in litigation, I have deemed it my duty to direct a verdict, no disputed fact being involved as to the construction of the contract, and it being purely a matter of law. Verdict directed accordingly.

("A")

(Contract of 1849.)

This indenture, made this thirteenth day of September, in the year of our Lord eighteen hundred and forty-nine, by and between the city of Cleveland, by F. W. Bingham, mayor of said city, thereunto duly authorized by resolution of the city council of said city, party of the first part, and the Cleveland, Columbus & Cincinnati Railroad Company, by John M. Woolsey, vice president thereof, thereunto duly authorized by resolution of the board of directors of said company, party of the second part, witnesseth:

That said city of Cleveland, in consideration of the sum of fifteen thousand dollars, received by said city of said railroad company, in the capital stock of said company, for which a certificate for one hundred and fifty shares, of one hundred dollars each, full paid, of said stock, hath been issued to said city, the receipt whereof is hereby acknowledged, and also in consideration of the covenants of said railroad company hereinafter contained, hath granted, and by these presents doth grant, to said railroad company, as fully and absolutely as said city or the constituted authorities thereof have the power or legal authority so to do, the right to the full and perpetual use and occupancy for their railroad tracks, turnouts, engine and car and passenger houses, turntables, water tracks, or stations, avenues to and from the same, leaving open spaces between when deemed expedient, and other purposes connected with, and necessary for, the convenient use and working of said road, all of Bath street, in said city of Cleveland, situate northwardly of a line drawn parallel with the southerly line of Bath street, and one hundred and thirty-two feet northwardly, at right angles therefrom; excepting and reserving therefrom a piece or parcel bounded southerly by the last-described line, eastwardly by a line drawn parallel with the westerly face of the Stone Pier, so called, and one hundred (100) feet eastwardly therefrom, and northwardly by a line drawn parallel with the south line of Bath street, and two hundred and eighty-two (282) feet northwardly therefrom, which is reserved for public use as a part of Bath street; and also reserving and excepting therefrom a strip of twenty-five feet in width bounded westerly by the west face of said pier, and eastwardly by a line parallel therewith, and twenty-five feet therefrom, and extending from the northerly line of said last-described parcel of land, along said pier, to the northwardly end thereof as it now is or may be hereafter extended; which is to be kept open as a public highway, and shall not be obstructed by said city, or by any person or persons or company claiming through said city, or by their permission,—to have and to hold the same to the said railroad company, its successors and assigns, upon the terms, and subject to the stipulations and conditions, following, that is to say:

Said company shall take and hold the same subject to all legal claims, either in law or equity, of any person or persons, company or companies; it being expressly understood that the city does not guaranty nor warrant either the title or the right to occupy the same, the said railroad company to have all the money compensation, interest, benefits and rights which the city could in any manner be entitled to on account thereof.

Said company shall save said city harmless from all damages to persons holding any part or parts of the premises under leases from the city, consequent upon the taking possession of the ground so leased, or in any way depriving them of the full enjoyment of their leasehold interests before the expiration thereof; it being understood that this indemnification is to extend to such damages only as the city shall be legally holden to make good to the claimants thereof.

All leases made by the city of parts of said premises shall be assigned to said company, said company to have the right to collect and receive the rents

hereafter accruing, and shall pay over to said city two-thirds of all rents collected on land fronting on the river, and lying between the south line of Bath street and a line parallel therewith, and 282 feet northwardly therefrom, until said company shall deliver to said city the possession of said strip of 100 feet in width next to the pier hereinbefore reserved.

And said company shall not renew or extend said leases, nor grant any new lease, of any part of the premises, which will interfere with the opening of Bath street to the width of 132 feet, or of the extension thereof on and near the stone pier, as hereinbefore described.

The said company shall not lease any part of the premises to any person or persons, company or companies, to be used for conducting or carrying on forwarding, storage, or commission business, or for the erection of warehouses thereon for the accommodation of such business; nor shall said company use said premises, or any part thereof, for the purpose of engaging in, accommodating, or aiding in the transaction of forwarding, commission, or warehousing business, with a view, either directly or indirectly, of deriving profit therefrom, nor shall they grant the right to any railroad company, person or persons, or other company or companies, so to do.

But this prohibition shall not be construed to prevent said railroad company from erecting on said premises a suitable warehouse or warehouses for the reception and safe-keeping of such articles of property as may be intrusted to their care for transportation, and not consigned to any person or persons or company in Cleveland having the means of storing the same; it being the object and intent of the parties to this agreement to provide that said premises shall not be so used as to interfere or come into competition with individuals, companies, or firms engaged in forwarding, commission, storage, or warehousing business in Cleveland, by carrying on or engaging in by said company, accommodating, or aiding in forwarding, commission, storage, warehousing, or other business not necessary to secure the transportation of property over their road, but may be used by said company for all purposes necessary for the convenient and profitable working of their road, subject to the restrictions aforesaid.

Said company to take and hold said land subject to all the legal rights and claims of the Cleveland & Pittsburgh Railroad Company upon the same, and to have all the benefits to accrue from such claimants, as is before provided; and, as a further provision for the same, shall, upon reasonable and equitable terms, extend to said Cleveland & Pittsburgh Railroad Company and the Cleveland, Painesville & Ashtabula Railroad Company room for warehouse and passenger depots, and such facilities for coming on to said premises with their cars, engines, and tenders, for the reception and delivery of passengers, baggage, and freight, subject to the same restrictions, as to warehousing, forwarding, and commission business, as are herein imposed upon the Cleveland, Columbus & Cincinnati Railroad Company, and for transferring them to, or receiving them from, other railroads, or from steamboats, either by independent tracks, or by the use of the tracks laid by the Cleveland, Columbus & Cincinnati Railroad Company, as shall be found most convenient to all concerned; and in case the parties cannot agree, either as to the terms or manner of occupying such part of the premises as may be so required, the same shall be determined by three competent disinterested men, one to be chosen by each party, and the third by the two so chosen; it being, however, understood that the Cleveland, Columbus & Cincinnati Railroad Company shall not be bound to permit either of said railroad companies to use for car, engine, or warehouse, or grounds on which to place or dispose of cars, engines, tenders, or other furniture of their roads, any part of said premises which said arbitrators shall decide is necessary for those purposes, to be used exclusively by said Cleveland, Columbus & Cincinnati Railroad Company; it being further understood and agreed that no part of said premises shall, after two years from this date, be used by said Cleveland, Columbus & Cincinnati Railroad Company for forges, furnaces, workshops, or anything of a similar character, for the manufacture of cars, engines, or other machinery, so as to deprive either of said other railroad companies of the full benefit of the use of part of said premises intended by this agreement to be extended to them.

Said Cleveland, Columbus & Cincinnati Railroad Company shall manage and take care of all suits or actions now pending, or which may hereafter be commenced, for obtaining possession of said premises, or any part thereof, and may compromise or settle such suits; and said company shall save said city harmless from all costs and charges on account thereof, except such as have already accrued against the city, and, in case of settlement, shall save the city harmless from all legal costs in the case in court in bank, except the costs made by the city; and shall further save the city harmless from all legal claims or demands which are now or may hereafter be set up against the city, growing out of the use or occupation of said premises by said city, or its tenants or lessees; and to enable said company to compromise and settle with the claimants Lloyd & Camp and all other claimants for the extinguishment of their claims to said premises, or any part thereof, they may allow them to retain such portion thereof as may be necessary to effect such settlement, and as shall not be deemed necessary to be used for railroad purposes.

And the said Cleveland, Columbus & Cincinnati Railroad Company doth hereby covenant and agree, to and with said city, that said company will hold said premises upon the terms, and subject to the stipulations and conditions, herein recited, and will do and perform all and singular the acts required, and abstain from doing and performing all and singular the acts prohibited, by the terms and stipulations herein recited.

In witness whereof the city council of the said city of Cleveland have caused to be hereunto affixed the seal of said city, and these presents to be subscribed by the mayor thereof. And the Cleveland, Columbus & Cincinnati Railroad Company have caused to be hereunto affixed their corporate seal, and these presents to be subscribed by their vice president, the day and year first above written.

[Seal of the City of Cleveland, Ohio.]

The City of Cleveland,

By Flavel W. Bingham, Mayor.

[Seal of the Cleveland, Columbus & Cincinnati Railroad Company.]

The Cleveland, Columbus & Cincinnati Railroad Company,

By John M. Woolsey, Vice President.

Signed, sealed, and delivered (the words "Alfred Kelley," in the 6th line of 1st page, being first erased, and the words "John M. Woolsey, vice," interlined above such erasure; also the word "vice" being first interlined above the second line from the bottom of the last page) in presence of

Jas. D. Cleveland,

D. W. Crop.

State of Ohio, Cuyahoga County, ss.: Before me, Jas. D. Cleveland, a justice of the peace in and for said county, personally appeared the within named John M. Woolsey, as vice president of the Cleveland, Columbus & Cincinnati Railroad Company, and Flavel W. Bingham, as mayor of the city of Cleveland, and severally acknowledged the signing and sealing of the within instrument to be their several voluntary act and deed, for the purposes therein expressed, this 14th day of September, 1849.

Jas. D. Cleveland, Justice of the Peace.

Indorsed:

The City of Cleveland to The Cleve., Col. & Cinti. R. Rd. Co. Deed of Land in Cleveland—Bath St.

Received July 1, 1851, and recorded July 7, 1851, in Cuyahoga County Records, Vol. 51, pages 187-8-9-90.

John Packard, Dep. Recorder.

Supposed to be property listed July 2, 1851.

A. Clark, Auditor.

Cuyahoga County, Ohio, Title File No. 12. Main Line, Cleveland Division, C., C., C. & St. L. Ry.

("B")

(From Answer in Holmes v. Railroad Co.)

And this defendant [the Cleveland, Columbus & Cincinnati Railroad Company], further answering, says that, for the purposes and in the manner

hereinafter stated, and under a legal authority so to do, derived from the source and in the manner hereinafter set forth, and not otherwise, this defendant is in the joint occupancy, with the said Cleveland, Painesville & Ashtabula Railroad Company, or so much of the premises mentioned in said bill, and embraced between the westerly line of water street, extended on the east to the said government pier on the west, the northerly line of the premises in said bill mentioned on the north, and a line drawn parallel with, and one hundred and thirty-two feet northerly from, the said northerly line of original lot number one hundred and ninety-one, on the south, as on the diagram hereto attached as Exhibit A, and made a part of this answer, is colored a straw color, together with the tracks thereon indicated by red lines; which diagram, this defendant avers, is a true representation showing the lands embraced in said Bath street at the time this defendant took possession of the same, and lying southerly of low-water mark,—the water line or low-water mark in said lake at the time possession was so taken,—the piling and planking that has since been done by it, the said Cleveland, Painesville & Ashtabula Railroad Company, and the Cleveland & Pittsburgh Railroad Company, northerly of said water line, and the structures which have by them, respectively, been erected on the same, as extended by such piling and planking. And this defendant, further answering, says that so much of said premises as lies northerly of said low-water mark, neither the said Connecticut Land Company, nor said trustees, nor their heirs or assigns, nor the assigns of any or either of them, ever had, or now have or has, any title whatever, and that the title to the same, both legal and equitable, and the sole control thereof, have at all times been, and still are, in said city of Cleveland, or in the public, for the sole use and benefit of the public.

And this defendant, further answering, denies that it occupies, or claims to occupy, the aforesaid parcels, through or under, in any manner, the said William B. Lloyd, or his assigns, or the other heirs at law of said Thomas Lloyd, or their assigns, or said Thomas Lloyd himself, or under or by virtue of the quitclaim deed to said Thomas from said trustees, or that this defendant now holds, or ever held, any title or interest whatever in said parcel of land, in trust for complainants, or any or either of them, or that this defendant has received a large amount of rents and issues from said land, as alleged in said bill of complaint. But this defendant admits that it does now refuse, and has at all times hitherto refused, to recognize said complainants as having any legal or equitable title whatever in said parcels, or either of them, and that it has at all times refused, and still does refuse, to account in any manner to complainants for the use of said parcels, or either of them.

And this defendant, further answering, says that as early as the year 1796 the said Connecticut Land Company, being desirous of founding a city on the Western Reserve, at the mouth of the said Cuyahoga river, and on the easterly side thereof, caused the northwesterly portion of the lands upon which the said city of Cleveland is now situated, by Seth Pease and Augustus Porter, surveyors of said company, and authorized agents thereof, for such purpose, to be surveyed and laid off into town lots, streets, lanes, and public grounds, and the town so surveyed and laid out so to be named "The City of Cleveland," and a map or plat thereof, and minutes of such survey, to be made by said Pease and Porter (commonly called the map and minutes of Pease and Porter), particularly setting forth the lots, streets, lanes, and public grounds, and describing the same by courses, boundaries, and extent, a copy of which map and minutes is hereto attached, marked "B" and made a part of this answer. That upon said map said company caused the lots so laid off to be numbered progressively from one to two hundred and twenty, inclusive, and all the lands described in said bill of complaint lying west of the west line of Water street, and north of the north line of lot number 191, and of the said Cuyahoga river, and south of the waters of Lake Erie, as indicated on said map, to be laid off as public ground, and designated as "Bath Street" (the same having no other, northerly boundaries than the waters of said lake); said company intending thereby to give, and in fact giving thereby, and dedicating to the public, all the lands so designated upon said map as "Bath Street," for the purposes of a public street or

way communicating with the navigable waters of Lake Erie and said river, and for such other commercial purposes as the commerce and well-being of the future inhabitants of such city of Cleveland might require a public ground, situate as Bath street was and is, in reference to said lake and river, to be used. That, in the year A. D. 1801, said Connecticut Land Company, by one Amos Spafford, a surveyor and authorized agent of said company, for such purposes, caused the streets, lanes, and public grounds of the said city of Cleveland, surveyed and platted as aforesaid in 1796 and '7, to be resurveyed, and minutes thereof to be retaken, and a second plat to be made of the lots, streets, lanes, and public grounds in such city (which was and is substantially a copy of the aforesaid map of Pease & Porter), commonly called the plat and minutes of Amos Spafford of the city of Cleveland, a copy of which plat and minutes is hereto attached, and marked "C," and made a part of this answer, and that upon said last-mentioned plat (as upon the plat of said Pease & Porter) said company again caused all the lands lying west of the west line of said Water street, and north of the north line of said lot No. 191 and the Cuyahoga river, and south of the waters of Lake Erie, to be designated as "Bath Street"; thereby affirming the dedication and appropriation of the same, made as aforesaid in the year 1796, to the public, for the purposes aforesaid. And this defendant, further answering, says that said Connecticut Land Company, having allotted and platted the said city of Cleveland as aforesaid, proceeded to sell the lots designated in said plats in reference thereto, and long since sold out, and otherwise disposed of, the lots in said plats, and ceased to have any interest therein. That the trustees of said company long since executed conveyances of the same to the purchasers thereof, and distinctly recognized the existence and validity of the survey and plat of said Spafford in their conveyances of the lots contiguous to said Bath street. That the purchasers of said lots took possession of the same, and made valuable improvements thereon, in reference to said plat and said Bath street; and they and their assigns have ever since, for a period of more than a half century, occupied and improved said lots, and still do occupy and enjoy the same, in reference to said plat. That from the making of the said Spafford map, as aforesaid, until the present time, said land company and their assigns, so long as they continued to have any interest in the lands embraced in said plat, and the inhabitants of said city of Cleveland, have at all times recognized, and still do recognize, the plats of said Spafford and Pease and Porter as controlling evidence of the boundaries of lots, streets, lanes, and public grounds designated therein.

And this defendant, answering, says that, in obedience to the requirements of an act of the legislature of the territory northwest of the Ohio, passed December sixth, A. D. 1800, entitled "An act to provide for the recording of town plats," etc., to be found in 1 Chase's Ohio St. p. 291, c. 130, and which is made a part of this answer, said land company caused the map and minutes of said Spafford, as it had before caused those of said Pease and Porter, to be deposited in the office of the recorder of the said county of Trumbull (in which county the lands described in said plat were then situate) for record, and the same, as this defendant has been informed and believes to be true, were, on or about the 15th day of February, A. D. 1802, duly recorded by the recorder of said county, although the record of said map has long since been accidentally lost or destroyed, and cannot be found.

And this defendant, further answering, says that, as early as the year A. D. 1800, said Bath street, as delineated on the plat of said Spafford, having for its northern boundary the waters of Lake Erie, as aforesaid, with the free knowledge and consent of said land company, was opened, occupied, and traveled as a public street or way, and from thence hitherto, with the full knowledge and uninterrupted acquiescence of said company, the trustees thereof, and their respective heirs and assigns, it has been at all times regarded, used, and occupied by the inhabitants of said city of Cleveland, and the public generally, without molestation, not only as a public way in said city communicating with said lake and river, but also (and of late years extensively so) as a quay or public landing for persons and property transported, and to be transported, upon the waters of Lake Erie, and still

is so regarded, used, and occupied by the inhabitants of said city; and that for more than a quarter of a century prior to the year 1827, when the channel of the said river, as laid down on the map of said Spafford, was changed to its present location by the United States government, said Bath street was the only public way used, or which could be used, by the inhabitants of said city and the public, for the transportation of persons or or property, by vehicles of any description, to or from said lake or river.

And this defendant, further answering, says that, by an act of the general assembly of the state of Ohio entitled "An act to incorporate the village of Cleveland, in the county of Cuyahoga," passed December 23, A. D. 1814, and is to be found in volume 13, p. 17, of the laws of said state, and which is made part of this answer, so much of the plat of said Spafford as lies northerly of Huron street was erected into a village corporate, to be known by the name of "The Village of Cleveland," and the corporation thus created invested with the powers therein mentioned, which corporation continued to exist until superseded as hereinafter stated. That by another of the same general assembly, entitled "An act to incorporate the city of Cleveland, in the county of Cuyahoga," passed March 5, A. D. 1836, and to be found in volume 34, p. 271, of the Local Laws of said state, and which is also made part of this answer, all the lands embraced in the plat of said Spafford lying eastwardly of the present channel of the Cuyahoga river, together with additional territory, was declared to be a city, and the inhabitants thereof created a body corporate and politic, by the name and style of the "City of Cleveland," and invested with such powers and trusts touching the streets, alleys, public grounds, and harbor within the corporate limits thereof as are specified in said act, which powers and trusts have from thence hitherto been, and still are, exercised and executed by said corporation, and that said Bath street at all times since the passage of said acts of incorporation, respectively, with the knowledge and acquiescence of said land company, its trustees, and their respective heirs and assigns, has been claimed, regarded, controlled, and regulated by the inhabitants and corporate authorities of said village and city as one of the streets and public grounds thereof, and still is so claimed, regarded, and governed by the corporate authorities of the said city of Cleveland, and the use of the same, as such, has never been in any wise vacated or abandoned by said city or its inhabitants; and this defendant avers that by reason of the premises aforesaid said Bath street is in fact one of the public streets and grounds of said city; that the legal title thereof, as this defendant is advised by counsel learned in the law, is now vested either in the said city of Cleveland or the public, in trust for the uses and purposes intended as aforesaid by said Connecticut Land Company in dedicating the same as aforesaid to the public, and that the public has the right to use the same for such purposes without molestation from complainants.

And this defendant, further answering, says that, after the channel of the Cuyahoga river, as delineated on the plat of said Spafford, was changed to its present location, as aforesaid, the government of the United States, on the easterly thereof, at its mouth (to render said river accessible to water craft navigating Lake Erie), constructed permanent improvements, extending into said lake more than a quarter of a mile from the northerly or water line of said Bath street, as it was when said channel was changed. That, by reason of said improvements and lesser ones made by the inhabitants and corporate authorities of said city at great expense, the encroachment of said lake upon said Bath street, which at times had threatened wholly to submerge the easterly portion thereof at and in the vicinity of said Water street, and render the same useless for the purposes to which it was dedicated as aforesaid, have been stopped, and that part of said Bath street easterly of, and in the vicinity of, the east pier of said river, has been increased in width, by slow and imperceptible alluvial formation, so that the greater portion of the land embraced between the southerly line of said Bath street and said water line or low-water mark, as the same was when this defendant took possession of said premises, has been formed by accretion, and lies northerly of the water line of said street as it was when said channel was changed; and that, notwithstanding said Bath street has increased in width, the rapid growth of the said city of Cleveland, and the incessant and increasing wants of its

commerce, and of its inhabitants, more than keep pace with the increase of said street, and imperatively require every part and parcel thereof, enlarged as it is, to be used for the commercial purposes, to which it was devoted as aforesaid, by the original proprietors of said Western Reserve, and will ever require the same, however much it may be enlarged by the means aforesaid, to be thus used and appropriated.

And this defendant, further answering, says that it is a body politic and corporate, duly organized under, and created by, an act of the legislature of the state of Ohio passed March 14, 1836, "An act to incorporate the Cleveland, Columbus & Cincinnati Railroad Company," and under and by virtue of another act of said legislature passed March 12, 1845, entitled "An act to revive the act entitled 'An act to incorporate the Cleveland, Columbus & Cincinnati Railroad Company,'" and under and by virtue of the several acts of said legislature amendatory and supplementary thereto, and under and by virtue of certain sections of the act of said legislature passed February 11, 1848, entitled "An act regulating railroad companies," especially the eleventh section of the last-named act, which sections were duly adopted by this defendant as a part of its charter on the 20th day of May, 1848; all which acts and parts of acts are made part of this answer.

And this defendant further avers that it has been such body politic and corporate for more than six years last past, and that, under and by virtue of the power conferred upon it by said acts and parts of acts, this defendant has constructed, and is now successfully operating, a railroad extending from the grounds so in its occupation, in said Bath street, in the city of Cleveland, to the city of Columbus, in the county of Franklin, in said state, to the great advantage of the public at large, and especially of the inhabitants of the said city of Cleveland, and to fully secure to the public the benefits contemplated in the charter of this defendant in the working of said railway; it being necessary to connect the same with the waters of said lake and river, within the limits of said Bath street, for the delivery of freight and passengers, and the exchange of freight and passengers with other roads, and with water craft navigating said lake and river, and the same being also a suitable place for the terminus of said railway within said city, this defendant, under a license obtained from said city of Cleveland on the 13th day of September, A. D. 1849, has laid down, in a proper manner and not otherwise, its railway tracks upon said Bath street, as shown in said diagram, and in such manner as to connect its said railway with the waters of said lake and river, and this defendant is now, and for some time past has been, running its railway carriages, in connection with said Cleveland, Painesville & Ashtabula Railroad Company, upon the tracks so laid down to and from said river and lake, for the purposes aforesaid, in a prudent manner, at reasonable times, and so as to work no inconvenience to other legitimate uses of said street.

And this defendant, further answering, says that, to make said exchange with a due regard to the safety of persons and property, it was indisputably necessary to provide suitable railway fixtures and improvements upon some part of said Bath street, and that for such purposes, and for such purposes only, this defendant, with the consent of said city of Cleveland, and in conjunction with said Cleveland, Painesville & Ashtabula Railroad Company, has also constructed, and is now using and maintaining, in a reasonable manner, the structures for depots, engine houses, and other railway fixtures indicated on said diagram as in the joint possession of this and the last-named company, all which are necessary to the convenient management of the said road.

And this defendant, further answering, says that the harbor accommodation afforded by said river being inadequate to the commercial wants of the inhabitants of the said city of Cleveland, and the channel of said river contiguous to said Bath street being also too small and otherwise insufficient to admit of the safe and convenient ingress and egress to and from the same of the largest class of water craft navigating said lake, to effect, conveniently and safely, exchanges of passengers and freights with such craft, it was necessary for this defendant, and the said Cleveland, Painesville & Ashtabula Railroad Company, to connect, in a suitable manner, and to a depth of water sufficient for the safe approach thereto of such craft, a wharf upon

that portion of the premises embraced in said diagram, and lying northerly of the water line or low-water mark between said Bath street and said lake, and thereon shown to be in the joint possession of this and the last-named company, and in connection with said last-named company it has constructed such wharf, and laid down thereon the tracks and erected the other structures shown on said diagram; and this defendant, in connection with said Cleveland, Painesville & Ashtabula Railroad Company, is now, and for some time past has been, for the purpose of making such exchanges, working in a prudent manner, and without inconvenience to the public, its railway carriages upon said tracks, and this defendant, when necessary so to do, has also used portions of said wharf as a place of temporary deposit for property awaiting transportation. And this defendant submits and insists that it has the right, as a component part of the public, to occupy, with the consent of said city, said Bath street, in the manner and for the purposes aforesaid; that such are a great public accommodation, and not incompatible with the purposes intended by said Connecticut Land Company in dedicating the same to the public as aforesaid, but consistent therewith; and that the city of Cleveland, in permitting this defendant thus to use a limited portion of said street, and thereby distributing its legitimate use so as to best subserve the convenience and business interest of its inhabitants and the rest of the public, has committed no breach of trust, nor violated any public or private right, but performed, rather, a duty which is owed as well to the forecast of said land company as to the public.

And this defendant, further answering, submits, if it is mistaken in the opinion hereinbefore expressed that the legal title of said Bath street is now vested in said city of Cleveland, or in the public in trust for the inhabitants of said city, and the same is in fact held by said Lloyd, or his assigns, or the heirs of the survivor of said trustees, that the parties who hold the same, whoever they may be, have no beneficial interest in said street, and hold the legal title thereof in trust for the uses and purposes intended by said land company in dedicating the same to the public as aforesaid, and ought not to be permitted, in a court of equity, to disturb or molest this defendant or the rest of the public in the legitimate use of the same.

("C")

(From Answer in Price & Crawford Case.)

That, after the location of the railroad from Columbus to Cleveland, it became necessary, in the opinion of the directors, to obtain the whole of the tract of land called "Bath Street," and they made a formal appropriation of the same by resolution on the 18th of September, 1848. The entire title of that tract was involved in a controversy between the city of Cleveland and said Camp & Lloyd. That suit was then depending for the possession of said premises. That a suit had already been decided against the city, and was then depending in the supreme court of Ohio on exceptions to the judgment of the court of common pleas. That the opinions, not only of people generally, but also of men professing to understand the legal questions involved in the controversy, differed so much as to the probable result that it was impossible to anticipate the event. That it was the interest and wish of the respondent to get clear of all controversies, whether legal or otherwise, and for that reason this respondent was unwilling to have said company obtain possession of said property by the power given them by their charter, but proposed and believed it to be for the interest of this respondent, and all parties having any interest in said property, to make an amicable arrangement, by which the said company might be invested with all the rights of this respondent in said property. Upon these views, this respondent being compelled to transfer to said company said property, and preferring to do so under a negotiation, than to have it taken under and by virtue of said company's charter and appropriation, and desirous of avoiding all controversy with said company, for the convenience and advantage of this respondent the said negotiations and contract were made between said company and respondent; but this respondent has in no instance had the wish or purpose of obtaining

any unfair or dishonest or fraudulent advantage of said complainants, or of any other party or person having a claim or interest in said premises, or any part thereof, nor has said company, so far as respondent knows or believes, been guilty of any act of bad faith or injustice towards any person or party intrusted in said premises, or any portion thereof. Respondent admits it to be true that, by the terms of the contracts between the city of Cleveland and said company made on the 13th day of September, 1849, as aforesaid, said company took the interest of the said city in the said Bath street property, subject to all the rights and privileges of all other persons which would be legally enforced against the property had the city continued to hold the same, and also assumed all the legal liabilities to other persons which rested on the city in the relation to said property, up to that time; but this respondent utterly denies that the city or said company, or the assignees in the premises, was or ever could become liable to the complainants or other lessees of said premises on account of any failure of title in the city. And this respondent, further answering, says that said city, in the leases now held or claimed by the complainants, as well as in all other leases granted by her on Bath street, guarded herself in the strictest manner against any implied liability to guaranty the possession of the lots leased, and provided that an eviction of the lessee should merely stop rents, but that said city should not be liable to pay any damages. Respondent, further answering, admits it to be true that judgment was rendered in the court of common pleas in favor of said Camp & Lloyd in the suits embracing the premises claimed by the complainants, in pursuance of the agreement made by said company with said Camp & Lloyd on the said 8th day of August, A. D. 1849, as aforesaid, not because the contests of the suits was given said company, as alleged in the bill, but because said company, as this respondent is informed and believes, having succeeded to the rights of the city as aforesaid, and having by said agreement with said Camp & Lloyd compromised all matters in controversy, ceased to make a further defense to said suit, and permitted judgment to be entered. And this respondent is informed and believes that said compromise was a fair and reasonable one, and such as said company was freely justified in making. That there was nothing in the relation which had previously existed between the said city and the complainants which required the city, while holding its original interest against said company after the contract of the 13th of September, 1849, to persist in maintaining a series of doubtful and expensive lawsuits, when a peaceable compromise of the same would be made. Respondent, further, is informed and believes, that, in making the same compromise, the railroad company obtained from said Camp & Lloyd the best terms which they would be induced to grant, and so far as these terms seemed to said company the rights which said city has previously claimed. Respondent is informed and believes that it will furnish to the various lessees a full protection against the reverse claim of said Camp & Lloyd, and protect them in their several leases, so far as they themselves have performed their covenants in the same. But this respondent is informed and believes that, by the terms of said compromise, said company failed to obtain any interest in, or control over, any part or portion of the premises claimed by the complainants, except a small part in the lots 6 and 7, and that said company disclaims any interest in or under it over the residue of the lots claimed by said complainants.

("D")

RAILROADS.

An Act Regulating Railroad Companies.

(Passed February 11, 1848. 46 Ohio Laws, p. 40.)

Sec. 2. Said corporation shall be authorized to construct and maintain a railroad, with a single or double track, with such side tracks, turnouts, offices and depots as they may deem necessary, between the points named in the special act incorporating the same, commencing at or within, and extending to or into any town, city or village named as the place of beginning, or ter-

minus of such road, and construct branches from the main line to other towns or places within the limits of any county through which said road may pass.

Sec. 11. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officers, or public authorities, owning or having charge thereof, and the railroad company to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company, to use or occupy such road, street, alley, or other public way or ground, such company may apply to the court of common pleas of the county in which the same is situate, setting forth the aforesaid facts, and said court shall thereupon appoint at least three judicious disinterested freeholders of the county, who shall proceed to determine whether such occupation is necessary, and if necessary, the manner and terms upon which the same shall be used, and make return of their doings in the premises to said court, who shall, if they deem the same just and proper, make the necessary order to carry the same into effect, or they may order a review of the same, as such court may consider justice and the public interest require.

Sec. 14. Such company may acquire, by purchase or gift, any lands in the vicinity of said road, or through which the same may pass, so far as may be deemed convenient or necessary by said company to secure the right of way, or such as may be granted to aid in the construction of such road or be given by way of subscription to the capital stock, and the same to hold or convey in such manner as the directors may prescribe; and all deeds and conveyances made by such company shall be signed by the president, under the seal of the corporation; and any existing railroad corporation may accept the provisions of this section, the five preceding sections of this act, or either of them, and after such acceptance, all conflicting provisions of their respective charters shall be null and void.

Sec. 15. It shall be lawful for such corporation, whenever it may be necessary in the construction of such road, to cross any road or stream of water, or to divert the same from its present location or bed; but said corporation shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness.

CONVERSE v. KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO.¹

(Circuit Court of Appeals, Seventh Circuit. July 26, 1898.)

No. 478

1. INSURANCE — PLACES OF PROHIBITED RESIDENCE — TRAVEL — CONTINUOUS JOURNEY.

An assured permitted to travel through sections of country where residence is prohibited is not required to make a continuous journey in order not to violate the policy, but is entitled to make reasonable stops for purposes consistent with the character of a traveler; and, if sickness and death interrupt his travel in such locality, the policy is not invalidated.

2. SAME—POLICY—CONSTRUCTION—EVIDENCE.

A policy permitting residence in certain prescribed localities during the entire year prohibited residence in the Western hemisphere south of the thirty-second parallel between July and November of each year, but authorized assured "to pass as a passenger, by the usual routes of public conveyance, to and from any port or place within the foregoing limits; but, if he should * * * pass beyond or be without the foregoing limits," the policy should be void. Assured thereafter obtained permission to reside in the pine regions south of the thirty-second parallel at all seasons. On one occasion, he went from L., within such regions, to N., a place of prohibited residence, to consult a physician, and on the same day returned to L., and later started for his home by the usual route, by

¹ Rehearing denied October 3, 1898.

way of N., where he again consulted his physician, and on his advice went to the home of a friend, where he died. *Held*, that the policy should be construed as prohibiting assured from passing beyond or being without the regions of permitted residence, except to go, as a passenger, by the usual routes, between ports and places within those regions, and hence assured's journey from L. to N. and return did not constitute a breach thereof.

3. SAME—QUESTION FOR JURY.

Where an assured, in passing, as a passenger, over a usual route of conveyance from one place of permitted residence to another, stopped at a place of prohibited residence to consult a physician, and on his advice remained and died there shortly thereafter, whether such interruption of the journey was improper was a mixed question of law and fact for the jury.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The plaintiff in error, Carrie E. Converse, sued the Knights Templars' & Masons' Life Indemnity Company in assumpsit upon a policy of insurance upon the life of her husband, Charles S. Converse, who, at the date of the policy, April 12, 1889, resided at Roscommon, Mich. The policy contains the following clause, upon the construction of which the controversy turns:

"Fifth. The holder of this policy, during the continuance of his membership in this company, is freely permitted to reside in any settled portion of the Western hemisphere lying north of the thirty-second parallel of north latitude, at all seasons of the year; and in the United States lying south of said thirty-second parallel, excepting from the first day of July until the first day of November in each year; and in the Eastern hemisphere lying north of forty-second parallel of north latitude and west of the fortieth meridian of longitude east from Greenwich, at all seasons of the year; and in Italy south of said forty-second parallel, excepting from the first day of July to the first day of November in each year; and he may also pass as a passenger by the usual routes of public conveyance to and from any port or place within the foregoing limits; but, if he shall, at any time during the continuance of his membership in this company, pass beyond or be without the foregoing limits, * * * then, in each and every of the foregoing cases, this policy shall become null and void."

Besides the plea of nonassumpsit, the defendant in error pleaded specially that:

"Contrary to the express terms and conditions of the policy," the assured "on the 25th day of August, 1894, and for some time hitherto, to wit, between the 1st day of July and the 1st day of November, 1894, did reside in the United States south of the thirty-second parallel, and outside of the pine regions of the state of Mississippi, to wit, in the city of New Orleans, within the state of Louisiana; * * * and while then and there so residing, to wit, on said 25th day of August, and not while his residence was within the pine regions in the said state of Mississippi, * * * said Converse did die"; or, as it is alleged in the second plea, that the assured, "during a period longer than ten consecutive days, to wit, from August 6th to August 25th, did remain in the United States south of the thirty-second parallel, and outside of the pine regions of the state of Mississippi, to wit, in the city of New Orleans, within the state of Louisiana, * * * and while then and there so remaining, to wit, on said 25th day of August, and not while his residence was within the pine regions in the said state of Mississippi, * * * did die."

The evidence adduced at the trial shows, without conflict, the issue of the policy of insurance, the removal of Converse in June, 1891, from Michigan to Bogue Chitto, also called "Wellman," a place in

the pine regions of Mississippi a few miles south of the thirty-second parallel of latitude, and the consent of the company, evidenced by correspondence in writing, that he should reside in the pine regions of that state, on condition that if he should die of yellow fever the company should not be liable upon the policy. It further appears, without dispute, that on July 24, 1894, Converse, being in poor health, went with his wife from his home at Wellman to Long Beach, which is also in the pine regions of Mississippi, going by the usual route of travel, that is to say, from Wellman by the Illinois Central Railroad to New Orleans, and thence by the Louisville & Nashville Railroad to Long Beach. On July 31st he went from Long Beach to New Orleans to consult a physician, and on the same day returned to Long Beach. His condition of health growing constantly worse, on the morning of August 6th he started, in company with his wife, to return to his home at Wellman. Arriving at New Orleans, he went first to see his physician, and on his advice went to the house of his friend and associate in business, and there took immediately to bed, not to rise again. He died of heart disease on August 25, 1894.

At the close of the evidence, the court directed a verdict in favor of the defendant, and upon that ruling error is assigned.

Clark Varnum, for plaintiff in error.

C. H. Aldrich, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The clause of the policy on which, presumably, the special pleas were intended to be predicated, contains two restrictions; one upon residence and travel, expressed in permissive words, and the other a prohibition "to pass beyond or be without the foregoing limits." The first of these pleas has reference to residence alone, and not only was not established, but was disproved; it being clear upon the evidence that the residence of Converse, from the time of his removal from Michigan to the date of his death, was at Wellman, and was not affected in the legal sense, or in the sense of the policy, by his temporary absence during the few days before and at the time of his death. The second plea is equivocal, and does not disclose with certainty upon what theory it was intended to be drawn. The substance of it is that for more than 10 days the assured "did remain, etc., in the city of New Orleans, and while then and there so remaining, etc., and not while his residence was within the pine regions, etc., did die." Fairly construed, this means that at the time of his death Converse was, and for more than 10 days had been, a resident, not of the pine regions of Mississippi, but of New Orleans. A part of the allegation being untrue, perhaps the whole should fall; but, even if the negative clause concerning residence in the pine regions of Mississippi be regarded as separable, and be rejected as irrelevant, or as contrary to the evidence, and if it be conceded, as alleged, that the deceased "remained" in New Orleans for more than 10 days, and while so remaining died, it does

not follow that he was not there in strict accordance with the permission given him "to pass as a passenger by the usual routes of public conveyance." That clause, like other terms of the policy, when construed strictly against the company, as it should be, and liberally in favor of the assured, gave him the privilege of going as passengers or travelers are accustomed to do. He was not bound to be in constant conveyance on the line of his journey from the start to the end; but, like a traveler, he was entitled to reasonable stops on the way, for whatever reasonable purpose consistent with the character of a traveler, though not entitled, perhaps, to become what would be called a "sojourner"; and if, by reason of sickness, he was compelled to interrupt his journey, it is not to be said on that account that his policy became void. There could certainly be no injustice in applying the strict rule of construction to pleas like these, designed to present a defense which has no merit beyond the mere letter of the supposed contract, the breach of which it is not pretended had the remotest relation to the health or death of the insured. Such an insistence upon the technical meaning of the contract might well be met by a like insistence upon the technical rule of pleading; but we prefer to decide the case upon its merits as disclosed by the evidence. Assuming the pleas to be sufficient to present the issue intended, we are of opinion that, upon a proper construction of the policy, the defense was not established. If, for the sake of clearness, only the provisions touching residence and the right to go and come in the United States be regarded, permission is given to reside in the settled portions north of the thirty-second parallel of latitude at all seasons of the year, and south of that parallel at all times except from the 1st day of July to the 1st day of November in each year, and to "pass, as a passenger, by the usual routes of public conveyance, to and from any port or place within the foregoing limits; but, if he shall * * * pass beyond or be without the foregoing limits, * * * this policy shall become null and void." The question is, what is the scope of the right given "to pass * * * to and from any port or place within the foregoing limits"? The answer to the question depends mainly upon the force of the words "the foregoing limits," as used in that clause. The contention of the defendant in error is, and it seems to have been the view of the court below, that the words imply a limitation of time as well as of territory. According to the court's charge to the jury, the assured was forbidden to go "beyond the limits of prescribed residence," except that, under the permission to travel, he might go "from one port or place to any other port or place within the allowed territory, although the route might take him out of the prescribed limits." That is to say, the words, "the foregoing limits," as if followed by the word "respectively," are to be applied distributively to each distinct region of residence for the time during which residence therein is permitted, and not to the entire region of residence as a whole, and without regard to the implied inhibition against residence in particular locations at particular seasons. Following that construction, the court held that, while the journey from Wellman by way of New Orleans to Long Beach was passage by a usual route from one place of permitted residence to another, the going from Long Beach to New Orleans and re-

turning to Long Beach again on July 31st, no matter for what purpose, was "a breach of the conditions of the policy"; that is to say, of the prohibition to "pass beyond or be without the foregoing limits." On that interpretation, if Converse, after availing himself of the time between trains at New Orleans to see his physician, had gone on to Wellman, or to any other place of permitted residence except Long Beach, from which he started, and thence had returned immediately to Long Beach, though by way of New Orleans for the purpose of seeing his physician again, it would have been only what he was permitted to do. To state it in another way: If the journey of July 31st had been begun with the intention of going to Wellman, but, on arrival at New Orleans, it had been found necessary or desirable for any reason to return immediately to Long Beach, it could not have been done, consistently with the terms of the policy, without first going from New Orleans to some other place of permitted residence. Besides such incongruities, this construction involves contradiction in the terms of the particular provision of the policy under consideration. In one clause the right is given to pass from one place to another, "within the foregoing limits," and in the next clause it is said that to "pass beyond or be without the foregoing limits" will nullify the contract. If, according to the first clause, a right of travel may lie without or beyond "the foregoing limits," it cannot be reconciled with the equally explicit inhibition of the second clause against passing beyond or being without those limits. There is no such inconsistency in the terms of expression,—one clause permitting travel within, and the other forbidding the passing or being beyond the intended limits; and they can be made irreconcilable only by attributing to the words "the foregoing limits," as first used, one meaning at one time and another meaning at another time, according to the limitations prescribed for residence. If, on the contrary, those words be treated as having one and the same meaning with reference to all seasons, and as embracing as a unit all regions in which residence at any season is permitted in both hemispheres, the entire provision becomes harmonious and reasonable. The right given to travel in or through any region where residence is permitted for any part of the year, and from any port or place in one of those regions to another by the usual routes of conveyance, is not limited to any part of the year; and the prohibition of the next clause is against going or being outside of the limits of residence and of travel, as defined in the preceding clause. As employed in the second clause, the words "the foregoing limits" evidently have a wider scope than the same words in the preceding clause. Besides the regions of permitted residence, they include the usual routes of travel to and from ports and places in those regions. The meaning, therefore, is that if the assured shall pass beyond or be without the regions in which residence is permitted, except to go, as a passenger, by the usual lines of conveyance between ports or places within those regions, the policy shall be void; and perhaps it is to be inferred, though it is not explicitly stated, that if he shall be in a specified region of residence, but at a time when residence there is not permitted, except it be to "pass, as a passenger," upon a usual route of travel, the policy shall become void. If any such inference against the assured is allowable, that would seem to be the ut-

most scope of it. It was, therefore, a violation of no condition of the policy that the assured went from Long Beach to New Orleans, and back to Long Beach again, on the 31st day of July, 1894, nor that, on arrival at New Orleans on August 6th, he was compelled to interrupt his journey homeward, and to go to the house of a friend to die, unless, according to the fair meaning of the policy, construed liberally in favor of the assured, he by so stopping ceased to be a passenger and became a resident. As already indicated, our opinion is that, to be a passenger or traveler on a journey, by a route of public conveyance, one need not be on the constant go. He may not stay on his way so long, and under such circumstances, as to become a sojourner; but he has the right to stop, as a passenger or traveler is to be expected to do, for any purpose of business, health, or pleasure,—and especially when sickness makes it necessary. Whether, in this instance, the interruption of the journey was improper, was, in the view most favorable to the defendant in error, a question of fact, or of mixed law and fact, to be submitted to the jury upon proper instructions. Many decided cases have been cited, to some of which reference was made by the court below; but, upon our view of the proper construction of the policy, they are not relevant, and need not be reviewed. The point decided being that the evidence in the record does not show conclusively that there had been a breach of any condition of the policy, the question does not arise whether a conceded or established breach, for which by its terms the policy is to become void, may be excused because produced by an act of God or other like cause. The judgment below is reversed, and the cause remanded with direction to grant a new trial.

NEW YORK LIFE INS. CO. V. DINGLEY. ¹

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 466.

INSURANCE—LIFE POLICY—FORFEITURE—NONPAYMENT OF PREMIUM—NOTICE—VALIDITY.

A policy provided that, after it had been in force three months, one month's grace would be allowed in payment of subsequent premiums, which became due annually on July 19th. Laws N. Y. 1892, c. 690, art. 2, § 92, by which the policy was governed, provides that no life insurance corporation doing business in that state shall declare a policy forfeited for nonpayment of premium when due, unless a notice stating the amount due, the place of payment, and the person to whom payable shall be mailed to the person insured at least 15, and not more than 45, days, prior to the day when the same falls due, and stating that, unless the amount then due shall be paid by such date, the policy will become forfeited, and declares that, if payment so demanded is made within the time limited therefor, it shall be a full compliance with the policy, and that no such policy shall in any case be forfeited until the expiration of 30 days after the mailing of such notice. Plaintiff's decedent paid two annual premiums prior to June 27, 1896, when defendant mailed him a notice in compliance with the statute, except that it declared that, unless the premium was paid on or before July 19th, the policy would be forfeited, but also stated that the notice was sent in compliance with the New York law, and did not modify the provisions of the policy. The premium due July 19, 1896, was not paid, and assured died in November of that year. *Held*, that since, under the statute, the policy could not be forfeited until 30 days after the mailing

¹ Rehearing denied May 23, 1899.

of the notice, and that that period could not expire between June 27th and July 19th, and in view of the grace provision of the policy, the notice declaring that it would be forfeited, if payment was not made on the latter date, was invalid, and hence that the policy was continued in force.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

Geo. H. Durham, for plaintiff in error.

Preston, Carr & Gilman, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action upon a policy of life insurance issued by the New York Life Insurance Company by which it insured the life of one Walter F. Dingley. That the contract was made under and subject to the laws of the state of New York is not disputed. Its date is August 3, 1894, and one of the considerations for the contract was the payment to the company by the insured, in advance, of \$158, "and of the payment of a like sum on the 19th day of July in every year thereafter during the continuance of this policy, until twenty full years' premium shall have been paid." The contract further provided, among other things, as follows:

"No agent has power, in behalf of the company, to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any representation or information. These powers can be exercised only by the president, vice president, second vice president, actuary, or secretary, and will not be delegated. All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice president, second vice president, actuary, or secretary, and countersigned by such agents. If any premium is not thus paid on or before the day when due, then, except as hereinafter otherwise provided, this policy shall become void, and all payments previously made shall remain the property of the company. After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium, with interest as above, remains an indebtedness due the company, and, in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

At the time of the making of the contract in question there was, and yet is, in force, a statute of the state of New York which provides as follows:

"No Forfeiture of Policy Without Notice. No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more

than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly-appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value, or paid-up policy, as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690, art. 2, § 92.

Two premiums, aggregating \$316, were paid on the policy, being those for the years 1894 and 1895. The premium for 1896 was not paid, and on the 12th day of November, 1896, the insured died at the city of Seattle, state of Washington. In his application for the policy, the insured gave his post-office address as Oakland, Alameda county, Cal. Subsequently, to wit, April 8, 1895, he notified the company in writing that he had changed his residence to Seattle, Wash., and requested that thereafter all notices should be addressed to him at that place, post-office box 1272. This change of address was noted in the books of the company, and was thereafter the post-office address of the insured last known to it. On the 27th day of June, 1896, the company deposited in the United States post office at San Francisco, Cal., postage prepaid, a notice addressed to the insured at Seattle, as directed, which notice was printed on a card, and reads as follows:

"(2) Bring this card with you when paying premium or inclose it with your remittance. The New York Life Insurance Company hereby gives notice that on policy No. 628,645 a premium of \$158 will be due July 19, 1896, provided the policy be then in force. This premium will be due and payable at the home office, 346 and 348 Broadway, New York, to the cashier of the company, or to Fred G. Redding, cashier, Mills Building, San Francisco, Cal., on the production of the official receipt therefor. Unless such premium then due shall be paid to the company, or to a duly-appointed agent or person authorized to collect such premium, by or before the day it falls due, such policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value or paid-up policy which may be provided in said policy, or by statute. This notice is required by the law of New York, and does not modify any of the terms of the contract. John A. McCall, President.

"Remittance should be made by bank draft, post-office or express money order, or certified check, payable to the order of the New York Life Insurance Company.

[Over.]

"Notice to Policy Holders.

"No agent has power, in behalf of the company, to make or to modify any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or by making or receiving any representation or information. These powers can be exercised only by the president, vice president, second vice president, actuary, or secretary of the company, and will not be delegated. All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but any premium may be paid to an agent, producing a receipt therefor, signed by the president, vice president, second vice president, actuary, or secretary, and countersigned by such agent. If any premium is not thus paid on

or before the day when due, then (except as otherwise provided) the policy shall become void, and all payments previously made shall remain the property of the company. If any premium is not paid upon the date when due, a grace of one month is allowed by the company within which the overdue premium will be accepted, if paid, with interest, at the rate of 5 per cent. per annum. During this month of grace, the policy is continued in full force. The acceptance of any premium by the company after the expiration of the month's grace is subject to the condition, and upon the express warranty on the part of the holder of the policy that the insured is in good health, and is not to be construed as a waiver of the conditions of the policy as to future payments, nor as establishing a course of dealing between the company and the holder of the policy. Please notify the branch office to which you pay your premium of any error or change in your post-office address, in writing, giving the number of each policy now held by you."

The only question in the case is whether or not the policy became forfeited by reason of the nonpayment of the premium for the year 1896. The statute of New York, under and subject to which the policy was issued, declares, as has been seen, among other things, that no life insurance corporation doing business in that state shall declare forfeited or lapsed any policy thereafter issued, by reason of nonpayment, when due, of any premium required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, the place where and the person to whom it should be paid, shall be duly addressed and mailed to the person whose life was insured, at his or her last known post-office address, postage prepaid, at least 15, and not more than 45, days prior to the date when the same is payable. The notice is also, by the statute, required to state that, unless such premium be paid to the corporation or to a duly-appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void; with a provision to the effect that no policy shall in any case be forfeited, or declared forfeited or lapsed, until the expiration of 30 days after the mailing of such notice. But for this statute, there could be no doubt that the policy in question was forfeited; for not only was the premium for the year 1896 not paid on the 19th day of July of that year, nor within one month thereafter, but it was not paid at all. The statute, however, which entered into and controls the contract of the parties, prohibits such forfeiture unless the company gave the prescribed notice. It is manifest, therefore, that the real question is whether the notice of June 27, 1896, conforms to the statutory requirements. It is not disputed that it was properly addressed and mailed. The purpose of the statute was, as said by the court of appeals of New York in *McDougall v. Society*, 135 N. Y. 556, 32 N. E. 252, "to afford a protection to the assured by the reasonable requirement of a notice, couched in plain terms, from the insurer, before the interests of the assured could be forfeited." And it has been several times decided by the same court that the provisions of the statute respecting forfeitures should be strictly interpreted in favor of the assured, and that the defense of a forfeiture through nonpayment of premium is not available to an insurance company if there has been any substantial departure on its part from the provisions of the statute in regard to notice. *De Frece v. Insurance Co.*,

136 N. Y. 144, 32 N. E. 556; *Baxter v. Insurance Co.*, 119 N. Y. 450, 23 N. E. 1048; *Phelan v. Insurance Co.*, 113 N. Y. 147, 20 N. E. 827; *Carter v. Insurance Co.*, 110 N. Y. 15, 17 N. E. 396.

The first part of the notice in question informed the insured that a premium of \$158 would become due on the policy July 19, 1896, and stated where and to whom payable. It next informed him that unless such premium, then due, "shall be paid to the company, or to a duly-appointed agent or person authorized to collect such premium, by or before the day it falls due, such policy, and all payments thereon, will become forfeited and void," with an exception not important to mention. So far, this was a substantial compliance with the requirements of the statute, the provisions of which are, as has been seen, that notice shall be given of the day when the premium will become due, in the prescribed way, at least 15, and not more than 45, days prior to the date when the premium is payable, with information to the effect that, unless paid by or before the day it becomes due, the policy, and all payments thereon, would become forfeited and void. It cannot be doubted that, under the terms of the policy in suit, the premium for the year 1896 became payable on the 19th day of July of that year. The company was therefore required by the statute to give the notice not less than 15, nor more than 45, days prior to that date. It was given June 27, 1896, and was therefore within the prescribed time. Yet the forfeiture for failure to pay the premium on the 19th day of July, 1896, of which notice was thus given, was prohibited, both by the statute and by the provisions of the policy. It was prohibited by the statute by virtue of that clause thereof declaring that "no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice." The notice having been mailed June 27, 1896,—only 21 days prior to July 19, 1896,—there was this statutory inhibition against forfeiture for the nonpayment of the premium on July 19, 1896; and, under the terms and conditions of the policy, it was not possible for the forfeiture to occur until the expiration of one month's grace from July 19, 1896, on which day the premium was by the policy declared to become due and payable. Of this the notice also informed the insured; for, after reminding him that the premium became due and payable July 19, 1896, and informing him, wrongly, that, if it was not then paid, the policy, and all payments thereon, would become forfeited and void, it proceeded to say that such notice was given because of the statute of New York, and that it did "not modify any of the terms of the contract"; one of the provisions of which, it reminded the insured, was that:

"After this policy shall have been in force three months, a grace of one month will be allowed for payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium, with interest as above, remains an indebtedness due the company, and, in the event of death during said month, this indebtedness will be deducted from the amount of the insurance."

These contradictory and inconsistent notices do not answer the requirement of the New York statute, as construed by the court of appeals of that state, which demands a notice to the insured in

plain, and therefore unambiguous, terms, of the time when the premium will be due, and of the time when a forfeiture will accrue if not theretofore paid. The insured, in the present instance, receiving the notice sent him by the company, and from lack of ability, or neglect, not having paid the premium on the 19th day of July, 1896, might very readily have supposed that his failure to pay on that day worked a forfeiture of the policy; for in the first part of the notice he was distinctly so told, although wrongly, as has been shown. Receiving such notice from the company, and the 19th day of July, 1896, having come and gone without the payment of the premium, it might very well have happened that the insured relied upon the information thus conveyed, and abandoned all effort to pay the premium, without looking to the statute of New York, or to the grace clause printed on the back of the notice, to which his attention was also directed in the notice, by one of which provisions he was still allowed 8 days, and by the other 30 days, after July 19, 1896, within which to pay the premium, and avoid the forfeiture of his policy.

The action of the court below in respect to the instructions requested by the plaintiff in error, and in respect to those given to the jury, pursuant to which a verdict was returned for the plaintiff in error, being in accordance with the views above expressed, the judgment is affirmed.

PREFERRED ACC. INS. CO. OF NEW YORK v. BARKER.

(Circuit Court of Appeals, Fifth Circuit. February 28, 1899.)

No. 739.

1. ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—SUFFICIENCY OF PROOF OF ACCIDENTAL DEATH.

Under an accident policy requiring the claimant thereunder, in case of the death or disability of the insured, to furnish direct and positive proof that the death or disability resulted proximately and solely from accidental causes, the testimony of eyewitnesses to the death of the insured is not required, where there was no witness, but the furnishing of such circumstantial evidence as was afterwards sufficient to satisfy a jury that the death resulted from one of the causes insured against must be deemed to have been a sufficient compliance with the requirement.

2. JUDGMENTS—PLEADING AS ADJUDICATION.

Under the prescribed practice in Louisiana, a defense of *res judicata* must be specially pleaded to be available.

3. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—ADMISSIBILITY OF EVIDENCE.

Testimony in reference to the citizenship of the parties is only admissible in support of allegations properly made in the pleadings.¹

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action brought in the United States circuit court for the Eastern district of Louisiana by Mrs. Harriet Barker, widow of J. W. Barker, against the Preferred Accident Insurance Company of New York, upon a policy of insurance of that company held by him in favor of his wife. Ver-

¹ As to allegations of citizenship, see note to *Shipp v. Williams*, 10 C. C. A. 249, and supplementary thereto, under same title, note to *Mason v. Dullaghan*, 27 C. C. A. 298.

dict was for \$3,000, the full amount of the policy. The case was brought here by said insurance company upon a writ of error. For former report, see 32 C. C. A. 124, 88 Fed. 814.

Mr. J. W. Barker held an accident policy for \$3,000 with the Preferred Accident Insurance Company. It was what is known as a "restricted policy." It insured him solely against the effects of bodily injury caused solely by external, violent, and accidental means. A further clause provided that it did not extend to or cover any cause of disability or death whatever, except where the claimant shall furnish to the company direct and positive proof of such disability or death which resulted proximately and solely from accidental causes. Death by freezing was excepted. Clause 2 of conditions in the policy provides that, "unless direct and positive proof of death or injury and duration of disability shall be furnished to the company within the following limit of time: (1) As to fatal injuries, within two months from the date of death, * * * then all claims based thereon shall be forfeited." Other conditions named in the policy were numerous, but become unimportant under the assignment of errors in this case.

Testimony taken at the trial tended to show that Barker lost his life as follows: Quite early in the morning of the 26th of November, 1896, he went hunting near the Rigolets, and was last seen alive about 7 o'clock in the morning. About 5 o'clock that evening one J. G. Sanford found him dead, standing in mud and water up to between his knees and hips, leaning across his boat, and grasping in his hands bunches of grass that had been growing near the shore. The ducks he had shot, together with the decoys he had been using, his coat, and other property were arranged in the boat. The bow of his boat was resting upon shore. Sanford, who was a tall strong man, lifted him out with considerable difficulty, and placed him in the boat. It was shown that Barker had been in good health, and that he was an experienced hunter. The evidence also showed that the day was very cold; that it had been raining hard; that Barker was a small man, weighing about 120 pounds. There were no marks of violence on the body, and Dr. Fenner testified, from his examination, he came to the conclusion that Barker died from being exposed to the cold weather, etc., as the result of being bogged up, and was unable to extricate himself, and avoid the effects of the cold weather and water.

Hewes T. Gurley, for plaintiff in error.

Solomon Wolff, for defendant in error.

Before McCORMICK, Circuit Judge, and BOARMAN and SWAYNE, District Judges.

SWAYNE, District Judge (after stating the facts as above). At the close of the testimony defendant's counsel moved the court to instruct the jury peremptorily to find a verdict for the defendant on the grounds following:

"First, that the proofs of death were not furnished to the company in accordance with the requirements of the policy, and were not such proofs as were required; second, that the judgment of the court herein on the exceptions acts as res judicata to the effect that these proofs were not sufficient; third, on the ground that it has not been affirmatively or positively shown that the death of J. W. Barker was the result of an accident."

The only assignment of errors brought up in the record is the following:

"The lower court erred in refusing the motion made by defendant, at the close of the testimony, to direct a verdict for the defendant, and refusing such verdict, as fully shown by the reasons and statements contained in bill of exceptions No. 1; and erred in refusing to admit the testimony regarding the citizenship, as shown by the statements contained in bill of exceptions

No. 2,—which bills of exceptions Nos. 1 and 2 are, by reference, made a part of this assignment of errors, as if repeated and copied in full.”

The first question raised by the assignment of errors, under bill of exceptions No. 1, is in reference to furnishing proofs of death to the company in accordance with the requirements of the policy. A careful inspection of the record shows that said proofs were sent and received by the company long before the time had expired in which they should be sent under the terms of the policy. Said proofs consisted of a sworn statement of John G. Sanford, detailing the circumstances under which he found the body of the deceased; the affidavits of the clergyman and the undertaker who officiated at the funeral that they identified the body as that of J. W. Barker; the formal questions and answers propounded to the beneficiary, Harriet Barker, also sworn to; the certificate of the board of health for the parish of Orleans, describing the deceased, stating cause of death to be exposure; and the certificate of Dr. Fenner, assistant coroner, and the certificate of coroner, as to death from exposure. It would be difficult to see how more thorough and satisfactory proofs of death could have been furnished than the above, under the circumstances.

We do not lose sight of the contention of the company, as expressed in its letters, at the trial, and brought up here as one of the principal grounds of defense, that the company must be furnished with direct and positive proof that death resulted proximately and solely from accidental causes. It is admitted that no one witnessed the death of the insured, but there are other evidences than the testimony of eyewitnesses that can properly be considered, and, if the jury find them satisfactory and convincing, they are direct and positive enough to sustain the verdict. The previous good health of the deceased, the condition of the body when found, the depth of mud and water in which he died, the difficulty of removing the body from the bog, the position and contents of the boat, and the character and temperature of the weather, were important facts, properly submitted to the jury, to enable them to determine the issues formed in the case. In this case, as in many others, where the body of the insured is found, and no one has witnessed the death, the circumstances and surroundings are the only evidence that can be produced to determine the cause of the death. Such facts must be submitted to the jury for their consideration, and their finding thereon is final. It would have been grave error for the trial judge to have complied with the request of the defendant below and directed a verdict for it.

The record does not disclose the fact that the ruling of the circuit court upon the exceptions to the first petition was *res judicata*. Said petition was afterwards amended, and there is no plea in the record specially setting up “*res judicata*” as a defense, according to the practice prescribed in the state of Louisiana. Therefore that defense cannot be urged here. The testimony in reference to the citizenship of the parties litigant was not admissible for the same reason. It was not pleaded, and, according to the practice here, evidence could not be admitted at the trial

on that subject. As this disposes of all the questions raised by the assignment of errors, we believe the judgment of the lower court should be affirmed.

WHITE et al. v. INSURANCE CO. OF NEW YORK.

SAME v. GERMAN ALLIANCE INS. CO.

(Circuit Court, D. Rhode Island. March 6, 1899.)

1. INSURANCE—BROKERS—AUTHORITY.

An insurance broker was employed to obtain \$40,000 additional insurance on property which was insured for \$60,000, and thereafter, on being notified that defendants desired to cancel the policies purchased, procured other insurance to be substituted therefor, the policies for which had been mailed, but not received, at the time of the loss. *Held*, that the broker had no authority to increase the total insurance beyond \$100,000, and hence that both sets of policies were not in force at the time of the loss.

2. SAME—POLICIES—ASSURED'S POSSESSION—EFFECT.

Mere possession of policies by assured at the time of loss is not conclusive evidence that they were in force at that time.

3. SAME—BROKER—AGENT OF ASSURED.

The fact that an insurance broker was authorized to procure insurance does not make him the agent of assured to receive notice of cancellation of the policies.

4. SAME—AUTHORITY TO SUBSTITUTE.

An insurance broker was authorized to procure certain insurance, and given discretion in the selection of the companies. At various times previous to the loss, he procured substituted insurance, selecting new companies, without objection from assured. Previous to the loss, defendants notified the broker that they desired to cancel the policies, whereupon he, with knowledge of assured, procured other insurance. The new policies had not been delivered at the time of the loss, nor had assured surrendered the old ones, but he made claim under the substituted policies, and received moneys thereon, and afterwards surrendered the old policies. *Held*, that the substitution was authorized, and that defendants' liability on the old policies had ceased before the loss.

F. W. Tillinghast and W. G. Roelker, for plaintiffs.

E. S. Mansfield, J. M. Ripley, and J. Henshaw, for defendants.

BROWN, District Judge. These are actions on fire policies, and were heard upon evidence, jury trial being waived. Before the loss, the broker who had placed the policies in suit was notified that the defendants desired to cancel the policies. Thereupon the broker contracted for new insurance to replace the old, and notified the defendants' agents thereof. The new policies were issued by other companies before the loss, but were in the mails at the time of the fire, and had not reached the broker or the plaintiffs. The old policies, now in suit, were in the possession of the plaintiffs at the time of the fire. The plaintiffs claim that the policies in suit were in force at the date of the fire, for the reason that no effective notice of cancellation had reached the plaintiffs before the loss. They claim—First, that, at the time of loss, both the original policies and the new policies were in force, and that the liability of the defendants is to contribute to a loss of \$83,000 on the basis of a total of \$127,000 of insurance; second, that if both sets of policies were not in force,

and if the total insurance was but \$100,000, the defendants are liable to contribute on that basis to a loss of \$83,000. It is agreed that the loss on the property was \$83,000.

We will first consider whether both sets of policies were in force at the time of loss. We think that it will appear that, though there may be some difficulty in determining which set of policies shall bear the loss, there is little difficulty in determining that one set of policies only was in force, and not both sets.

The insurance broker, Tillinghast, was authorized to place insurance upon the plaintiffs' mill property to the amount of \$40,000. It is undisputed that he had no authority to exceed this amount. It is also clearly established by the evidence that no act of Tillinghast's was ratified with any intention of increasing the gross amount of insurance. It is agreed that, there being \$60,000 previous insurance, Tillinghast was employed to increase the amount to \$100,000. In the plaintiffs' brief it is said:

"It is true that the parties had not intended that there should have been more than \$100,000 in all on the property, but they had not carried their intentions into legal effect, as they had not taken the proper steps to cancel the policies before the new ones were issued."

The error of the argument advanced to prove the existence of \$127,000 of insurance, in violation of the plaintiffs' instructions and of the acknowledged intent, lies in attempting to separate into two parts what was intended as a single transaction. What Tillinghast assumed to do on behalf of the plaintiffs was to substitute insurance. To effect a substitution, and also to keep within his authority to maintain insurance to the amount of \$40,000, it was essential that Tillinghast should perform two acts which were related and complementary parts of the single complete transaction of substitution. If he took out new insurance without canceling old, or if he canceled old insurance without taking out new, he violated his instructions, and failed to maintain \$40,000 insurance.

The only other possible construction for the plaintiffs on this branch of the case is that though Tillinghast exceeded his original authority, by taking out \$27,000 additional insurance, this was subsequently ratified by the plaintiffs. The complete answer to this is that the plaintiff Oscar H. White, on the witness stand, expressly disclaimed doing so; and there is abundant evidence in his letter to C. B. Shove, dated October 19, 1897, and in his proof of loss to the Insurance Company of the State of New York, that he intended to adopt the broker's complete act of substitution of insurance, including both the cancellation of old policies and the taking out of new.

There is no basis whatever in the evidence for the claim that the plaintiffs intentionally adopted that part of Tillinghast's act which was for their benefit, to wit, the procurement of new policies, and repudiated that part which was to their detriment,—the cancellation of the old policies. If the broker's acts were originally authorized or subsequently ratified, only the new policies were in force. If not authorized or ratified, only the old policies were in force. If it is true that the old insurance was in force, because the policies had not been delivered up by the plaintiffs at the time of the fire, then it is

equally true that the new policies were not in force, because they had not then been accepted by the plaintiffs. If, under the circumstances, there could be a ratification after the loss,—a question which it seems unnecessary to decide in this case,—we should be compelled to apply the rule that, if a principal ratifies that which favors him, he ratifies the whole. *Gaines v. Miller*, 111 U. S. 395, 398, 4 Sup. Ct. 426. If a ratification of the taking out of the new policies was made, that would necessarily be equivalent (under the undisputed evidence) to a ratification of the cancellation of the old insurance. I find, therefore, that, at the date of loss, only \$100,000 of insurance was in force.

The main question in the case, therefore, is: Was Tillinghast authorized, before the fire, to substitute insurance, by taking out new insurance, and canceling old? If he was so authorized, there can be no doubt that a complete substitution of insurance was effected before the loss; since he had placed the new insurance, and given notice thereof to the defendant, long before the fire. The mere possession of the written policies is not conclusive. It is true that the fact that Tillinghast was authorized to procure the insurance did not make him the agent to receive notice of cancellation. *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207. There is, however, in the present case, evidence of a course of dealings which tends to establish the authority of Tillinghast to maintain insurance to the amount of \$40,000, and from time to time to substitute insurance for that originally taken out. I find that Tillinghast was instructed in general terms to procure \$40,000 insurance, and was given full discretion in the selection of the original companies; that he at various times between July 22, 1897, and the date of the fire, August 19, 1897, procured substitutional insurance, selecting the new companies without objection from White, who, upon receipt of the new policies, returned the old to Tillinghast; that on July 24, 1897, Tillinghast, in writing White, requested the return of other policies, saying, "I will send you others to take their places;" that on July 27, 1897, he wrote, "I will have to make another change, when I will send you policies by to-morrow, which I trust will make everything all straight;" that on August 3, 1897, Tillinghast wrote for other policies, saying, "I will send you others to take their places;" that on August 6, 1897, he wrote, "I have replaced all the insurance on both mills now. Please return me at your earliest convenience all the policies you have, except the two I send you to-day." I find from this evidence that Tillinghast was given the same discretion in the selection of new companies as in the selection of the original companies. Though there is no evidence of any authority given in express language to substitute insurance, and though it appears that White in no case surrendered an old policy until after the receipt of a new one, I think that the course of dealings between White and Tillinghast is sufficient evidence that Tillinghast was authorized to make a substitution of policies. The acquiescence of White, and the absence of any protest under circumstances which would have called for a protest had Tillinghast's assumption of authority been unwarranted, are matters deserving special attention. Tillinghast's letter of August 6th con-

veyed the information that the insurance covered by the policies in suit had been replaced; yet it does not appear that White took any steps to repudiate this act in his behalf. Furthermore, White, while on the stand, made no denial that Tillinghast was authorized to substitute insurance, nor did he testify that he exceeded his authority in so doing. We should also consider, as bearing upon the question of original authority, the fact that White adopted the benefits of what the broker did, and made claim under the substituted policies, and received moneys on account thereof. Tillinghast's authority was not questioned by the plaintiffs at the time of the loss. On the contrary, the new policies were accepted, and claim made and payment received thereunder; and the old policies now in suit were surrendered on the 24th of August, about four days after the fire, after the plaintiffs had taken legal and other advice. On the whole evidence, I am of the opinion that, by a preponderance of evidence, it is established that the substitution of new policies for old was duly authorized, and that, before the time of the loss, the liability of the defendants had ceased, through the substitution of other contracts of insurance for those of the policies in suit. If, for any purpose, the parties desire a more specific statement of findings of fact or law, they may within 10 days present requests therefor. Judgment will be for the defendants.

BRANNIGAN et al. v. UNION GOLD-MIN. CO.

(Circuit Court, D. Colorado. March 11, 1899.)

No. 3,827.

DEATH BY WRONGFUL ACT—RIGHT OF ACTION UNDER COLORADO STATUTE—
NONRESIDENT ALIENS.

Nonresident aliens are not entitled to the benefit of the Colorado statute giving a right of action for death by wrongful act to the next of kin of the deceased, and cannot maintain an action thereunder.

On Demurrer to Complaint.

Scott Ashton, for plaintiffs.

Wolcott & Vaile and Charles W. Waterman, for defendant.

HALLETT, District Judge (orally). James Brannigan and Mary B. Brannigan against the Union Gold-Mining Company is an action to recover damages for the death of the plaintiffs' son. Deceased was in the employ of the defendant company, and it is alleged that his death occurred from negligence of the company in respect to the management of the mine while he was in such employment. The action is based upon the statute of the state which gives the right to the father and mother to recover damages in the case of a death occurring through the negligence of the defendant under circumstances shown in the complaint. A demurrer was put in to the complaint upon the ground that it appeared in the complaint that plaintiffs are nonresident aliens, they being citizens and residents of Ireland, in the kingdom of Great Britain. It is not averred that they were ever residents of Colorado, or any part of the United States. In support

of its contention, defendant cited the case of *Deni v. Railway Co.*, 181 Pa. St. 527, 37 Atl. 558. That is a case in which it was ruled that a nonresident alien has no right of action under a statute similar to the statute of this state. I have examined the statute of Pennsylvania, and upon this question it is the same as the statute of Colorado; that is to say, the right of action is given to certain representatives of the deceased generally, and without any statement as to whether they shall be citizens of Pennsylvania or residents of Pennsylvania. In that respect the statute is not different from the statute of the state of Colorado. The reasoning of the court upon the subject is clear and full to the point that such a statute cannot be taken to be for the benefit of people residing in foreign parts. The court says that "No case has been brought to our notice in which an English court has held that a nonresident alien is entitled to the benefits conferred by the act of 1846." The act of 1846 I understand to be Lord Campbell's act, which has been the precedent for all statutes in this country. "The same may be said of the decisions of the courts of our sister states having statutes similar to our own;" that is to say, there is no decision anywhere upon this subject other than that made by this court. Under the circumstances, I see no reason for denying the force and effect of this opinion. It appears to be founded upon good reason, and to be as applicable in Colorado as it is in Pennsylvania.

The plaintiffs' counsel was able to call the attention of the court to the case of *Luke v. Calhoun Co.*, 52 Ala. 118. That case was founded upon an act entitled "An act to suppress murder, lynching, assaults and batteries" (Laws 1868, p. 452), and it appears from the statement of the case—I have not seen the act referred to, but it appears from the statement of the case—that it allowed the surviving parents to recover a penalty of \$5,000 for the death of a son occurring through violence; such recovery to be against the county in which the crime was committed. The court in that case held that nonresident aliens could recover under that act, but the decision appears to have been upon the ground that this was an act to suppress crime and to punish criminal acts; in other words, it was an act under the police power of the state, to preserve the peace and good order of the community. It was an act to protect people living within the several counties of the state in their lives and persons. In that view, an alien residing in the state was as much entitled to protection as a citizen, and it was so held. I do not see that the case is at all similar to the case at bar. The statute of Colorado giving damages under the circumstances detailed in the complaint, and the statute of Pennsylvania as well, upon which the decision reported in 181 Pa. St. and 37 Atl. is based, are not acts for the suppression of crime. They are not acts under the police power of the state. They are acts of benefit to the survivors of persons who suffer death from the negligent acts of others, to give them some compensation for the loss sustained by them in the death of the person injured. So that there is a very full distinction between the Alabama case and the Pennsylvania case.

Counsel also called attention to *McConville v. Howell*, reported

in 17 Fed. 104, a decision which recognized the right of nonresident aliens to inherit property lying in this state. That decision, however, was based upon a statute of the state of Colorado which expressly gives such right of inheritance. In my judgment, the statute referred to has no application to the act relating to personal injuries, and allowing damages therefor. Under the damage act, persons entitled to have damages for the death of any person do not stand in right of inheritance. The statute does not give them the action as heirs or representatives. The moneys recovered are not the estate of the person killed; they are recovered by the individuals named in the statute by force of the statute, and not as a matter of inheritance from the deceased person. So far as I have been able to investigate the question, the rule of interpretation applied to the Pennsylvania statute is applicable to the Colorado statute; and it ought to be said here, as it has been said in Pennsylvania, that nonresident aliens living in foreign lands have no right of action under the statute. The demurrer will be sustained, and the suit dismissed, at the cost of the plaintiffs.

The same order will be entered in No. 3,828, wherein John Fitzpatrick is plaintiff. The facts are the same in each case.

DURANT MIN. CO. v. PERCY CONSOL. MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. March 20, 1899.)

No. 1,116.

1. TRESPASS ON MINING PROPERTY—INTENT—MEASURE OF DAMAGES.

While one who willfully and intentionally takes ore from another's mine is not entitled to deduction from the value thereof for labor bestowed, where the taking was inadvertent, and under an honest mistake as to the ownership of the land, only the value of the property in its original place can be recovered.

2. SAME—BOUNDARY LINE—DISCOVERY—NEGLIGENCE.

Where a trespasser on land of another fails to use ordinary care to ascertain the boundary line between his land and that on which he entered, the jury may infer that the trespass was intentional.

3. SAME—INSTRUCTIONS.

Where the evidence as to defendant's intent in taking ore from another's land adjoining his mine was conflicting, an instruction that, if defendant had been negligent in failing to discover the location of his property, he was estopped to say that the taking was not willful or intentional, was erroneous.

4. REVIEW—ERROR—PRESUMPTION OF PREJUDICE.

An erroneous instruction is presumed to be prejudicial, and is not cured by a correct direction in another part of the charge.

5. SAME.

A general verdict on an erroneous instruction cannot stand, where there are two theories on which the jury might have found it, under one of which the instruction was harmless, while under the other it was error, since error is presumed to be prejudicial, and it cannot be said on which theory the verdict was based.

6. MINES AND MINERALS—EVIDENCE.

In an action for taking ore from another's mine, evidence that an unknown person, after the commencement of the suit, took out ore, was not competent to prove defendant's trespass to have been willful.

In Error to the Circuit Court of the United States for the District of Colorado.

The La Salle and the Stilwell lode mining claims joined each other. The Durant Mining Company, a corporation, the plaintiff in error, and the owner of the Stilwell claim, removed some ore from a stope many hundred feet beneath the surface of the earth, which proved to be on the line between the two claims, so that about 43 per cent. of the ore taken from it was on the La Salle claim. The Percy Consolidated Mining Company, a corporation, and the owner of $\frac{21}{32}$ of the La Salle claim, sued the Durant Company for willfully and intentionally extracting ores from its claim of the value of \$50,000. The Durant Company denied that it had taken any ore belonging to the Percy Company, denied the charge of willful trespass, and alleged that, if it had extracted any ore from the La Salle claim, it had done so inadvertently, and in the honest belief that it was mining on its own ground. On the trial it was conceded that the Durant Company had taken valuable ores from the La Salle claim, but it insisted that it had done so believing that it was its own ore, and the evidence on the question whether the trespass was inadvertent or intentional was so conflicting that it would have sustained a verdict either way. The jury found a general verdict for the defendant in error for \$11,431.25, and the testimony relative to the value of the ores removed disagrees to such an extent that it is not possible to determine from the verdict whether the trespass was willful or innocent. It is the judgment upon this verdict that has been removed by the writ of error.

Charles J. Hughes, Jr., for plaintiff in error.

W. H. Bryant and William O'Brien (C. S. Thomas and H. H. Lee, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). One who unintentionally, and in the honest belief that he is lawfully exercising a right which he has, enters upon the property of another and removes his ore, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, timber, or other thing in its original place, and for no more. He may limit the recovery of the owner by deducting from the value of the ore at the mouth of the shaft the cost of mining and transporting it to that point; and from the value of the timber at the boom, the cost of cutting, hauling, and driving it to that locality. But one who willfully and intentionally takes ores, timber, or other property from the land of another must respond in damages to him for the full value of the property taken, at the time of his conversion of it, without any deduction for the labor bestowed or expense incurred in removing and preparing it for the market. It is the duty of every one to exercise ordinary care to ascertain the boundaries of his own property, and to refrain from injuring the property of others; and a jury may lawfully infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right, and to appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them. *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398; *Benson M. & S. Co. v. Alta M. & S. Co.*, 145 U. S. 428, 12 Sup. Ct. 877; *Cheesman v. Shreeve*, 40 Fed. 787; *Mining Co. v. Turck*, 17 C. C. A. 128, 70 Fed. 294, 301; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561;

King v. Merriman, 38 Minn. 47, 35 N. W. 570; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 86, 89; St. Clair v. Milling Co., 9 Colo. App. 235, 47 Pac. 466; Dyke v. Transit Co. (Sup.) 49 N. Y. Supp. 180; Hartford Iron Min. Co. v. Cambria Min. Co., 93 Mich. 90, 53 N. W. 4; Warrior Coal & Coke Co. v. Mabel Min. Co., 112 Ala. 624, 20 South. 918; Ross v. Scott, 15 Lea, 479; Hilton v. Woods, L. R. 4 Eq. 441; Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. 925; United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045.

No controversy has arisen over these principles. They are stated to call to mind the rules by which the questions presented must be answered. The complaint here is that the court below went further, and instructed the jury that, if the plaintiff in error was guilty of negligence in discovering the line between its claim and that of the defendant in error, they not only might, but must, find that its trespass was willful and intentional. The portion of the charge against which this criticism is leveled reads in this way:

"In addition to what I said on the subject of knowledge, if there was a lack of diligence on the part of the defendant company in ascertaining the location of the line, upon that you may say— That is, if there was negligence in ascertaining the fact, you may say they should be charged with the value of the ore at the mouth of the pit, without reference to the cost of mining and transporting to that place. It is the duty of one who carries on work in his own territory to ascertain the location of his lines. That duty is so strong upon him, if he fails in that respect he is not at liberty to say that he was negligent, or that it was not willful or intentional, and therefore he ought not to be charged more heavily than would be the case if he had exercised proper care and diligence to ascertain where his line is."

Now every trespass upon the land of another that is not willful and intentional necessarily implies some degree of negligence (Coal Co. v. McMillan, 49 Md. 549, 559); and a rule which makes the negligent failure to discover the line of the property trespassed upon conclusive evidence of intentional trespass removes all room for the defense of inadvertence and honest mistake. The logical and necessary effect of that portion of the charge of the court which we have quoted was to deprive the trespasser of the defense that its acts were unintentional and innocent. It declared that the mere failure to ascertain the true line between the claim of the Durant Company and that of the Percy Company was the legal equivalent of knowledge of that line, and of willful intent to cross it, and was conclusive proof of a willful and intentional trespass. If this were a true statement of the law, there never could be an inadvertent and unintentional trespass, for the essential attribute of such a trespass is an innocent failure to know the true line. If there can be no innocent failure, if every failure to find the line is evidence of a willful and intentional trespass, then every trespasser is guilty of a willful trespass, and liable for the full value of the property which he takes, at the time of its conversion, without any deduction for the cost of removing and preparing it for the market. But this is not the law. The only issue in this case, aside from that which arose from the varying estimates of the amount of ore taken, and of the cost of mining it, was whether the taking was willful or inadvertent. This was an issue upon which, under the rules and authorities to which we have referred, the de-

fendant in error was entitled to the finding of the jury. The testimony upon it was voluminous and conflicting, and the effect of the charge was to entirely withdraw it from the consideration of the jury. We are unable to escape from the conclusion that this was a serious error. It is probable that the mistake in this charge arose from the inadvertent application of the rule relative to the ascertainment of the line between properties in actions of trespass or ejectment, in which the lowest measure of damages only is sought, and therefore intent is not material, to this case, in which a higher measure is sought, and the intent became the chief element of the controversy. Where no claim is made for larger damages than the value of the ore or other property taken, in its original place, it is of no importance whether or not the trespass was mistaken. It is no defense in such a case that the defendant carelessly or otherwise failed to discover his line. He is liable for the lowest measure of damages in any event, whether he knew where his line was or not, and whether his trespass was willful or innocent. In such a case the charge here criticised would not have been improper. *Maye v. Yappen*, 23 Cal. 306, 307. But in the case at bar it erroneously withdrew the chief defense in mitigation of damages which the plaintiff in error had interposed, and upon which it was entitled to the verdict of the jury.

It is contended that this error is cured because in other portions of the charge the court submitted to the jury the question whether the trespass was willful or inadvertent, and instructed them that their decision of this question would determine whether, in estimating the damages, the cost of mining and transporting the ore should be deducted from its value at the mouth of the shaft. There are two answers to this argument: In the first place, the court had already told them that they must find that the trespass was willful, since it had informed them that, if the plaintiff in error had failed to discover its line, it could not be heard to say that its trespass was not willful, and it was conceded on the trial that it had failed to find the true line; and, in the second place, if this had not been so, the two portions of the charge would have been inconsistent and contradictory, and it would be impossible to determine which the jury followed. The presumption is that error produces prejudice, and the vice of an erroneous instruction is not extracted by a correct direction upon the same subject in another part of the charge. *Railway Co. v. Needham*, 3 C. C. A. 129, 147, 52 Fed. 371, and 10 U. S. App. 339.

It is said that the error probably produced no prejudice, because there is sufficient evidence to sustain the verdict on the theory that the trespass was not intentional. But, on the other hand, there is ample evidence to sustain it on the ground that the trespass was willful. The verdict is general, and we cannot tell on which basis it was rendered. A general verdict on an erroneous instruction cannot stand, where there were two theories on which the jury might have found it, and under one of which the instruction was harmless, while under the other it was error, because the presumption from error is prejudice, and the court cannot say upon which theory the verdict stands. *Lyon, Potter & Co. v. First Nat. Bank*, 29 C. C. A. 45, 85 Fed. 120, and 55 U. S. App. 747, 757; *Coal Co. v. Johnson*, 6 C. C. A.

148, 56 Fed. 810, and 12 U. S. App. 490, 495; *Railway Co. v. Needham*, 11 C. C. A. 56, 63 Fed. 107, and 27 U. S. App. 227, 237.

The conclusion at which we have arrived renders it unnecessary to consider the other assignments of error in this case. We may remark, however, for the guidance of the court below in the subsequent trial of this case, that the evidence that some ore was taken from the La Salle mine by some unknown person at some time after the commencement of this suit does not appear to us to be competent evidence of the evil intent of the plaintiff in error in committing the trespass charged in the complaint.

There was no error, in our opinion, in refusing to instruct the jury to deduct from the value of the ore the expense of running the cross-cuts or the tunnel in order to reach it. The judgment is reversed, and the case is remanded to the court below with instructions to grant a new trial.

UNITED STATES v. DAVENPORT et al.

(Circuit Court, D. Connecticut. March 28, 1899.)

No. 410.

OFFICERS—ACTION AGAINST BONDSMEN—PLEADING.

Where a complaint against the bondsmen of a public officer for overcharge and unlawful expenditure sets out fully the items thereof, averments as to an adjustment of his accounts by his official superior, whereby a certain sum was found due, and a reference to the account as stated by such superior, and his reports in relation thereto, on file in court, will be stricken out.

Action by the United States against Theodore Davenport and others. Defendants move to strike out part of the complaint.

C. W. Comstock, for the United States.

H. Stoddard, for defendants.

TOWNSEND, District Judge. This is an action brought by the United States to recover \$5,000, damages from the bondsmen of one Theodore Davenport, on account of alleged breaches of duty by him while acting as superintendent of post-office buildings and disbursing clerk of the United States. The breaches of duty alleged consisted in unlawful expenses and overcharges for salaries, fuel, furniture, painting, and miscellaneous items. Paragraphs 12 and 13 of the complaint are as follows:

"(12) The said defendant Theodore Davenport did, during the term of his said office as superintendent of departmental buildings and disbursing clerk, receive from the plaintiff, and did overcharge, and unlawfully, and without authority or right, and in violation of the said writing obligatory, and the conditions thereof, as set forth in paragraph one of this complaint, of the moneys of the plaintiff, expend, overcharge, withhold, and unlawfully keep and retain from the plaintiff, on account of sale of old material, in 1891, \$24, and on account of miscellaneous expenditures and items prior to the sixth day of March, in the year 1893, \$34, as by the reports of the first comptroller of the treasury numbers 300,141, 65,438, 65,523, 65,524, 65,471, 65,302, 65,503, 65,521, 1,811½, 66,969, which are filed in court with this complaint, and made a part thereof, it fully appears; said sums amounting, in all, to \$3,810.51.

"(13) After the expiration of the term of office of the defendant Theodore Davenport, and prior to the commencement of this action, the accounts of the said Davenport, as such departmental buildings and disbursing clerk, were adjusted according to law by the first comptroller of the treasury, and the said comptroller, as on said reports mentioned in paragraph 12 of this complaint and filed herewith it appears, found and reported a balance due from the defendant Theodore Davenport to the plaintiff in the said sum of \$3,810.51."

The defendants move to strike out that portion of paragraph 12 which states, "as by the reports of the first comptroller of the treasury numbers 300,141, 65,438, 65,523, 65,524, 65,471, 65,302, 65,503, 65,521, 1,811½, 66,969, which are filed in court with this complaint, and made a part thereof, it fully appears," and all of paragraph 13, and the alleged reports referred to therein, because the allegations therein are incompetent, irrelevant, immaterial, and hearsay, and contain no statement of a relevant or issuable fact; and, further, to strike out the reference to said alleged reports in paragraph 14, and the exhibit containing the same filed as part of said complaint; and they also specify a large number of letters and papers therein which they wish to have stricken out. The papers, taken as a whole, comprise a recommendation by the comptroller to the postmaster general that there be an investigation of Davenport's accounts; a mass of papers, accounts, and correspondence; a report by the register to the comptroller indicating a balance due of \$3,810.51; and a certificate of the acting register that said papers contain the final adjustment of the account of said Davenport. The items making up said total amount of \$3,810.51 are each and all contained in paragraphs 5, 6, 7, 8, 9, 10, 11, and the first part of paragraph 12, of the complaint. The object of said complaint is to inform the defendants of the charges against them, and to show what matters are disposed of by final judgment. It is clear that the collection of papers contained in this exhibit, taken as a whole, are not a proper part of the complaint. The question of their admissibility in evidence has been much discussed in the briefs of counsel. While the character of many of them is such that it is difficult to conceive on what theory they could be offered in evidence, it is unnecessary to pass upon that question in disposing of this motion. The motion to strike out is granted.

HOFFMANN et al. v. MAYAUD et al.

(Circuit Court of Appeals, Seventh Circuit. March 28, 1899.)

No. 539.

1. APPEAL—RECORD—REVIEW—EXCLUSION OF EVIDENCE.

The rule, in force when this case was tried, that the substance of excluded answers must appear in the record, did not apply where the witness testified in person; and the exclusion of an answer will be deemed error or not, according as the question upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose favor it is propounded.

2. GUARANTY—EVIDENCE—CONCLUSIONS.

In an action on a guaranty the guarantors cannot state their individual understanding whether an acceptance of the guaranty was conditional, and whether an extension of credit had been given in pursuance thereof.

3. SAME—BEST EVIDENCE.

A guaranty read, "In consideration of your extending credit to" a company which already owed the guarantee, and which had given further orders for goods, "we hereby personally guaranty the payment of all bills contracted by" the company. *Held*, in an action thereon, that the guarantors could not state what was the consideration of the guaranty, and what moved them to sign it.

4. SAME—PAROL EVIDENCE.

They might, however, state the conversations they held with the person who procured the guaranty, in reference to giving it, so far as what was said was relevant, and consistent with the writing. This was especially so where such person had written the guarantee that he had secured a guaranty of "the sum due and to become due," and his letter had been admitted against the guarantors.

5. SAME.

To show what was a reasonable extension of credit as to the past-due debt, it was not inconsistent with the writing to prove that at the time it was executed it was agreed that the debtor company was to pay about 1 per cent. of the debt per month, and as much more as it could, and that it was not to be pressed for more during the current year.

6. CONSTRUCTION OF CONTRACT.

The guaranty contemplated an extension of credit as to the past-due debt at most for a reasonable time, and such extension was not unreasonable, especially where the creditor justly disfavored the company as a debtor, and the proffered guaranty was unquestionably ample.

7. SAME—AGENCY.

The fact that such extension differed from the agreement mentioned in the letter of the person who procured the guaranty was immaterial, as against the guarantors, since such person was the agent of the guarantee, who was bound by the agent's knowledge.

8. SAME—ACCEPTANCE—PERFORMANCE.

In consideration of a desired extension of credit to a company which already owed the guarantees, and which had given further orders for goods, a guaranty was proffered, in February, by managers of the company individually, to secure payment of the bills contracted by the company. Before this, the company had agreed to pay a certain sum monthly, and as much more as possible. In March the guarantees wrote the company, without mentioning the guaranty, and insisting on a large remittance in addition to the monthly sum, and stating that they could neither increase nor maintain the account. In reply the company urged the guarantees to fill the pending orders, calling attention to the guaranty, and promising to reduce the indebtedness. In April the guarantees wrote, again without mentioning the guaranty, and stating that they would forward such of the goods as were ready, in consideration of the promise to reduce the indebtedness. In August the guarantees again wrote, complaining that nothing besides the monthly drafts had been paid, and urging a large remittance in September, and the balance in December, and stating that the unfilled orders would not be sent before the receipt of a large remittance. In reply the company asked further indulgence, and directed that the orders be canceled if the goods were not to be shipped "at present." The guarantees answered in September, stating that it was impossible to increase or maintain the account. At this time the debt was less than when the guaranty was proffered. *Held*, that the guarantees did not accept the guaranty as a matter of law, and so perform the consideration therefor, by extending credit, as to be entitled to sue thereon.

9. SAME—MODIFICATION OF CONTRACT.

By the correspondence no modified arrangement was made by which the creditors were to ship the goods in August only on condition that such shipment would not increase the account, and on condition that in the meantime a substantial payment should be made.

10. SAME—CONSIDERATION.

Forbearance without an agreement on the part of the creditor to forbear is not a sufficient consideration for a guaranty of the debt.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

This action was brought by the defendants in error, Louis Mayaud and Theophile Hunte, citizens of France, and co-partners in business at Paris under the firm name of Mayaud Freres, against the plaintiffs in error, Joseph C. Hoffmann and Bernard Hoffmann, citizens and residents of Wisconsin. The action is upon a contract of guaranty. It is alleged in the declaration: That between July 1, 1893, and December 31, 1895, the plaintiffs sold and delivered to the Hoffmann Bros. Company "religious goods and articles" to the amount and value of 135,549.65 francs, of which there remained due on the last named date 95,492.40 francs. That subsequently the plaintiffs refused to extend the time of payment, or to give further credit, unless guarantied payment for goods sold and to be sold; and thereafter, on February 24, 1896, "to induce the plaintiffs to extend credit upon future sales to said Hoffmann Bros. Company, and to extend the credit upon the goods theretofore sold and delivered to said Hoffmann Bros. Company, the said defendants, Joseph C. Hoffmann and Bernard Hoffmann, who were the managers and principal stockholders of said company, did personally guaranty, in writing, the payment of all bills contracted by said Hoffmann Bros. Company for goods theretofore and thereafter sold and delivered by these plaintiffs to said Hoffmann Bros. Company, which contract of guaranty was in the words and figures as follows, to wit:

"Milwaukee, Wisconsin, Feb. 24, 1896.

"Messrs. Mayaud Freres, Paris, France—Gentlemen: In consideration of your extending credit to Hoffmann Bros. Company, we hereby personally guaranty the payment of all bills contracted by Hoffmann Bros. Company.

"[Signed]

Joseph C. Hoffmann.

"Bernard Hoffmann."

It is further alleged that, relying upon the guaranty, the plaintiffs "extended credit or time of payment of all bills for goods theretofore sold and delivered to said Hoffmann Bros. Company, and extended the credit or time of bills for goods thereafter sold and delivered by them to said Hoffmann Bros. Company"; that between February 24, 1896, and September 23, 1896, the Hoffmann Bros. Company made payments to the plaintiffs on account, and the plaintiffs, relying upon the guaranty, made further sales of goods to the company, as set out in an exhibit attached to the declaration, "so that on October 1, 1896, said Hoffmann Bros. Company was indebted to the plaintiffs for goods sold and delivered * * * in the sum of 94,425.40 francs," for which sum, with interest, judgment is demanded. The answer of Joseph C. Hoffmann contains a general denial of the averments of the declaration, and that of Bernard Hoffmann is, in substance, the same. Each party, at the close of the trial, moved for a peremptory instruction. The court sustained the motion of the plaintiffs, and accordingly a verdict was returned and judgment entered for the plaintiffs in the sum of \$18,119.21 with costs. Error is assigned upon this instruction of the court, and also upon the exclusion of evidence. The contention of the appellants is that the defendants in error did not accept, nor give notice of their acceptance of, the guaranty, and did not perform the consideration thereof by giving new credit to Hoffmann Bros. Company, or by extending the time for the payment of the accrued indebtedness of that company. The evidence, which it is important to consider, consists mainly of correspondence subsequent to the execution of the guaranty, and presents no conflict. The inferences to be drawn from it are disputed.

A letter from Hoffmann Bros. Company to the plaintiffs, dated January 10, 1896, contained the following postscript: "We think you better make a draft on us each month anyway for frs. 1,000. Make the drafts payable at ten days' sight, and send them on regularly, and we will pay them as they come; and, besides, we will send you remittances as best we can." By a letter of January

31, 1896, Hoffmann Bros. Company canceled all prior orders, and sent a new order for goods to the approximate value of 2,328.10 francs. The contract of guaranty was delivered on the day of its date to Alfred Beck, a traveling salesman of the plaintiffs, whose habit it was to make annual visits to customers, and who, in this instance, had arrived at Milwaukee as early as February 20, 1896, and on that day had received from Hoffmann Bros. Company an order for goods to the amount of \$2,500. In a letter of February 28, 1896, Beck wrote to his employers as follows: "You will find inclosed herewith the two orders from Milwaukee, nine and ten, and the accounts. I secured a guaranty from the two Hoffmann brothers of the sum due and to become due in the future from the company, Hoffmann Bros. Joseph Hoffmann is worth individually \$200,000 and the other \$150,000, and there is no danger whatever for our money, but they cannot make any remittance at the present moment, —'voilà le maheur,'—they cannot pay at this moment. If affairs shape themselves with this individual so that he can, when he returns he will pay us between now and the month of July. Let us hope that matters will arrange themselves thus. He has paid the first draft of 1,000 francs on the 24th of February." On March 17, 1896, the plaintiffs wrote to "Hoffmann Brothers, Milwaukee," as follows: "We have just received the order you kindly gave to our representative when he called upon you recently. We must let you know, before putting in hand this order, that, although it is our intent to favor you, and give all satisfaction, that our financial state would not allow us neither to increase nor maintain the uncovered balance of your account. Be sure, gentlemen, it is not the fear towards your debt which cause this matter, but the necessity in which we are to make the due entry of our accounts for the needs of our industry, and so avoid that the welfare of our trade does not suffer on account of that. We beg you eagerly to cover us, in order that your shipments be dispatched in time required, and favor us, besides the draft of frs. 1,000 we draw on you monthly, with a remittance on account of frs. 20,000 at least. We hope that you would appreciate the equity with our request, and grant it, what we thank you very much beforehand. Waiting for your answer, we beg to remain." On April 11, 1896, Hoffmann Bros. Company answered as follows: "We beg to acknowledge receipt of your letter of the 17th ult., and we regret very much that you have taken this stand. As we have informed Mr. Beck, we will do our utmost to reduce the old account, and we will not increase it, as you seem to think. If it was not reduced during the past year, it was due to the condition of business in this country, which made it impossible for us to do so. But we have every hope that things will improve soon, and our first endeavor will be to pay you up. We are doing our best to accomplish this, and we are sure that you will be satisfied, as we will send you remittances to reduce the old account besides the monthly drafts you are now making. It is impossible for us to send anything at the present time yet, as most of our customers do not make any remittances until after Easter, and we expect now that we will soon receive enough to send you remittances regularly. We hope, therefore, that you will reconsider your decision not to fill the order given Mr. Beck, as we would only be compelled to order goods from other manufacturers, and we would not like to do this, for the reason that we consider it our duty to place all orders with you. You can readily see this, as we must have goods in order to do business, and without these goods we simply could do nothing at all. If, therefore, you should not fill this order we gave, we would be no better off financially, and would have to get our other manufacturers besides, which would only complicate matters more. We hope, therefore, that you will consider these things, and fill this order for us. We positively promise you that we will not increase the amount of our indebtedness, and will, in addition, reduce the old account all we can. In order to satisfy you, and to show that we intend to do all we can, we gave Mr. Beck a guaranty to absolutely protect you, and to induce you to furnish us such goods as we might need. You will also see that we have ordered only such goods as we actually needed, and only in small quantities. Please let us hear from you, therefore, by return of mail, so that we may be sure of getting these goods for fall. In the meantime we beg to accept our thanks for the favors and the consideration shown us in the past, and we hope that you will extend the same to us for the future also. Awaiting an early reply." On April 28,

1896, the plaintiffs responded as follows: "Your favor dated 11th inst. came duly to hand. With regard to the express promise you make to send us next remittances besides the monthly drafts, we forward you the goods ready on your order of January 13th, and we put in hand the one you gave to our representative, Mr. Beck. We hope to send it towards the beginning of August. * * * Hoping to hear from you shortly, we remain." Again, on August 7, 1896, they wrote: "The month of July is over, and you did not send remittances in spite of the promises you positively stated in the contents in your last letters. We regret very much you take this stand to settle the due bills, because we are just now in a great embarrassment, and get to our credit on the spot, being compelled to borrow to our bankers when we have ever been obliged to do so. We have lately inform them that we shall reimburse ourselves in August, and therefore we are at a loss on account of your indebtedness. We cannot wait any longer, and beg you earnestly to be able to send us 50,000 frs. within the end of September, and the balance of your account in December prox. Hoping that you will understand these reasons, and waiting to hear from you, we beg to remain. * * * P. S. We hurry on orders given by your favor of the 25th ult., but we will not send any goods before you send us a very large remittance." On August 22, 1896, Hoffmann Bros. Company answered: "Gentlemen: Your letter of the 7th inst. has just been received. We are very sorry that we have been unable to send you any remittance beyond the drafts we have paid up to now, but it was simply impossible for us to do so, as the present financial condition of affairs is such in our country that money is simply not to be had. We have large amounts outstanding, and could easily send you the entire amount of our indebtedness if we could but succeed in getting our money from our customers, but we cannot get it, although we have tried everything, and as a result we have been unable to meet our promises to you. We therefore ask you to kindly have a little patience with us, and we will do our best to pay up just as soon as we can possibly manage to do so. We are sorry to learn from your letter that you do not wish to ship any goods until you have received a large remittance from us. This would result in great loss to us, as we would be unable to fill orders we have taken for some of these articles, and we hope you will reconsider this, and ship the goods ordered, if you have not yet done so. If, however, you decide not to ship these goods at present, we would request you to kindly cancel the order given Mr. Beck entirely, as it would be of no use to us to receive these goods after the fall season is over, for the reason that we would then be obliged to hold the goods over until spring. We hope, however, as we have stated above, that you will ship our order, as we would very much like to have these goods for our fall trade, and especially as the bill of goods is not very large, on account of our having ordered only what we absolutely needed. Kindly let us know by return what decision you have come to, and, if you will ship the goods, please do so at once, as it is even now very late for them to come here. Awaiting your kind early reply." On September 18, 1896, the plaintiffs replied: "Dear Sirs: Your favor dated 22nd of August, came duly to hand. We regret very much to say that we can but to confirm the terms of our letter of the 7th same month. We repeat again, we cannot, and it is quite impossible for us to increase, and even to maintain, the actual outstanding debt, because our resources would not allow us to do this. We hope that you understand the reasons which compel us to write you again, and we are certain that you will do all it is in your power to reduce your account. * * * Hoping to hear from you shortly, we beg to remain." On September 23, 1896, a creditors' bill was brought against Hoffmann Bros. Company in the circuit court of Milwaukee county, and a receiver appointed, and in that proceeding a dividend of \$1,248.31 was paid to the plaintiffs, leaving \$17,492.96, with interest from May 4, 1897, due them.

During the progress of the trial below the court refused to permit the defendants, each, when testifying in their own behalf, to answer a number of interrogatories, one of which was the following: "Q. What conversation did you have with Mr. Beck in reference to the giving of this guaranty by yourself and your brother? Please state fully all the conversation, and all the circumstances connected therewith." In the specification of error it is stated that the witness was expected to answer that question as follows: "That Mr.

Beck came to the city of Milwaukee in February, 1896, and stated that the plaintiffs were not satisfied with the condition of their account against Hoffmann Bros. Company; that they did not like to deal with corporations, but, if Joseph Hoffmann and Bernard Hoffmann would guaranty the indebtedness to be incurred by Hoffmann Bros. Company, the plaintiffs would fill and ship promptly the order given at the time the guaranty was given by the Hoffmann brothers, and would fill all further orders given by Hoffmann Bros. Company in the usual course of business promptly; that a remittance of 1,000 francs should be made monthly, and that Hoffmann Bros. Company should make such remittances as they might be able to do, but in no event were the plaintiffs to press the Hoffmann Bros. Company for a larger remittance than the 1,000 francs monthly during the year 1896; that, relying on Mr. Beck's agreement that the plaintiffs would do as stated above, the guaranty was executed by the Hoffmann brothers, and delivered to Mr. Beck, with the order for goods, which was accepted by Mr. Beck as a part of the agreement of the guaranty."

The brief for the defendants in error concludes as follows: "On February 24, 1896, when the guaranty was written, Hoffmann Bros. Company had already (1) contracted bills for 93,792.50 francs which were past due; (2) had given an order for goods in January for 2,328.10 francs, which had not yet been accepted; (3) had given an order at the same date as the guaranty for goods to be manufactured and shipped the following August, which had not yet been accepted. The matter was thus in fact submitted to Mr. Beck. It was a mere 'projet' until ratified by Mayaud Freres. When the matter was submitted to Mayaud Freres, they were not satisfied with the arrangement, and on March 17, 1896, write Hoffmann Bros. Company, 'That our financial state would not allow us neither to increase nor maintain the uncovered balance of your account,' and that they will not ship the January order, or start the manufacture of the February order, unless they received a remittance of 20,000 francs. Upon receiving this letter, Joseph C. Hoffmann, one of the guarantors, on April 11, 1896, with the knowledge and consent of his co-surety, Bernard Hoffmann, writes a letter in the name of the company to Mayaud Freres, and suggests a modification on their part of the arrangement, and agree that they will, in the near future, make a substantial remittance, and agree to the proposition of Mayaud Freres that in no event shall the account be increased. What the contract was between the parties is thus shown in these letters. If, on February 24, 1896, it had been the intention of the parties that the words 'extending credit' should mean that Mayaud Freres would unconditionally ship the goods ordered in February, the correspondence shows that this arrangement, by agreement of all the parties, including the two sureties, was modified so that Mayaud Freres agreed to ship the goods in August only on condition that such shipment would not increase the account, and on condition that in the meantime a substantial payment would be made. The correspondence thus shows the consideration of the guaranty to have been the extension of the time of payment of the 95,000 francs past-due bills, the sale on credit of the January order, and a further additional agreement to ship in August the goods ordered in February, if, in the meantime, a substantial remittance were made, and that such shipment would not increase the account. The substantial remittance and the agreement not to increase the account were conditions precedent to be performed before Mayaud Freres were obliged to ship the goods. Upon the failure of Hoffmann Bros. Company to perform these conditions precedent, Mayaud Freres were released from making the shipment."

J. F. Trottman, for plaintiffs in error.

George P. Miller, for defendants in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The refusal of the court to permit the witnesses to answer the questions propounded, it is urged, on the opinion of this court in U. S.

v. Indian Grave Drainage Dist., 57 U. S. App. 417, 29 C. C. A. 578, and 85 Fed. 928, is not reviewable, because it is not shown by the bill of exceptions that the court below was informed what response the witnesses were expected to make; but, while our view of the better practice was stated in that opinion, the decision turned upon other considerations. Our rule on the subject being then the same as that of the supreme court, we could not reasonably have enforced an interpretation or construction different from that declared by the supreme court in *Buckstaff v. Russell & Co.*, 151 U. S. 626, 14 Sup. Ct. 448. The rule had not been changed when this case was tried. By a revision of our rules adopted February 10, 1899, rule 11 was so amended as to require that, "when the evidence rejected is oral testimony a written statement of the substance of what the witness was expected to testify shall be filed and brought to the attention of the court before the retirement of the jury." We have no doubt that the interrogatories by which the plaintiffs in error were required to state their individual understanding, belief, or conclusion whether an acceptance of the guaranty was conditional, whether an extension of credit had been given in pursuance of the guaranty, what was the consideration of the guaranty, what consideration moved them to sign the guaranty, and the like, were properly overruled; but when they were asked what conversations they had with Beck in reference to the giving of the guaranty they should have been allowed, we think, to answer anything relevant, and not inconsistent with the terms and meaning of the written guaranty. On its face that writing is indefinite and uncertain, and besides the proof of the previous dealings and existing relations of the parties, admitted in order to make out their intention, it was competent for the same purpose, so far as it could be done consistently with the writing, to show their negotiations and contemporaneous declarations. The agent, Beck, went beyond the terms of the instrument when he wrote to his principals that he had secured a guaranty of "the sum due and to become due." He simply stated his conclusion, and, if that letter was competent evidence in behalf of the plaintiffs, as we think it was, because it contained the information on which they were to determine whether they would accept the proffered guaranty and incur the resulting obligation "to extend credit," it was more clearly competent for the defendants to show the actual conversations which were had, and on which, presumably, Beck's conclusion was based. Even when, on the evidence admitted, it was clear that a large commercial debt had been incurred, and that further purchases of goods on credit were contemplated, it was still uncertain, except as stated in Beck's letter, whether the time for payment of the existing indebtedness was to be enlarged, and, if so, for how long a time; and, after determining that the existing debt was to be carried, as well as more goods sold, the most that could be said of the agreement was that the extension should be for a reasonable time. Of what would have been a reasonable time what better evidence could there be than the oral declarations or agreements of the parties at the time of the execution of the imperfect writing? The proof offered that the debtor company was to pay 1,000 francs per month, and as much in addition as it could,

but was not to be pressed for more during the year 1896, would have contradicted no term of the written agreement, and, under the circumstances, could hardly be thought to have been unreasonable, especially in view of the creditor's just disfavor of the corporation as a debtor, and the unquestioned and ample sufficiency of the proffered guaranty. If it be suggested that such proof would have shown a guaranty on terms different from those stated in Beck's letter, the sufficient answer is that the plaintiffs alone should suffer for the failure of their agent to furnish them full information. By a familiar rule of agency, if they chose to accept the guaranty so procured for them, they were bound by the acts, declarations, or knowledge of their representative in the premises, as if their own, whether known to them or not.

This brings us to the inquiry whether the evidence shows beyond question that the plaintiffs did in fact accept the guaranty, and so perform the consideration therefor, by "extending credit," as to be entitled to maintain this action. It is not important to enter at large into the distinction between contracts of guaranty which, in order to become mutually binding, must have been accepted, and those which, from the beginning, are unconditional. Like other contracts, a guaranty requires the concurrent assent of the minds of the parties; and, as the doctrine has been applied by the supreme court of the United States, proof of acceptance by the guarantee, or of notice thereof to the guarantor, is required, because "deemed essential to an inception of the contract." It is so declared in *Davis v. Wells*, 104 U. S. 159, where the following language, employed in *Manufacturing Co. v. Welch*, 10 How. 461, 475, is reaffirmed: "He [the guarantor] has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases. It is deemed essential to an inception of the contract." The contract under consideration, it is evident, did not take effect upon delivery to Beck. It is not shown, nor to be presumed, that he had authority to accept it. In his hands, to quote the brief for defendant in error, "it was a mere 'projet' until ratified by Mayaud Freres"; and it does not appear that he sent to them the writing, or a copy of it. They knew simply what he wrote them, and on that information, it is conceded, they were not satisfied with the arrangement, and on March 17, 1896, wrote Hoffmann Bros. Company the letter of that date. The letter contained no mention of the guaranty, and, if any inference on the point is to be drawn, it is of repudiation rather than of acceptance. The proper course for the guarantees would have been to write to the guarantors individually, informing them whether the guaranty had been or would be accepted and acted upon. But the guarantors are shown to have been in charge of the business of the corporation, and to have conducted or known of the correspondence, and if, in the letter addressed to the corporation, it had been stated that the guaranty had been received and accepted, it would, of course, have been equivalent to a like statement to the guarantors directly. The plaintiffs not only did not accept the guaranty, or approve the arrangement made and reported by Beck; they insisted upon a remittance of

20,000 francs in addition to the 1,000 francs promised in the letter of January 10th to be sent monthly, and declared themselves under a necessity "neither to increase nor maintain the uncovered balance" of the account. To this the corporation responded by its letter of April 11th, regretting the stand taken, declaring its inability to make present remittances, and urging upon the plaintiffs, by promising not to increase the indebtedness, by reference to the guaranty, and on other grounds, to reconsider their decision, and "to fill the order given Mr. Beck." That order was in addition to the order of January 31st, which yet remained unfilled. In their reply, by the letter of April 28th, the plaintiffs omitted again to mention the guaranty, or in any way to signify their acceptance of it, but declared their purpose to forward "the goods ready" on the order of January 13th, and "to put in hand" the order given to Mr. Beck. Their determination to do so was not stated to be in consideration of the guaranty, but "with regard to the express promise" of the debtor to send "next remittances besides the monthly drafts." About one-half only of the goods covered by the January order were forwarded, and whether the order sent by Beck was put in hand does not appear. No goods were sent upon it. In the account filed with the declaration, credit is given for eight monthly payments of 1,000 francs, ending with the month of August, 1896, and, additional credit for goods having been given only to the amount of 1,000 francs, it follows that there had been no increase, but a considerable reduction, of the debt when the letter of August 7, 1896, was written, complaining that remittances (beyond the monthly drafts) had not been forwarded, and urging that 50,000 francs be sent them "within the end of September, and the balance of the account in December prox." Other than this, there is to be found in the entire correspondence no promise, or ground for inferring a promise or intention, to extend credit, or give further time for the payment of the existing indebtedness; and, even if this expression could be considered to be such a promise, it was not pretended to be made with reference to the guaranty, or, indeed, upon any consideration. That a definite extension of the time for the payment of the 50,000 francs mentioned was not intended is shown by the notice given in the postscript that no goods would be sent before receipt of "a very large remittance." To this Hoffmann Bros. Company replied on August 22d, begging further indulgence, and urging that the goods ordered be shipped, but directing that the order be canceled if they decided not to ship "at present." The plaintiffs responded on September 18th that they could only confirm the terms of their letter of August 7th, and repeat that it was quite impossible for them "to increase, and even to maintain, the actual outstanding debt"; but before that letter could have reached Milwaukee the possibility of further negotiations ended with the filing of the creditors' bill. The guarantors had knowledge of this correspondence, conducted it on one side, and, of course, are bound by it; but the assertion in the brief that it shows a modified arrangement between the parties, by which "Mayaud Freres agreed to ship the goods in August only on condition that such shipment would not increase the account, and on condition that in the meantime a

substantial payment should be made," is not justified. On the contrary, persistent disagreement at every step of the correspondence is evident. The most that can be said is that Mayaud Freres offered to make further shipments, but upon conditions never assented to by the Hoffmann Bros. Company. If, however, the alleged new or modified arrangement were conceded to be deducible from these letters, or any of them, it could be of no effect upon this controversy unless made on the faith of the guaranty, and of that there is no direct evidence, and, if any from which an inference of acceptance could be drawn, certainly not enough to warrant a withdrawal of the question from the jury. The complaint shows that the guaranty was given to induce the plaintiffs "to extend credit upon" and to secure to them payment of "bills contracted * * * for goods theretofore and thereafter sold." After the agreement was made, the plaintiffs, as already stated, gave further credit for goods sold to the amount of 1,000 francs only. They received monthly payments to the amount of 7,000 francs. The debt was drawing interest meanwhile at the rate of 5 per cent. There had been, therefore, no actual increase of indebtedness above the amount due at the date of the guaranty. At that date the debtor was already insolvent, as the guarantors probably knew, and unable to continue in business, unless helped out of its difficulties; and for that purpose, being themselves possessed of large wealth, and amply responsible, they consented to give the guaranty. Instead of the credit expected and necessary to keep the company in business, the small additional shipment of goods was made as stated, and for seven months the company had the benefit of not being sued, though frequently pressed for payments, upon the principal debt, for the extension of which the guaranty had been given. Nothing was actually done in avowed reliance upon the guaranty, and it is impossible to say that the entire consideration for its execution was performed. It appears that the court below was of opinion that there was some consideration in the fact that Beck, when in Milwaukee, did not bring suit or institute proceedings of any character to enforce the payment of the debt, and that there was in fact an extension of credit. An agreement on the part of the creditor for general indulgence towards the debtor, without any definite time being specified, with proof of actual forbearance for a reasonable time, has been held to be sufficient consideration for a guaranty of the debt (Brandt, Sur. § 16, and authorities cited); but it is equally well settled, as the authorities there cited show, that forbearance without an agreement on the part of the creditor to forbear will not be deemed a sufficient consideration. "There must be promise for promise." This record contains no evidence upon which it can be said conclusively that there was an agreement by the plaintiffs, in consideration of the guaranty, to extend credit or to forbear bringing suit upon their demand. The judgment below is reversed, with direction to grant a new trial.

BURCH v. CADEN STONE CO. et al.

(Circuit Court, D. Kentucky. March 28, 1899.)

INJURY OF SERVANT—JOINT LIABILITY OF FELLOW SERVANT AND MASTER.

An employé of a corporation cannot be held jointly liable with the corporation for an injury to another employé alleged to have resulted from negligence, both on his part and on the part of the corporation, where it is not alleged that he was guilty of willful wrongdoing, or that he acted outside of his instructions or the scope of his employment.

On Demurrer to Petition.

Pryor, O'Neal & Pryor, for plaintiff.

Fairleigh, Straus & Eagles, for defendants.

EVANS, District Judge. This action was begun in the state court, and was afterwards removed here by the defendants. The petition is in three paragraphs, though in the decision of the court upon the pending question the third paragraph need not be considered. The plaintiff, in substance, avers, in paragraph 1 of the petition, that he was, on the 22d of October, 1896, in the employment of the Caden Stone Company, and was engaged in laboring for it; that while acting in the line of his duty as a servant of said company, and while acting under the orders of its agent and servant, Albert Caden, a derrick fell upon the plaintiff, and wounded and injured and caused him to suffer greatly, both mentally and physically, and impaired his ability to earn money,—all to his damage in the sum of \$10,000. Further, that said derrick fell and injured him, as a direct and natural result of the gross negligence of the servants of said company, who were running and operating its quarry, and who, with such gross negligence, had erected said derrick in such an unskillful and unworkmanlike manner as to greatly endanger the lives of all defendants' employés near the same, and that, well knowing its dangerous condition, said company did erect and knowingly maintain the same, whereby plaintiff was injured as aforesaid. The second paragraph is in the following language:

"Plaintiff says, further, that said derrick was erected and maintained as set forth in the first paragraph of his petition, and at the time of his injury aforesaid, and prior thereto, Albert Caden was the agent and servant of said Caden Stone Company, and that he, with other agents and servants of said company, did assist in the erection and maintenance of said derrick, as set forth in the first paragraph of his petition, and that by his gross negligence, joined and concurring with the gross negligence of said company, all his injuries aforesaid were received, as the direct and natural consequence of said gross negligence. He says, further, that said Albert Caden was, at the time of his said injury, a stockholder, agent, and partner in the said Caden Stone Company. He says, further, that said Albert Caden is jointly and severally responsible to him for all his injuries aforesaid, and that by his gross negligence aforesaid this plaintiff has been damaged in the sum of \$10,000."

No suggestion has been made of a misjoinder, either of parties or of causes of action, but defendant Albert Caden has filed a general demurrer to the second paragraph of the petition, bringing up thereby the question of whether that paragraph states a cause of action against that defendant. Assuming its statements to be true (except that the word "partner" must be ignored), and giving to them

their natural significance and meaning, the paragraph, taken in connection with the first paragraph, charges that the Caden Stone Company, its agents and servants, including Albert Caden, erected the derrick with such gross negligence, and in such an unskillful and unworkmanlike manner, as to greatly endanger the lives of the employes of the company, and that the company, knowing the dangerous condition of the derrick, knowingly maintained it, whereby plaintiff was injured. It is furthermore averred that the defendant Albert Caden, as agent and servant of the company, assisted in the erection and maintenance of the derrick, as set forth in the first paragraph, and that by his gross negligence, joined and concurring with the gross negligence of the company, the plaintiff's injuries were received while acting under the orders of said defendant, as agent of the company. The pronouns are so mixed in paragraph 2 as to make it somewhat difficult at times to gather the exact meaning of the pleader, but it is apparent from the pleading that the plaintiff and Albert Caden were both at the time employes of the Caden Stone Company, but whether Albert Caden was at any time acting beyond the orders of his principal does not appear. It is not shown that there was any authority on the part of Albert Caden independently to control the manner in which the derrick was erected. It is not shown that Albert Caden was guilty of any willful or intentional wrongdoing respecting the derrick or the operations of the company whereby the plaintiff was injured. If it appeared from the pleading that the injury to the plaintiff was the result of a positive and willful wrong, he might possibly be jointly liable with his principal; but in the absence of any statement showing that there was willful wrongdoing, or any express statement that Albert Caden had any control superior to that of the plaintiff over the operations of the derrick, and in the absence of any statement directly connecting Albert Caden with the operations of the derrick in any manner not directed by the principal, or not within the scope of his employment, the court has reached the conclusion that the second paragraph of the petition does not show a cause of action against the defendant Albert Caden. It does not show a case where any one but the principal—in this case, the common employer of both men—is liable to the plaintiff. The case appears to be one where the principal should respond, and not the servant. It is a case of negligence only. Mere negligence, however gross, would not change the rule, unless it were willful or malicious. The demurrer, therefore, is sustained, with leave to the plaintiff to amend within two weeks.

GOLDMAN et al. v. SMITH (FRANKS, Intervener).

(District Court, D. Kentucky. February 9, 1899.)

1. BANKRUPTCY—PLEADING—DEMURRER TO ANSWER.

An issue as to the sufficiency of an answer to a petition in involuntary bankruptcy cannot be raised by demurrer. Petitioning creditors, objecting to the answer on this ground, must set the case down for hearing on the petition and answer, according to the rules of equity practice.

2. SAME—ACTS OF BANKRUPTCY—PREFERENCE.

Where an insolvent merchant transferred his stock in trade to a creditor, part of the consideration being a payment made by the latter to a bank to make good the merchant's overdrawn account at the bank, the creditor having verbally agreed with the bank to be responsible for such overdrafts, *held*, that the transfer was an act of bankruptcy, being made with intent to prefer either the creditor advancing the money (if the debt was considered as due to him), or else the bank, by means of the payment of the overdraft by the creditor as a surety or guarantor, and his reimbursement by the bankrupt.

3. SAME—PARTIES—INTERVENTION BY CREDITOR.

Where a petition in involuntary bankruptcy alleges the giving of an unlawful preference to a particular creditor of the bankrupt, that creditor may, on his own petition, intervene and be made a party defendant, with leave to plead to the petition.

In Bankruptcy. Petition in involuntary bankruptcy by Goldman, Beckman & Co. and other creditors against Newton M. Smith, with petition by A. C. Franks, an alleged preferred creditor, for leave to intervene and be made a defendant.

Sidney G. Stricker, for petitioning creditors.

W. M. Fenley, for bankrupt.

A. G. De Jarnette, for intervener.

BARR, District Judge. Goldman, Beckman & Co., and other creditors of Newton M. Smith, filed a petition to declare the defendant, Newton M. Smith, an involuntary bankrupt. The grounds set out in the petition are that Smith, being the owner of a stock of goods of the value of about \$3,000, transferred and conveyed the same to his brother-in-law, A. C. Franks, with intent to hinder, delay, and defraud his creditors; and, second, that Smith, being insolvent, transferred said stock of goods and merchandise, which were located in his store, in Grant county, to said A. C. Franks, upon the consideration of an existing debt alleged to be due and owing from said Smith to said Franks, with intent to prefer said Franks over and above all of his other creditors. There are other grounds alleged, but these are the only grounds needed to be considered upon the pending question. Process went upon this petition against Smith, and he appeared and filed on January 4, 1899, an answer thereto, and subsequently filed an amended answer. This answer, as amended, has been demurred to by the plaintiffs on the ground that said answer does not state facts sufficient, in law, to constitute a defense to the petition.

If we are to apply the rules of equity practice to proceedings in bankruptcy,—and we understand these are to be applied (see Sup. Ct. Rule 37, 18 Sup. Ct. x),—the sufficiency of an answer cannot be raised by a demurrer, but it can only be done by setting the case for hearing upon the bill and answer. *Walker v. Jack*, 31 C. C. A. 462, 88 Fed. 576, and *Grether v. Wright*, 23 C. C. A. 500, 75 Fed. 743. In the latter case the court of appeals, by Judge Taft, uses this language:

"A demurrer to an answer is unknown to the equity practice in the federal court, as it was unknown to the practice of the high court of chancery in England. *Crouch v. Kerr*, 38 Fed. 549; *Banks v. Manchester*, 128 U. S. 244,

9 Sup. Ct. 36; *Travers v. Ross*, 14 N. J. Eq. 254; *Winter v. Claitor*, 54 Miss. 341; *Edwards v. Drake*, 15 Fla. 666; 1 Daniell, Ch. Prac. 542. The only way by which the sufficiency of an answer to a bill in equity can be tested is by setting the case down for hearing upon the bill and answer, the effect of which is an admission by the plaintiff of all the averments of fact properly pleaded in the answer, and a waiver of any right to contest them by replication and proof. *Barry v. Abbot*, 100 Mass. 396; *Brown v. Mortgage Co.*, 110 Ill. 235; *Stone v. Moore*, 26 Ill. 165. If, therefore, any objection had been taken to the demurrer filed to the answer, it must have been stricken from the files; but as no objection was taken in the court below, and as no objection is made on the hearing in this court to the form of proceedings, we should treat the demurrer filed by the plaintiff as an application to the court to set down the case for hearing upon the bill and answer, and consider the decree as if it had been entered upon such hearing. *Barry v. Abbot*, 100 Mass. 396."

As counsel on both sides have argued this demurrer as raising the question of the sufficiency of the answer, the court should dispose of the question as counsel have made it,—as, in effect, raising the question whether, the answer being taken for true, the defendant, Smith, should be declared an involuntary bankrupt. In this answer the defendant makes this general denial:

"He denies that on or about December 5, 1898, or at any other time, he transferred and conveyed to A. C. Franks a stock of general merchandise, of the value of \$3,000, or other value, consisting of clothing, boots, shoes, rubbers, dry goods, groceries, notions, etc., or any goods or merchandise whatever, with intent to hinder, delay, or defraud his creditors, or to prefer said Franks to the exclusion of other creditors. Denies that on or about December 5, 1898, or at any other time, he transferred the stock of goods of which he was then the owner, consisting of the items aforesaid, or other items, of the value of \$3,000, or other value, located within his store, at Stewartsville, Grant county, Ky., or other place, to said A. C. Franks, or other person, upon a pretended consideration of a pre-existing debt alleged to be owing by him to said A. C. Franks, or other person, with intent to prefer said Franks above all or any creditor or creditors of this defendant. The defendant says that on the 29th day of November, 1898, he did sell, transfer, and convey to said A. C. Franks a certain stock of dry goods, notions, boots, shoes, clothing, etc., then located in his store, at Stewartsville, Ky., of the value and for the consideration of \$2,700; that the consideration of said purchase and sale was the agreement of said Franks to pay off and discharge a mortgage debt held by Mrs. Magerhance for \$1,367, about \$806 checks issued by this defendant, which said Franks had recently taken up at the request of the defendant, and \$525 in cash paid by said Franks to defendant at the time of said sale. He says this was a valid transaction, without any intent or thought of hindering or delaying any of his creditors, or preferring said Franks. He says said mortgage was an existing lien upon his stock of merchandise, and petitioners all had notice of same long before and at the time they sold this defendant the goods for which he is indebted to them as stated in their petition. Said mortgage was executed and delivered more than six months prior to the filing of the petition herein. He says the \$806 which he paid said Franks in the transfer to him of said merchandise was a debt created by the payment of defendant's checks, given mostly to the petitioners, and which defendant did not have the funds to meet, and said Franks paid same as an accommodation; and, as this defendant's creditors got the money paid upon said checks, he did not know it was wrong or in violation of law to pay it back to said Franks in the sale of the goods. Defendant says the balance of said purchase price, to wit, \$525, was paid him in cash by said Franks at the time, and simultaneously with, and as part of the consideration of, the sale and transfer of said stock of goods, and insists that there was no thought or intention of preferring said A. C. Franks, or other person, in the sale and transfer aforesaid. Defendant admits that at the time of the sale and transfer he had not sufficient property to pay his debts, but says his credit in his neighborhood and elsewhere was good, and he thought he would in a short

time be able to pay all of his debts. He sold said stock of goods because he believed he could make more money in trading in stock,—a business which he had successfully followed before he embarked in the mercantile business."

And in the latter part of his answer he makes this allegation:

"Defendant again admits that, at the time he sold his said stock of merchandise to A. C. Franks, he had not sufficient property to pay his debts, but denies that in the transfer and sale of said merchandise, or any other matter or form, he committed an act of bankruptcy, unless the fact that he was unable to pay his debts, and the further fact that he repaid said Franks, in said sale, the money he had advanced to meet checks given by this defendant to his creditors aforesaid, shall be held an act of bankruptcy."

Defendant also files with his answer a schedule of all property owned by him just prior to the date of the sale, and a schedule of his indebtedness. These schedules show that, including all of the property,—that which was transferred to Franks, and all other,—he was at the time hopelessly insolvent.

Upon the 27th of January, after the demurrer was filed, Smith tendered an amended answer, in which he makes this allegation:

"That his attorney, in preparing the original answer, by mistake alleged that the \$806 paid by A. C. Franks as part of the purchase price of said stock of goods was paid in taking up certain checks given by defendant to his creditors, and now corrects said answer, and states that the payment of said \$806 was made by said Franks at the time of, and as a part of the purchase price of said goods, by paying an overdraft of the defendant to the Bank of Williamstown; checks for said overdraft having been given as stated in the original answer. Defendant further says that said Franks had agreed verbally with said bank to be responsible for the overdrafts aforesaid."

Although this amendment was not filed by leave of court, and was after the demurrer, still both parties have assumed in their arguments that the amendment is part of the answer, and it will be considered in that way by the court.

It seems to us, notwithstanding the general denial of this answer, the facts alleged and admitted show that the defendant has committed an act of bankruptcy, in making the transfer to Franks. It is clearly shown that the defendant, Smith, was insolvent, not only within the definition of insolvency given in the bankrupt act, viz. "that the aggregate of his property, exclusive of any property which he may have transferred, concealed or removed, or permitted to be transferred, concealed or removed, with intent to hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts," but that, including this property, he was at the time hopelessly insolvent. It is equally clear that the allegations and admissions of this answer show an intent upon the part of Smith to prefer one of his creditors over his other creditors, whether that creditor be Franks himself, or whether it be the Bank of Williamstown. If we consider, as first alleged, that the \$806 was a debt to Franks, that it was a preference to Franks is quite clear, and the knowledge of the preferred creditor of the insolvency and the purpose of the sale seems as certain. If, however, we consider the overdraft of Smith as held by the Bank of Williamstown, from the allegations of the answer it must be quite apparent that the payment of Smith's checks by the bank, and the creation of the overdraft, were upon the credit of Franks, and that

he was the obligor to the bank, and bound, as such, to pay the debt. In this view, the overdraft was Frank's debt. If it be considered that he was a mere guarantor, and the statute of frauds applies, we do not see that this makes any difference upon the question of bankruptcy, since the sale and transfer were to pay that debt, and by this means the debt has been paid, and Smith's creditor, whoever he may be, in law, was preferred. We conclude, taking the entire answer, that it does not present a good defense, and that upon the face of the pleadings the petitioners are entitled to an adjudication adjudicating Smith a bankrupt.

We do not see that the Kentucky act, as embodied in section 1910 of the Kentucky Statutes, has any application to this question, since the inquiry is whether or not the defendant, Smith, has committed acts of bankruptcy, under the provisions of the bankrupt act. Under the Kentucky law, as we understand it, if a preference is not attacked by a creditor within six months, the preference would be good; and, where there is a preference prohibited by the Kentucky statute, it does not of itself make the preference a general assignment, but requires some proceedings in the state court to have it so declared. Hence we have not regarded it as applicable to the question under consideration.

In regard to the intervening petition of A. C. Franks to be made a party defendant, the order should go allowing this petition to be filed, and that he be made a party defendant. What rights he may have as creditor are not now intended to be adjudicated upon, but may be presented by him either by filing his intervening petition as an answer or cross bill, or by amending his pleadings, as he may think proper. The order, for the present, will be that the intervening petition of A. C. Franks, marked, "Filed Jan. 6, 1899," is filed of record, and that he be made a party defendant to the petition filed by the petitioning creditors herein, with leave to plead further, if he so desires, within 20 days. This order should be entered before the order adjudicating Smith a bankrupt.

Unless counsel for the defendant has some other pleadings to present, the proper order should go, declaring that Smith's answer does not present a defense, and that he, upon the petition and answer, be adjudged a bankrupt, and the case referred to the proper referee.

In re GHIGLIONE.

(District Court, S. D. New York. April 10, 1899.)

BANKRUPTCY—DISMISSAL OF PETITION—COUNSEL FEES.

The provision of section 3 (e) of the bankruptcy act (30 Stat. 546), for the allowance of "costs, counsel fees, expenses, and damages" to the respondent when a petition in involuntary bankruptcy is dismissed, applies only to cases where an application to seize and hold the property of the alleged bankrupt pending the hearing was granted, and bond given, as provided in the same subdivision of section 3. In other cases the court cannot allow counsel fees, in addition to costs, to the successful defendant, the matter being governed by rule 34.

In Bankruptcy.

Coudert Bros., for petitioning creditors.

Bullowa & Bullowa, for respondent.

BROWN, District Judge. On the 11th of November, 1898, a creditors' petition was filed against Ghiglione to have him declared a bankrupt, charging insolvency and concealment of property. Upon an answer denying both charges, and two jury trials thereon, there being a disagreement on the first trial, the issue was finally determined in favor of the defendant, and the petition has been dismissed. Prior to the taxation of costs, defendant's counsel move for "counsel fees" to be allowed and taxed by the court pursuant to section 3 (e) of the bankrupt act. That clause provides as follows:

(e) "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alleged bankrupt prior to the adjudication, the petitioner shall file a bond * * * conditioned for the payment, in case such petition is dismissed, * * * all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt.

"If such petition be dismissed by the court, or withdrawn by the petitioner, the respondent shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court and paid by the obligors in such bond."

The prior subdivision (b) of section 3 contains the general provisions for petitions by creditors against alleged bankrupts. Subdivisions (c) and (d) regulate the proceedings in defense and the trial thereof: while subdivision (e) provides for the special case of a seizure of the defendant's property before adjudication.

Rule 34 of the supreme court in bankruptcy is evidently intended to govern the allowance of costs in ordinary involuntary proceedings. It provides that the petitioning creditor if successful shall recover "the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner."

There is no other provision in the bankrupt act or in the rules, authorizing this court in bankruptcy cases to allow or tax a counsel fee on dismissal.

On careful consideration of the arguments of counsel on these provisions, I am of the opinion that the last paragraph of subdivision (e) above quoted, applies only to cases arising under the first paragraph of that subdivision, and where the application "to take charge of and hold the property of the alleged bankrupt" prior to adjudication has been granted and the bond given. The allowance of "counsel fees" in addition to costs can rest only on express statutory provision. It is contrary to the ordinary federal practice, and seems to have been designed to afford a fuller measure of indemnity to the defendant than is ordinarily afforded in legal proceedings in the federal courts, for an unjustifiable interference with his property. Such interference may at times be ruinous, and by breaking up a man's business make him insolvent when he was not insolvent before. It is an available weapon which may be misused, and is there-

fore justly guarded by special provisions for the most complete indemnity to the accused. Ordinary cases of involuntary proceedings, not accompanied by such injurious interference, fall as respects costs under the provisions of rule 34, which does not allow counsel fees in addition to costs.

In the present case though an application was made for a receiver, the application was denied as unnecessary; no bond was given; nor was any injunction issued interfering with the transaction of the defendant's business in the manner in which it had been theretofore carried on. The motion for counsel fees must therefore be denied, and the costs taxed under rule 34.

In re MOYER.

(District Court, E. D. Pennsylvania. April 12, 1899.)

No. 6.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—SUFFERING PREFERENCE.

Under Bankrupt Act 1898, § 3, cl. 3, providing that it shall be an act of bankruptcy if a debtor shall have "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," and not vacated or discharged such preference "at least five days before a sale or final disposition of any property affected," where a creditor actually obtains a preference by entering judgment on a warrant of attorney previously given by the debtor, and levying execution on his stock in trade, the debtor being then insolvent, such debtor commits an act of bankruptcy if he fails to discharge such preference by filing his voluntary petition in bankruptcy (having no valid defense against the debt or the lien obtained by the levy), although he does not in any degree procure the entry of the judgment, or even know of it.

2. SAME—PREFERENCE—WARRANT OF ATTORNEY.

Within the meaning of the bankrupt act, a creditor obtains a preference by entering judgment on a warrant of attorney, and levying an execution thereunder on the debtor's stock in trade, within the time limited by the act, the debtor being then insolvent, notwithstanding that the warrant of attorney was given more than four months before the filing of the petition in bankruptcy against such debtor, and at a time when he was solvent.

In Bankruptcy. On motion for adjudication in involuntary bankruptcy.

Greenwald & Mayer, for petitioning creditors.

Thomas H. Capp, for certain creditors.

Howard C. Shick, for alleged bankrupt.

McPHERSON, District Judge. This is a case of involuntary bankruptcy, and the motion to adjudicate rests upon the following facts: Between December, 1897, and June, 1898, Henry Moyer was a solvent merchant. At different times during that period he borrowed about \$6,500 from several members of his family, securing the respective loans by promissory notes containing warrants of attorney to confess judgment. These creditors took no steps to collect their debts until November 14 and 16, 1898, when they entered judgment upon the notes in the court of common pleas of Lebanon county, and issued ex-

ecutions, which were levied upon the goods in Moyer's store, these goods being his only estate. Before sale by the sheriff, other creditors presented the petition now being considered, to which Moyer replied, denying, in effect, that he had committed an act of bankruptcy. The dispute was sent to the referee for hearing, and meanwhile the sheriff sold the goods, under an agreement of the parties interested, and retains the fund until the court shall decide the pending motion. The remaining pertinent facts are these: The entry of judgment in November was without the debtor's knowledge or procurement, but at that date he was insolvent, and could not pay the debts. He did not have a valid defense, either against the debts themselves or against the lien obtained by the levies, and he did not file a petition in voluntary bankruptcy. He therefore failed to vacate or discharge the preference obtained by the execution creditors within five days before the sale.

The question presented by these facts is important. If the bankrupt act of March 2, 1867, were still in force, the construction announced by the supreme court in *Wilson v. Bank*, 17 Wall. 473, and in *Clark v. Iselin*, 21 Wall. 360, would probably require us to decide that Moyer did not commit an act of bankruptcy. He was passive during the proceedings in November, and did not in any degree procure the entry of the judgments or the issue of execution with intent to secure a preference to the creditors controlling this process. But, as we understand the bankrupt act of 1898, its provisions are essentially different from the earlier act, and require the court to come now to a different conclusion. Clause 3 of section 3 declares that it shall be an act of bankruptcy if a person has "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference." It will be observed that this clause says nothing about the bankrupt's intent to enable the creditor to secure a preference; neither does it use the word "procure," which might seem to imply that the debtor must take some part in bringing the preference about. The dominant fact seems to be the actual result that has been attained by the creditor. If, through legal proceedings, he has succeeded in obtaining a preference,—that is (referring to section 60 for a description of preferred creditors), if the debtor is insolvent, and has either "procured or suffered a judgment to be entered against himself, * * * and the effect of the enforcement of such judgment * * * will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class,"—if this is the actual result of legal proceedings taken against an insolvent debtor, the clause in question requires the debtor to vacate or discharge such preference within a specified time, and, if he fails so to do, declares that he has committed an act of bankruptcy. How he is to vacate or discharge the preference is not specified; but the silence of the clause upon this point presents no difficulty. Legal proceedings are of many kinds, differing in the different states; but, whatever kind may be employed by the creditor, if the result of the proceeding gives him a preference over other creditors

of the same class, the insolvent debtor is thereupon charged with a clearly implied duty to vacate or discharge the preference within the time allowed him by the act. For example, if he has a defense to the debt, he may set it up; or, if he can overthrow the preference because the creditor's procedure has been defective, he may choose that method of attack. If neither of these weapons is available, he has still at command one sufficient weapon, of which he cannot be deprived,—he can apply promptly to the court in bankruptcy, and ask that his property should be ratably divided among his creditors. If he fails to move, his inaction is properly regarded as a confession that he is hopelessly insolvent, and as conclusive proof that he consents to the preference that he has declined to strike down. This construction of the statute seems to us to be the natural meaning of the clause in question, and to be in harmony with the general purpose of the act. A similar conclusion was reached a month or two ago in the district court for the Eastern district of Missouri in *Re Reichman*, 91 Fed. 624.

To avoid misapprehension, we desire to call attention to the fact that the preference complained of in the present case was obtained by the issuing of execution in November, and not by the giving of the judgment notes. When he gave the notes, the debtor was solvent, and no other creditor could complain; but, when execution was issued, he had become insolvent, and the situation had materially changed. If the judgments had been entered, say, in December, 1897, and he had then had real estate to be bound thereby, an enforcement of the lien in November, 1898, against the realty, would not offend against the clause in question.

We are of opinion that Henry Moyer has committed the act of bankruptcy described in clause 3 of section 3, and that the motion for adjudication must prevail.

In re FOERST.

(District Court, S. D. New York. April 15, 1899.)

BANKRUPTCY—EXAMINATIONS IN BANKRUPTCY—SCOPE OF INQUIRY.

The wife of a bankrupt, under examination as a witness at the instance of the trustee or creditors, may be questioned as to money or other property in her possession, and as to how and when the same was received or acquired, provided only that the testimony shows such questions to be reasonably pertinent to the subject of inquiry, the nature and location of the assets of the bankrupt.

In Bankruptcy. On question certified by referee.

William Riley, for creditors.

Edward Bittner, for bankrupt.

BROWN, District Judge. Upon an examination of the bankrupt and other witnesses before the referee in behalf of the trustee and creditors, objection being made to questions put to the wife of the bankrupt during her examination as respects moneys which she held, and when and how received, the question as to the admissibility of this testimony has been certified to the court.

There is no precise rule governing the admissibility of such testimony, other than that it should be reasonably pertinent to the subject of inquiry. In general, a large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings, or otherwise, for the purpose of discovering assets and unearthing frauds, upon any reasonable surmise that they have assets of the debtor. The intent of the bankrupt law is that only the debtor dealing honestly with his property shall be discharged; and that any proper assets of the estate, however concealed, shall be made available to creditors. The examination for this purpose is of necessity to a considerable extent a fishing examination. The extent to which it shall be permitted to go, must be determined by the sound judgment of the officer before whom it is taken. Reasonable examination should not be allowed to be checked by constant objections that the materiality of the answer may not be immediately apparent, where no harm can arise to the witness from the disclosure, if the transaction is honest. If the result of such an examination may often be a considerable amount of immaterial testimony, this is a much less evil than to stifle examination by technical rules which would defeat the purpose of the act, and discredit the administration of the law in the interest of creditors. Unreasonable discursiveness in the examination will be in some measure checked by making it at the expense of the examining party; if plainly frivolous or prolix, it should be stopped. Where questionable proceedings have been disclosed, greater latitude in the prosecution of inquiries should be allowed; and the precise form or order in which the questions are put can scarcely be deemed material.

Upon the above general principles, and upon the matters already disclosed on this examination, I think the witness should answer as respects any moneys or property acquired by her during the year prior to the adjudication, or even further back, should further testimony show such inquiries to be reasonably pertinent.

In re COLLIER.

(District Court, W. D. Tennessee. April 15, 1899.)

1. **BANKRUPTCY—VOLUNTARY PETITION—PAUPER'S OATH.**

Under Bankruptcy Act 1898, § 51, requiring the clerk to collect the fees of officers in each case before filing the petition, except where the petition of a voluntary bankrupt is "accompanied by an affidavit stating that the petitioner is without and cannot obtain the money with which to pay such fees," such affidavit is not conclusive of the poverty of the petitioner; and, if circumstances appear casting doubt upon the truth of the affidavit,—as, that the petitioner appears by counsel not shown to be acting gratuitously,—it may be sent to the referee to investigate and report the facts as to the petitioner's ability to deposit the fees.

2. **SAME.**

A person employed by a railroad company at a salary of \$30 per month, such salary being exempt from execution by the law of the state, is not entitled to take the benefit of the bankruptcy law without depositing the fees required by the act, on an affidavit that he cannot obtain the money

with which to pay such fees; and his petition will be dismissed unless the fees are deposited within a reasonable time.

8. SAME—EXEMPTIONS.

The exemptions allowed by the act do not excuse the payment from them of the fees of the bankruptcy court.

In Bankruptcy.

James G. Reasonover, for petitioner.

HAMMOND, J. This is an application for an adjudication in bankruptcy upon a petition and schedules which do not conform to the rules of the supreme court, and must, therefore, be amended, which the petitioner has leave to do.

The petition is filed upon the pauper's oath, the affidavit being that required by section 51 of the bankruptcy statute of July 1, 1898. That section enacts that the clerk shall

"(2) Collect the fees of the clerk, referee, and trustee in each case instituted, before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees."

There is no rule by the supreme court, nor other provision of the statute than that just quoted, declaring the effect of the affidavit, or regulating the practice. It cannot be that it was the intention of the statute to confer upon the petitioner the unqualified right to proceed in bankruptcy upon his own affidavit as to his poverty, nor that such affidavit should be taken as conclusive of the fact. It is noticed that some of the bankruptcy courts have established rules upon the subject, notably that of the Southern district of New York, which requires that:

"Petitioners who have made no deposit with the clerk for the services of the officers, should be examined by or under the direction of the referee on their appearance before him, with regard to their means; and if the referee is not satisfied of the bankrupt's inability to make the deposit a report thereof should be made to the judge."

This rule is in analogy with the common law, chancery, and admiralty practice in allowing poor persons to sue without security for costs. Without any statute, all those courts by grace or favor permit poor persons to sue without costs, when, as a matter of fact, they are paupers. But, to avoid imposition in that regard, it was always required that the poverty should in fact exist, as well as that the suitor, if a plaintiff, should have the certificate of counsel that he had a good cause of action; and the suitor's own affidavit was never regarded as conclusive of the fact of poverty. Daniell, Ch. Prac. pp. 37, 38, 40, 41; Bradford v. Bradford, 2 Flip. 280, Fed. Cas. No. 1,766; Roy v. Railroad Co., 34 Fed. 276. And if an order has been obtained as of course, permitting one to sue in forma pauperis upon a suppression of material facts, it will be discharged on an application by motion, on notice. Daniell, Ch. Prac. p. 41, citing Nowell v. Whitaker, 6 Beav. 407. And it will be seen by an examination of the authorities that the rule of exemption from costs where poverty actually exists applied to counsel as well as to officials of the court. I do not see why a preliminary inquiry into the actual facts is precluded by a stat-

ute granting the privilege any more than it was under the general law before existing. Unless the statute peremptorily makes the affidavit of the proposed suitor conclusive of the fact, it is always open to the courts to protect themselves against any imposition by proper inquiry. The general orders in bankruptcy allow the fees to be paid out of the estate, if any, and when it shall appear that the bankrupt can obtain the money. An inquiry before adjudication is quite as proper as one afterwards to be made. Gen. Orders Bankr. 35 (4). It will be observed that the new bankruptcy statute is peculiar in its phraseology, and requires the affidavit to show that the petitioner "cannot obtain the money," with which to pay his fees. These are only \$25, and it seems almost incredible that one who is able to procure counsel to resort to the bankruptcy court is unable to deposit that small sum to pay the officials of the court, unless it shall appear that counsel also is doing the work gratuitously. And there seems to be no good reason why one proposing to take the benefit of the bankruptcy statutes should be allowed to exhaust his means in the employment of counsel, and leave the other expenses unprovided for. I do not mean to hold that one who appears by counsel cannot have the benefit of the bankruptcy statute if he be really a pauper bankrupt; but what I do say is that, in the absence of any showing that counsel is acting without compensation, it is a suspicious circumstance as to the truth of the affidavit under this peculiar statute which requires the party to swear that he cannot obtain the money. If he can obtain the money to pay counsel, why cannot he obtain the money to deposit in court?

The statute does not mean that the party shall have the benefit of this provision because it is inconvenient to obtain the money, nor because he is willing to take the pauper's oath to avoid any effort to obtain it, but it means only that he shall be in such circumstances that it is reasonable to conclude that he really cannot obtain the money with which to pay the official fees; and the court will not be satisfied in doubtful cases to allow him the benefit of the pauper's oath until an inquiry has been made into the circumstances surrounding him. Hereafter, therefore, in this court, whenever the alleged poverty is doubtful, it will be sent by the clerk to the referee to take proof, upon notice to the bankrupt, and report the essential facts and circumstances showing whether in truth he is unable to obtain the money to make the deposit. In this case it is not necessary to make such a reference, because it appears from the statements of counsel that this petitioner is in the employment of a railroad company, receiving a monthly salary of \$30, which, by our state statute, is exempt from execution at law for the payment of debts; and from this mere fact it conclusively appears that the petitioner could, if he would, obtain the money to make the small deposit required by the bankruptcy statute. His application to proceed under the pauper's oath is therefore denied, and his petition will be dismissed, unless within a reasonable time the deposit is made. Gen. Orders Bankr. 35 (4).

This is only one of many similar cases coming into this court under the mistaken belief that the statute allows any one who is willing to take the pauper's oath to secure a discharge in bank-

ruptcy. It only allows that privilege to those who are paupers in fact, as they must be, indeed, if they cannot raise \$25 to pay the fees.

The argument is made at the bar that the petitioner needs his monthly salary of \$30 to pay his own and his family's living expenses, and that the salary is exempt under the state law. This may be true, but still the petitioner is not a pauper in the sense of the bankruptcy statute. It does not allow one to proceed under the pauper's oath simply because he and his family are unwilling to make the necessary sacrifice to pay the fees, he being himself the judge whether the sacrifice shall be made or not. The exemptions allowed by the bankruptcy statute are not intended to cover exoneration from, or excuse the payment of, the fees of the bankruptcy court, incurred by the petitioner to more effectually protect him from his debts, and secure him in the property exempted only because the act adopts the state exemptions as its own.

There being no minimum limit in the statute upon the amount one must owe to entitle one to file a voluntary petition in bankruptcy, petitions have been filed where the whole indebtedness is for living expenses, and ludicrously small; and this convenient interpretation of the statute in relation to the pauper's oath is a temptation to such debtors to resort to the bankruptcy court once a month, if need be, or if one chooses, and thereby avoid the payment of all living expenses, without any cost to the debtor himself. It cannot be that the beneficent provisions of the bankruptcy statute were intended to have this comical and demoralizing result, and for this reason, if no other, the court should be strict in disallowing the pauper's oath to those who are not really entitled to it. Ordered accordingly.

SMITH et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 47.

1. CUSTOMS DUTIES—CLASSIFICATION—CROCUS.

Crocus, produced from the dross or residuum of burn pyrites, principally used as polishing powder, but to a considerable extent as a painter's color, is not dutiable under Tariff Act 1890 (26 Stat. 567, c. 1244) par. 133, as the dross or residuum from burnt pyrites, or as a nonenumerated article, under section 4, since it has been improved by manufacture, but is included, under paragraph 61, within the classification of paints or colors, whether dry or mixed.

2. SAME—TEST—PREDOMINANT USE—WHEN APPLIED.

The test of predominant use, as applied to the classification of an article for duty under Tariff Act 1890 (26 Stat. 567, c. 1244), is only resorted to where necessary to properly classify an article falling within two or more classifications, either of which, standing alone, would adequately describe it, and where the article is enumerated by reference to its use.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Albert Comstock and Everit Brown, for appellants.
Henry L. Burnett, U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The importations in controversy were "crocus," an article which is produced from the dross or residuum of burnt pyrites treated by a process to eliminate the sulphur, and which is used principally as a polishing powder, but to a considerable extent as a painter's color. This appeal presents the question whether the importations should have been classified for duty under paragraph 61 of the tariff act of 1890 (26 Stat. 567, c. 1244), or under paragraph 133, or under those tariff provisions applicable to articles not enumerated or otherwise provided for in the act. Paragraph 61 subjects to duty "all other paints or colors." Paragraph 133 subjects to duty "iron ore, including * * * the dross or residuum from burnt pyrites." The importations are clearly not within the designation of paragraph 133, because they have been advanced beyond the category there defined, into an article having a distinctive name and character, by a process of treatment which adapts them to a different use, although not exclusively so. Although they are not described by the specific name by which they are commonly called, they meet the description of a paint or color as fully as do many other articles enumerated under that general classification. Paragraph 61 is the concluding clause of the schedule in the act entitled "Paints, Colors and Varnishes"; and the preceding clauses of the schedule enumerate among other paints and colors such articles as "ochery earths," "sienna earths," "umber earths," "barytes," "whiting," and "oxide of zinc." Paragraph 61 is intended to prescribe the duty on all other paints and colors not specifically mentioned in the preceding clauses. As the importations are within the description of the paragraph, and are nowhere else enumerated in the act by their specific name, that paragraph supplies their appropriate classification for duty purposes. Being there enumerated by a general descriptive term, those provisions of the tariff act relating to articles not enumerated or not otherwise provided for cannot be resorted to for the purpose of ascertaining their proper classification.

If the importations were not capable of use as colors, they would not be dutiable under paragraph 61, because they would not have been colors in fact. But because they were adapted also for some other use, though that were the predominant use, they were none the less colors. The test of predominant use is only resorted to in those cases where it is necessary to find the proper location of a dutiable article which falls within two or more classifications, either of which, standing alone, would adequately describe it, and in those cases in which an article is enumerated by reference to its use. Thus, if a duty were imposed by the act upon "polishing powder," and another upon "colors," and there were no other provisions indicative of the legislative intent, the importations now in controversy would be described by both, and it would be appropriate to resort to that test; and, because the predominant use of crocus is as a polishing

powder, it would be more appropriately located for duty under that provision.

We concur in the conclusions reached by the court below (84 Fed. 158) and by the board of general appraisers. The decision of the circuit court is affirmed.

MANITOWOC PEA-PACKING CO. v. WILLIAM NUMSEN & SONS.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1899.)

No. 573.

TRADE-MARKS—INJUNCTION—INNOCENT INFRINGEMENT.

An injunction will be granted restraining the use, however innocent of intended wrong, of a device accompanied with the name or nickname of a city in which defendants reside, as a trade label for his goods, where such label constitutes an infringement on the trade-mark of another, on goods of a like character.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

C. K. Offield, for appellant.

E. H. Bottum, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This appeal is from an interlocutory order restraining the appellant, the Manitowoc Pea-Packing Company, pending the suit, "from using, as a trade-mark or brand, upon any canned or packed peas or other vegetables or fruits, the word 'Clipper,' or the words 'Clipper Brand,' whether in connection with, or without, the use of the words 'City' or 'Clipper City'; and from using as a trade-mark, label, designation, or print, upon any label or wrapper attached to any such goods, or upon any package of such goods, any of the words hereby restrained from use, or the delineation or representation of a ship or clipper under full sail, or in imitation or similitude thereof, until the further order of the court." Judge Jenkins, when granting this order, made the following statement of the reasons for his decision:

"I assume, upon the evidence presented, that the adoption by the defendant of the representation of a clipper ship under full sail, and of the words 'Clipper' and 'Clipper City Brand,' were adopted by it in ignorance of the prior adoption of the words 'Clipper Brand,' and of the representation of a clipper ship under full sail, by the complainant; although, considering their long use by the complainant, and the sale of its goods bearing those marks throughout many states of the Union, and the diligent search which the defendant insists it made before their adoption to ascertain if they infringed on any other's rights, and the placing of a ship under full sail in the mouth of the harbor, as it appears upon the picture, out of all proportion to the rest of the print, render the coincidence of the adoption of both the ship and the name by the defendant as somewhat remarkable. It is none the less true, however, that the adoption of these designations tends to create confusion, and to induce the public, particularly customers of retail dealers, to purchase the goods of the defendant as and for the goods of the complainant; and, however innocent the defendant may be of intentional simulation of the complainant's brand, the equitable principles which underlie the question of fair trade, and by

which courts of equity are guided, will not permit the use of these brands by the defendant. It was substantially conceded by council that the use of the ship was a clear infringement of the complainant's rights. I think the use of the terms 'Clipper' and 'Clipper Brand' or 'Clipper City Brand' is quite as clearly an infringement. The defendant has shown that the city of Manitowoc, where the defendant is located, to some extent at least, is known as the 'Clipper City.' The proof does not go to the extent of showing that that city was generally so known. But, even if it were, I think the use of the term under the circumstances would be clearly a constructive fraud upon the public, and in violation of all principles of fair trade, and ought not to be permitted. I need not discuss the question further. So far as this circuit is concerned, the principles by which courts should be guided in these matters are firmly established by frequent decisions of the circuit court of appeals. A man may not use his own name to accomplish a fraud; neither can he use a synonym; nor can he use the name of the city where he lives, or its nickname, to accomplish a like purpose. It is always a question of fraud, but not necessarily of actual fraud. The act, however innocent, is considered constructively fraudulent, if the result would tend to unfair trade, to confusion of goods, and to interference with the rights of another."

Counsel for the appellant disavows having intended to concede in the court below any infringement of the rights of the complainant; but it is immaterial whether the concession was made, since, to the extent stated, the fact of infringement is patent. The only point urged here which is not covered by the opinion quoted is that the trade of the appellant, and the use of its label, "are confined to a particular and specified territory and portion of the United States"; and that the complainant "has not now, nor has had, any trade whatever in canned peas in such identified states or territory." Whether the proposition of law here implied that the owner of a trade-mark or trade-name cannot have an injunction against infringement in a portion of the country in which his goods have not been offered for sale need not be determined. The proof does not show that the trade of the appellant, actual or proposed, is confined to specified or definite limits, or that it has not been, and is not intended to be, carried into regions where the business of the appellee is already established. It is shown, on the contrary, that the appellant had put its peas upon the market in New York City; and, while it is said that the attempt to sell in that market was not a success, because made too late in the season, a purpose to renew the attempt is not denied; and, further, it is not denied that sales have been, and will be, made in the neighboring states of Michigan and Minnesota, where for several years the peas of the appellee have been in the market. The order of the circuit court is affirmed.

LALANCE & GROSJEAN MFG. CO. et al. v. HABERMAN MFG. CO.

SAME v. MATTHAI et al.

(Circuit Court, S. D. New York. March 25, 1899.)

1. PATENTS—PARTIES TO INFRINGEMENT SUIT—JOINT OWNERS—ASSIGNMENT BY ONE OWNER.

The execution of an assignment and release by one joint owner of his right to damages from an infringer does not destroy his co-owner's right to recover his damages from such infringer.

2. SAME—ARRANGEMENT OF PARTIES.

Where there seems to be no necessity for it, the court will not, at an early stage of the case, by an order require a party complainant, whose

interest may lie with the defendants, to become a defendant, but will leave the matter to the final hearing, and will then arrange the parties and administer relief as their respective rights may require. But if such co-complainant should undertake to delay, harass, or impede the orderly progress of the cause, the other complainant will be allowed to renew his motion to make such party a defendant.

3. ATTORNEY AND CLIENT—WITHDRAWAL OF ATTORNEY PENDING SUIT.

Attorneys who have withdrawn from a case, believing, in good faith, that the litigation is ended, will not, in case of its continuance, be enjoined from accepting a retainer from parties having an adverse interest to their former client, or from disclosing information acquired in their professional capacity from such client. In the absence of any showing to the contrary, the court will assume that such attorneys will observe all the obligations of honorable members of the bar.

These were two suits in equity, brought by the Lalance & Grosjean Manufacturing Company and the St. Louis Stamping Company against the Haberman Manufacturing Company and against Matthai, Ingram & Co., respectively, for alleged infringement of a patent for an invention.

Walter D. Edmonds, for plaintiff Lalance & Grosjean Mfg. Co.

Louis Marshall, for defendants.

LACOMBE, Circuit Judge. 1. These are suits in equity, against alleged infringers of a patent, for injunction and accounting. Having obtained jurisdiction of them when brought, the court does not lose such jurisdiction merely because, by reason of subsequent events, the right to relief by injunction may have been lost,—if, indeed, it has been lost. The court will hold the causes until final disposition upon accounting for damages and profits.

It is not thought that the execution of an assignment and a release by one of the joint owners destroys the co-owner's right to recover his damages from the defendant. To so hold would be to push the supposed analogy to the law of real property altogether too far. The kind of property which is represented by letters patent is peculiar,—indeed, *sui generis*; and to apply to it all the rules of the common law as to ownership of land would sometimes lead to absurdities. Unqualified assent has by no means been given to Judge Curtis' reasoning in *Clum v. Brewer*, 2 Curt. 506, Fed. Cas. No. 2,909; and the scrupulous care with which the supreme court has restricted its decisions in *Gottfried v. Miller*, 104 U. S. 521, and the *Paper-Bag Cases*, 105 U. S. 766, leaves the question still open, although, in this circuit, where *Pitts v. Hall*, 3 Blatchf. 201, Fed. Cas. No. 11,193, has laid down a different rule from that adopted by Judge Curtis, the principle of *stare decisis* would seem to require a denial of defendants' motion to dismiss. An interesting discussion of this important and unsettled question will be found in chapter 6 of Hall's *Patent Estate*, where the arguments on either side, and the entire body of federal decisions down to 1888, are most tersely and admirably set forth. Upon the precise question now presented, viz. the power of one co-owner to destroy the other's accrued right to damages, the opinion of Romilly, M. R., cited on complainants' brief (*In re Horsley & Knighton's Patent*, L. R. 8 Eq. 475), seems to characterize the proposition quite correctly as "a violation of the fundamental principles of law, and contrary to natural

justice." Defendants' motions to dismiss the bills of complaint are denied.

2. There seems to be no necessity for undertaking, by an order, at this stage of the case, to make the present complainant, the St. Louis Stamping Company, a defendant. The court, at final hearing, will arrange the parties and administer relief as their respective rights may require. Should the present co-complainant undertake to delay, harass, or impede the orderly progress of the cause, the motion may be renewed. With this reservation, it is now denied.

3. The former solicitors for complainant have filed all the papers, exhibits, specimens, etc., relating to these causes, with the clerk of the court. Upon giving his personal receipt for the same (said receipt containing a clause to the effect that they shall be returned to the clerk upon final termination of the causes), said papers, etc., may be delivered to the present solicitor for the prosecuting complainant. Since the St. Louis Stamping Company has no further interest—except, it may be, an adverse one—in the prosecution of the suits, its solicitors will not be allowed to inspect these papers, etc. The clerk will make a careful inventory of them.

4. Motion is also made for a direction by the court to the former solicitors of complainants to cancel and withdraw from the retainer of the National Enameling & Stamping Company, and forbidding them, during the prosecution of these suits, to accept any other retainer from said last-named company. The former solicitors have explained the awkward phraseology of their notification to the Lalance & Grosjean Company that they would have to withdraw from these litigations. The suggestion that their new retainer was conditional upon their abandonment of their former client is not supported by proof. Moreover, the court has no doubt that they acted in entire good faith, believing, as counsel for defendants has argued, that by reason of the assignments and releases of the co-complainant the litigations were terminated. As matter of fact, however, the litigations still continue; and the National Enameling & Stamping Company, including, as it does, both defendants and the "quitter" co-complainant, occupies a position distinctly hostile to the remaining complainant. Nevertheless, it may well be that the new client has, or is to have, business not germane to the issues in these litigations, with the care of which, in the interests of the Lalance & Grosjean Company, the solicitors were originally charged, and such business they can with perfect propriety conduct. It may, however, prove to be a very difficult matter to determine, as concrete questions arise, whether they can or cannot safely act for the new client,—whether in so doing they may not unintentionally, and perhaps unconsciously, put at its service confidential information obtained from the old client by reason of the professional relationship. This court, therefore, will not direct the cancellation of the new retainer. It will assume that counsel will decide that question for themselves, in scrupulous conformity to their professional obligations. The path of unquestionable safety would be found in abstention, during the continuance of these litigations, from participation, active or merely as advisers, in any business which may, even by unkind critics, be considered germane to the issues here involved. If,

while these suits are going on, they become actively engaged, as solicitors or counsel, for an interest hostile to that of their former client, they will be likely to find their progress constantly impeded by pitfalls or quagmires into which they may stumble, or by which they may be besmirched. This court has no apprehension that any such catastrophe will befall. As was said before, the acceptance of the new retainer was in the full belief that the litigations had terminated, and the whole matter may safely be left to the solicitors themselves. The injunction prayed for, to restrain them from giving information to others than their original clients of any matter or thing by them acquired from such clients in their professional capacity, is denied. It is thought that the honorable obligation of a reputable member of the bar is a better assurance that professional secrets will be respected than would be an order of the court.

TUBULAR RIVET & STUD CO. v. O'BRIEN et al.

(Circuit Court, D. Massachusetts. July 29, 1898.)

No. 997.

1. PATENTS—INFRINGEMENT—VIOLATION OF LICENSE.

Where the owner of a patent on a machine for setting lacing studs licenses the use thereof on condition that the licensee shall only use studs manufactured by the licensor, such studs not being patented, it is an infringement for the licensee to use the machine for setting studs obtained from others in violation of the license.

2. SAME—CONTRIBUTORY INFRINGEMENT.

In such case, a third person who sells to the licensee studs of his own manufacture, knowing that they are to be used in the patented machine in violation of the terms of the license, and intending that they shall be so used, is guilty of contributory infringement, and will be enjoined.

In Equity.

Fish, Richardson & Storrow, for complainant.

William A. Macleod, for defendants.

LOWELL, District Judge. The bill makes the following allegations: The complainant is the owner of certain patents for setting lacing studs, which patents are embodied in machines made by it. These machines it does not sell, but licenses their use by a lease which provides that the licensees shall use in the machines only those studs which are manufactured by the complainant, and that, upon violation of any of the conditions of the lease, the right to the further use of the machine by the licensees is forfeited, and the complainant may retake possession thereof. The respondent sells, and offers for sale, to these licensees, studs of his own manufacture, well knowing that these studs are to be used in the complainant's machines in violation of the provisions of the lease and of the complainant's rights, and expressly intending that his studs shall be so used. He has induced and persuaded, and still induces and persuades, the licensees to break their contracts with the complainant, and to infringe its rights under the letters patent. Wherefore the complainant asks for an injunction limited in its

terms, and for an account. To this bill the respondent has demurred.

The complainant contends—First, that, by using the respondent's studs in its machines, in violation of the terms of the license, the licensees become infringers of the patent; and, second, that by selling his studs to the licensees, and by inducing and persuading the licensees to use his studs in the complainant's machines, and so to break their contracts with the complainant, the respondent has been guilty of the tort of "contributory infringement," so called.

That the first point is well taken I have no doubt. The difficulty is with the second. For both its contentions the complainant relies upon *Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, 77 Fed. 288, decided by the circuit court of appeals for the Sixth circuit; and for the second contention upon *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, 22 C. C. A. 1, 75 Fed. 1005, decided in the circuit court of appeals for the Second circuit. Unless the decisions in these cases are opposed to some decision of the supreme court or to some other decision of some circuit court of appeals, I am practically bound by their authority. *Beach v. Hobbs*, 82 Fed. 916.

In the first-named case (*Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co.*), the bill was much like that in the case at bar, and the demurrer to it was overruled. It is true that the bill in the case at bar omits one statement made in the bill filed in *Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, viz. that the studs sold by the respondent were adapted solely to use in the complainant's machines; but in *Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co.* the court laid little stress upon this statement, and based its decision mainly upon the allegation, which is found in both bills, that the respondent induced the users of the complainant's machines to infringe the complainant's patent. Upon the authority of *Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, and especially upon that of *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, which case will be considered hereafter, the respondent's demurrer must be overruled.

By agreement of parties, the hearing upon the demurrer was coupled with a hearing upon the complainant's motion for a preliminary injunction. From the evidence in the case, I find that the respondent William O'Brien sold to some of the complainant's licensees studs of his own manufacture, well knowing that these studs were to be used in the complainant's machines, and that he sought a market for his studs without regarding whether those who bought them from him bought them for use in the complainant's machines or not. The respondent's studs could be used, and were sometimes used, in machines other than the complainant's, and that use, of course, was legitimate. The studs themselves were unpatented. The respondent knew the existence of the complainant's patent, and had sufficient knowledge of the terms under which the complainant's licensees operated the patented machines to understand that the use of his studs in them would constitute a

breach of the contract of lease. In answer to questions, he told the licensees that, if they got into trouble, he would himself furnish them with a machine of his own manufacture which would answer their purpose quite as well. Further than this, it was not shown that he persuaded or induced the licensees to infringe. For the purposes of this hearing, the validity of the patent in suit was admitted.

The question presented is this: Does one who sells an unpatented article to another, knowing the use to be made of it, become liable as a contributory infringer if the proposed use is an infringement of a patent?

In *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, *ubi supra*, the respondent sold "trolley stands," so called, an unpatented article, and the evidence showed that he sold them indifferently to those who intended to use them legitimately and to those who intended to use them as an element of the infringing manufacture of a patent article. The evidence of knowledge and intention in *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.* was certainly weaker than in the case at bar, yet in the former case the court held that an injunction should issue, carefully guarded in its terms. "It sufficiently appears," said the court, "from the defendant's advertisements and affidavits, that it was ready to sell to any and all purchasers, irrespective of their character as infringers." The injunction "does throw upon the defendant the duty of careful investigation into the objects of the purchasers of its stands, and of an abandonment of indifference as to whether they are seeking to trench upon the rights of the owners of the patent."

The doctrine that one who furnishes materials, knowing their proposed use, becomes thereby a tortfeasor, if the proposed use is a tort, is certainly novel as applied to most kinds of torts. A lumber dealer who knew that the boards he sold were to be made into a fence to be erected in a particular place could not, I think, be held to be a tortfeasor, though the proposed fence constituted an obstruction to a right of way subsequently discovered. In *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 26 C. C. A. 107, 116, 80 Fed. 712, 721, it was said by Judge Taft, who took part in the decision of *Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, that "an infringement of a patent is a tort analogous to trespass or trespass on the case. From the earliest times, all who take part in a trespass, either by actual participation therein or by aiding and abetting it, have been held to be jointly and severally liable for the injury inflicted." With all due respect for the learned judge, it must be observed that the accuracy of the statement just quoted depends altogether upon the meaning attached to the words "participation," "aiding," and "abetting." In a sense, a trespass is aided if the trespasser is fed during the trespass. Yet it can hardly be contended that an infringer's cook is liable as a contributory infringer. Probably she would not be liable even if she knew of her master's wrongdoing. Again, no aid is more potent than money. Is one who lends money to an infringer liable

as co-infringer? Many patents cannot be infringed without a building in which to construct the infringing device. Is the landlord who lets the building to an infringer liable as a co-infringer? The particular act of participation, aiding, and abetting complained of in *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.* was the sale of materials. Yet surely the maker of the pig iron out of which the offending appliances were made neither in that case nor in this has become guilty of any tort.

In the decisions above cited much importance is attached to the knowledge of certain facts possessed by the defendant. In order to determine precisely, and to state clearly, the correct principle of those decisions, we must discover exactly what is the knowledge which the defendant should have in order to become guilty of the tort of contributory infringement. Is it enough, in a case like that at bar, that the defendant should know the material use to which his studs are to be put, and nothing more? In most cases, if a man intends the material consequences of his act, and those consequences are a tort, he is, if liable at all, liable even though he is ignorant of the tortious nature of the consequences. Thus, if one directs the cutting of certain trees, and the trees cut are not his own, he is liable in trespass, though he had strong reasons to suppose them his own. If the sale of materials to an infringer be a tort under any circumstances, and if the common rule of torts just stated applies to the case, then it would seem that in this case the defendant is liable, even though he had never heard of the complainant's patent nor of its contract with its licensees. Yet such a conclusion seems inadmissible. If, however, this common rule, although applicable to most tortfeasors, be deemed too severe to apply to contributory infringers, and if the defendant in a case like this must know something more than the material use to which his studs are to be put, is it sufficient that he should know that the use of his studs by his vendee would be a breach of a contract between that vendee and the complainant, without any knowledge of the complainant's patent? For the purposes of this action, I suppose that the last question should be answered in the negative, inasmuch as the tort alleged in this suit is not the inducing a third person to break his contract with the complainant, as in *Lumley v. Gye*, 2 El. & Bl. 216, but an actual participation with the third person as joint tortfeasor in the tort of infringement.

All the cases above cited assert or imply that a necessary condition of the defendant's guilt is his knowledge of the complainant's patent. This knowledge is asserted in the bill of complaint in this case, and was relied on in argument. Ordinarily, ignorance of the existence of a patent does not justify infringement, but it seems that there is an exception in the case of some contributory infringers, and that the defendant in this case could not be enjoined unless he not only knew or should have known the physical destination of his studs, but also actually knew the existence of the complainant's patent. Regarding this last-mentioned actual knowledge, several further questions must be asked. Is the defendant liable as contributory infringer if he is merely notified that some

one claims a patent, in the infringement of which his acts may aid or participate? Or, in order to become liable, must a defendant have some special reason, such as an adjudication, to suppose the patent valid? If A., the holder of a patent on safes, notifies B., an iron master, who sells pig iron to C., that C. will use the iron in the manufacture of an infringing safe, can A. hold B. as contributing to the infringing manufacture of all the safes made with iron which has been sold by B. to C. after the notice given? Is the material man, on being notified that a patent is claimed, bound, at his peril, to ascertain the validity of the patent and the fact of infringement by his vendee?

It may be said that in a case like this the defendant is held liable, not because he furnished the complainant with the materials of infringement, but because his furnishing these materials to the infringer is evidence that he personally and actually participated in the infringing manufacture. This method of stating the liability does not remove the difficulties mentioned above. We have to ask in what cases the sale of materials is evidence of participation in manufacture, and what sort of evidence is relevant to show that a material man selling to an infringer does not participate. The defendant here did not, as in *Wallace v. Holmes*, 5 Fish. Pat. Cas. 37, Fed. Cas. No. 17,100, furnish an important completed part of the infringing machine,—a part which in itself embodied much of the patentee's invention. See *Rob. Pat. § 903*, and cases cited; *Bowker v. Dows*, 3 Ban. & A. 518, Fed. Cas. No. 1,734; *Richardson v. Noyes*, Fed. Cas. No. 11,792.

These suggestions are not made without purpose, nor are these questions asked captiously. The liability declared in the cases cited is somewhat novel, and is certainly far-reaching. That the principles upon which this liability rests should be ascertained, and that the limits of the liability should be defined, is of great importance, and it is believed that a frank discussion, even of opinions which I am bound to follow, may assist in reaching a satisfactory result. If there rests upon the seller of materials a duty of careful investigation into the objects of his vendee, as is asserted in *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, the former may, at least, reasonably ask precisely what he is bound to investigate.

The cases discussed were all decided on the theory that the sale of materials to an infringer, if made with a certain knowledge and a certain intent, constitutes an act of infringement for which the vendor may be made liable in an action at law. The respondents in these cases were enjoined because they had committed a tort and proposed to keep on committing it. The difficulties which beset this theory have been stated at some length, and perhaps the decisions might have been made to rest upon another theory, not alluded to in the opinions, which is in some respects less unsatisfactory in its application. It may be that one who sells materials or lends money or lets a building to a tortfeasor, or otherwise aids in the commission of a tort, even if not liable as joint tortfeasor in an action of tort for giving the aid, may yet be en-

joined by a court of equity from further continuance of his participation or aiding or abetting in the tort. If this be a sound doctrine, then a defendant will be restrained only if and after it has been judicially determined that the act which he is aiding is a tort, the determination having been made in a suit to which he himself is a party. That equity should restrain the further doing of an act which was not a tort when previously committed, which becomes a tort, if at all, only after the injunction has been issued, and only in consequence of the issuance of the injunction, may seem a novel proceeding, yet analogies exist. An injunction is often issued against a corporation and its officers and agents forbidding all to engage in an infringing manufacture. Not all the officers and agents enjoined have been guilty of the tort of infringement, and it is at least possible, for example, that the issuance of an injunction enlarges the duty of a director to control the corporate acts, as well as provides an additional penalty for his neglect of duty. Again, in *Supply Co. v. McCready*, 17 Blatchf. 291, 301, Fed. Cas. No. 295, the carrier of infringing articles was enjoined from continuing the carriage. It was urged that he had been guilty of no wrong for which he could be sued at law, but the court said that "the cases cited for the defendants are cases where it has been held that workmen and employes will not be held liable for profits and damages, in a suit for the infringement of a patent. Under section 4921 of the Revised Statutes, the authority of this court, in a case arising under the patent laws, of which it has jurisdiction, to grant an injunction, according to the course and principles of courts of equity, to prevent the violation of any right secured by a patent, is entirely independent of the award of any other relief in the same suit." "There can be no difficulty in so framing the order of injunction that, with the co-operation of the agents of the plaintiff, there will be but little practical difficulty in securing obedience to the injunction without serious practical inconvenience to the defendants. The defendants' company will be deprived of no more carrying trade in respect to infringing ties than they would be deprived of if the shippers of such ties were enjoined, and it must be presumed that they would be enjoined if their names were known." It seems probable that, in *Supply Co. v. McCready*, the court would not have held that, previous to the injunction, the defendant had committed any tort.

It is not worth while in this place to pursue further the suggestion just made. To the objection that it is novel, the answer may be made that the history of the jurisdiction and practice of equity is one of avowed novelty and flexibility, while the common law of torts is comparatively rigid. So far as the aider or abettor of a tort is amenable to an injunction, equity will consider if the aid given be sufficiently important to call for the injunction; but, if aiding a tort makes the aider a joint tortfeasor, then he can be sued at law, whether the aid be rendered be great or small, since legal remedies, unlike injunctions, are of strict right, and not of judicial discretion. Again, so far as the remedy against aiding a tort be afforded by injunction only, the question of the extent and

degree of the respondent's knowledge will offer no difficulty, since the injunction, by its terms, will precisely define the respondent's duties.

There being no evidence to connect the respondent Sarah S. O'Brien with the sale complained of, no injunction will issue against her. As I am bound by the cases cited, an injunction against the respondent William O'Brien will issue, conformed as closely as may be to the injunction issued in *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*

WILCOX & GIBBS SEWING-MACH. CO. v. MERROW MACH. CO. et al.

(Circuit Court of Appeals, Second Circuit. October 26, 1898.)

No. 113.

1. PATENTS—CONSTRUCTION OF CLAIMS—LOOPER OR OVERSEAMING DEVICE FOR SEWING MACHINES.

Claims 2 and 5 of the Willcox & Borton patent, No. 472,094, for a sewing machine, relate to a looper or overseaming device. The looper consists of a single part, having an upper and a lower jaw, which always remain in the same relative position, the part moving in a vertical plane, while the needle of the machine, in making the stitches, moves in a direction oblique to such plane; so that the looper, when seizing the needle thread below the cloth, is on one side of the needle, and, when presenting the loop above for the completion of the stitch, is on the other side. The device, by reason of its greater simplicity and the shorter distances traveled by its respective parts, which enable it to be operated at twice the speed of any prior device, is an ingenious and meritorious invention, of utility and novelty, which entitles the claims to a broad construction, and which is applicable to both single and double thread machines.

2. SAME.

Claim 2 of the Willcox & Borton patent, No. 472,095, for a sewing machine, which claim is for a looper for overseaming, does not disclose patentable invention, the device being the same described in patent No. 472,094, to the same parties, with slight mechanical changes, which were obvious in view of the prior state of the art, to adapt it for use on machines using a double thread.

3. SAME—INFRINGEMENT.

The Willcox & Borton patent, No. 472,094, for a sewing machine, as to claims 2 and 5, which cover a looper for overseaming, *held* infringed by a device having similar parts, and operating in substantially the same manner, though adapted for use on a double-thread machine, while the special kind of seam shown by the drawings of the patent is made with a single thread.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This was a suit in equity by the Willcox & Gibbs Sewing-Machine Company against the Merrow Machine Company and others for infringement of two patents relating to sewing machines. From a decree dismissing the bill, complainant appeals.

Hubert Howson and Edmund Wetmore, for appellant.
Melville Church, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Two patents are declared upon. The first is No. 472,094, for "Sewing Machine," dated April 5, 1892 (application filed July 23, 1887), to Willcox & Borton, assignors to complainant. The structure described is complete in all its parts, and is an elaborate piece of mechanism. The particular part involved in this action is the device known as a "looper," and the only claims relied upon are:

"(2) The combination with the needle and its operating mechanism, of a looper having an upper jaw provided with a hook and a lower jaw, said looper being arranged to oscillate in a path around the edge of the cloth plate, and means for actuating said looper to carry a loop of the needle thread around the cloth plate, substantially as described."

"(5) The combination of the double-jawed looper moving in a single plane, and a needle moving in a line oblique to the plane of the looper's movement, and intersecting the same, whereby the looper is, when beneath the cloth, on one side of the needle, and, when above the cloth, on the other side thereof, substantially as described."

The second patent is No. 472,095, for "Sewing Machine," dated April 5, 1892 (application filed May 24, 1890), to the same parties. The general form and organization of the machine are similar to that described in 472,094. Of the nineteen claims of this second patent only one is declared upon, viz.:

"(2) The looper made with two jaws, one of which is furnished with a hook, and the other with an eye, in combination with a reciprocating needle and operating mechanism for moving the looper in a plane oblique to the plane of movement of said needle, substantially as described."

The judge at circuit dismissed the bill, holding that the device of defendants did not infringe either of the three claims above quoted.

A brief reference to the genesis of No. 472,094 may be useful. The complainant introduced evidence to show that the Willcox & Gibbs Company had a machine making straight-ahead stitching, and running 2,000 to 3,000 stitches a minute, for the seaming of cut hosiery goods; but this straight-ahead stitching left a raw edge to the seam. There were also in existence so-called "buttonhole machines" which might be availed of to make an overseam, and thus avoid the raw edge, but the most efficient of these did not exceed 1,000 stitches a minute. From the manufacturer's view-point, high speed was necessary to produce knit goods economically; and the company, "in consequence, through [its] experts and mechanical engineers, took up seriously the work of getting out an overedging machine which could be successfully used for overedging cut hosiery goods, and which could be run at high speed. The matter was worked upon steadily by [its] experts and machinists; and, after four years of active, expensive work in experimenting and perfecting their inventions," the machine of patent 472,094 was produced. The circuit court found from the proofs in the case that, "prior to complainant's machine, the practical work of such machines [overseam machines] was not more than one thousand stitches per minute, while by complainant's machine more than two thousand stitches can be made." This finding is abundantly supported by the record. The result of patentees' experimenting has been to double the speed, and it might be expected that the new machine would be

found to contain some radical modification of all earlier ones to bring about such a result. Such expectation is fulfilled by the proofs showing the prior art. There were many prior patents for making overseam stitches. In all of them it was, of course, necessary to draw into proper position a loop of needle thread. Hooks of various shapes, eyelets, and jaws, and shanks are to be found in abundance; but, although the patentees have borrowed in part from the earlier art, they have so arranged the various parts as to secure a marked improvement in their operation. From the description of the patent it appears that the looper has two jaws, the upper one to seize the loop of needle thread below the cloth, and the lower one to distend the loop, and hold it distended above the cloth. The upper jaw is hooked so as to seize the loop; the looper then moves around the edge of the cloth, and, as it does so, the jaws being pushed inward, the loop releases itself from the upper jaw, and falls on the lower jaw, which then proceeds to complete the operation. The upper jaw always remains the upper jaw, and the lower jaw always remains the lower jaw. There is no revolution of the parts, nor is there any sidewise or shogging motion imparted to the looper, which remains always in the same vertical plane. The necessary shift of position from one side of the needle when below the cloth to the other side of the needle when above the cloth is accomplished by so arranging the needle and needle arm that the needle pierces the cloth, not perpendicularly, or nearly so, as usual, but at an angle less than 90 degrees. "This peculiar line of travel of the needle, in connection with a looper moving in [one plane at right angles to the line of seam], enables the looper to seize the loop below the cloth on one side of the needle (that nearest the already formed seam), and to hold the loop above the cloth on the other side of the needle, viz. that which is furthest from the already formed seam." The specification further states that the "novel and important feature of this part of the invention consists in the relative arrangement of the needle and the double-jawed looper, so that the line of the needle's motion is oblique to the plane in which the looper moves."

In the earlier art the looper had been transferred from one side of the needle to the other in a variety of ways, and, certainly in one patent (Wanzer), by moving the looper in a single plane diagonal to the path of the needle. But the Wanzer looper was not one with upper and lower jaws, but a revolving, or, as complainant's expert calls it, a "somersault," looper, and one with which high speed—the desideratum of the complainant's experts—was apparently impossible of attainment. It will not be profitable to discuss all the prior patents. Some of them are briefly referred to in the opinion in the circuit court. Assuming that the object of invention was a high-speed machine, and that patentees' machine is the first practical high-speed machine (as the evidence shows), it will be sufficient to indicate the points of divergence from the machines of the earlier art; and, if it is apparent that the changes devised by the patentees are of such a character as to permit the operator to double the speed of the overseam machine, it may fairly be concluded that they exhibit patentable novelty. All of the score or so of patents

which have been introduced as showing the prior art may be grouped under one or other of three classes, viz. somersault loopers, two-implement loopers, and compound-motion loopers.

The somersault looper performs its work by throwing a half somersault, so that the end which draws the loop and presents it travels back and forth on a circular path, of which the shank to which it is attached is the radius. In consequence, it does not keep close to the edge of the cloth when changing position from below the cloth plate to above it, or vice versâ; and, when it clutches the loop of needle thread, it is so far below the cloth plate that the stroke of the needle must be long in order to place the needle thread where it may be caught by the looper. Complainant's experts set forth several reasons why this arrangement is fatal to high speed. It hardly needs an expert to inform the court that the point of the needle can be made to reciprocate more rapidly, with less chance of distortion, if the distance it is required to travel be reduced. The looper of the patent in suit is made to travel as closely as possible around the edge of the cloth, keeping the same side up all the time, so that both looper and needle point operate on lines of travel so much shorter than those of any somersault looper of the prior art that the machine may be organized to work at double the speed attained before.

The two-implement looper is one which performs the operation of seizing the loop of needle thread below the cloth, and presenting it in proper position above the cloth, by the aid of two separate pieces of mechanism. These have to be separately operated, and the operating mechanism becomes more complicated. Not only is the improvement of the patent meritorious, as tending towards simplicity, but complainant's expert testifies—and no one contradicts him—that, the more complicated the mechanism involved, the more difficult it becomes to run at a high speed, while the multiplication of relatively moving implements, which co-operate in their action upon one thread, increases liability to skip stitches. Certainly, the device of the patent in suit is simpler, dispensing with one independently operated part. It is susceptible of high speed (apparently by reason of its greater simplicity), while the earlier two-implement machines were slow, and apparently were not susceptible of being made faster. These remarks apply equally to the compound-movement loopers, where, besides the motion in a vertical plane, a sidewise or shogging motion is also imparted, requiring a material increase in the complication of the actuating mechanism, and to that extent preventing high speed. No compound-motion overseam machine that ran or was capable of running at a speed at all comparable to complainant's has been found in the prior art.

When the increase of speed is so great as it appears to be in this instance, and that, too, in an art where increase of speed (efficiency being preserved) is of such practical importance, we are disposed to consider the changes in parts and arrangement of parts as showing meritorious invention. This capacity for high speed is not an afterthought, for at the beginning of the specification is found the statement:

"The machine has been contrived with reference to running at a very high rate of speed, the reciprocating parts being as short and light as possible," etc.

Referring to the increased speed of complainant's machine, the circuit court says:

"The advantage, complainant now insists, is due to the form of its looper, which allows the stitch to be made with a much shorter thrust of the needle. How much of this increase of speed is due to this device, and how much to other parts of the machine, does not appear."

It is undoubtedly true that, unless other parts of the machine are contrived (as they are) to drive the entire mechanism at the desired high rate of speed, the result sought for will not be accomplished; but, given mechanism organized to drive at that rate, it seems quite plain, upon the proofs, that complainant's stitch-making (looper) mechanism is so organized as to permit itself to be driven at that rate, and that it is the first stitch-making (looper) mechanism which could be so driven. We are unable to concur with the circuit court in the conclusion that patentees have not sufficiently set forth and claimed the noninverting character of their looper. As appears from the quotation above, they set out to attain high speed. They sought to achieve that end by, as they say, "[having] the reciprocating parts as short * * * as possible." They show, in fact, an arrangement which has shorter parts and shorter lines of travel, and which permits increased speed. That,—as compared with the somersault loopers,—this is accomplished by the use of a noninverting looper, is pointed out *supra* in this opinion; and that the looper of the patent is to be a noninverting looper seems plain from the requirement that it shall be double-jawed, having an upper jaw (which, as the description shows, always remains an upper jaw) and a lower jaw (which always remains a lower jaw). The patentees seem therefore to have made an ingenious and meritorious invention, of utility and novelty to support a broad patent, and to have sufficiently described such invention. The extent of the patent and the scope of the claims 2 and 5 are next to be considered.

As this opinion abundantly shows, the art of overseam or button-hole stitching by machinery was an old one, and many varieties of mechanism were in use. All such machines were broadly divided into single-thread or double-thread machines. The distinction between the two is succinctly set forth in the opinion of the circuit court:

"[In double-thread machines] a sewing-machine needle having the eye near the point is first thrust through the fabric, carrying the needle thread with it. Then a hook of some kind takes hold of the needle thread below the fabric, and holds it so that the needle, in being withdrawn from the fabric, leaves a loop of needle thread on the hook and below the fabric. This loop of needle thread is then drawn out to, and lifted up around, the edge of the fabric. Then a loop of another thread is thrust through the loop of needle thread, and the needle, in making its second stroke, passes through this second loop [of looper thread]. In single-thread machines the loop of needle thread, after being lifted up around the edge of the fabric, is carried over the fabric, and the needle, in making its second stroke, passes through the needle-thread loop."

When the complainant company set its experts to work, it wanted fast-running, instead of slow, overseam machines, of which two well-known classes already existed, making, respectively, single-thread and double-thread overseams. The method by which the stitch itself was formed in each kind was well known. The company, as is testified to, started in its experiments upon the single-thread class, because it was the easiest to experiment with. When the inventors had completed their invention (472,094), and came to describe and illustrate it, they naturally used drawings of a single-thread machine, and, when they described those drawings, used language peculiarly appropriate to single-thread machines. But we do not think that they thereby restricted their invention to that single class of machines. On the contrary, the language used by the patentees at the very outset of the specifications indicates that they understood that their improvements were available for all kinds of overseam, and undertook to say so. "The machine represented in the drawings," they say, "is one which makes an overseam, and is intended specially for sewing knit goods; and our improvements are chiefly applicable to machines making some variety of overseam. The special kind of overseam made by the machine shown in the drawings is formed of a single thread," etc. When we come to examine the precise improvement under discussion,—the oblique-plane, upper and lower jaw, noninverting looper, with its simplicity of parts, its motion in a single plane, its nearness to the fabric, its securing shortness of travel to needle point and looper,—it is quite apparent that those changes from earlier structures are as valuable in giving the capacity for high speed to a double-thread as to a single-thread machine. Unless, then, the claims themselves in some way confine the patentees to the single-thread class, they should be construed so as to cover the actual improvement over the prior art, whether embodied in one or the other of the old and well-known classes.

As already seen, it was and is the distinctive mark of a single-thread stitch that the needle, on its second stroke, should go through the loop of needle thread drawn off from its former stroke; but neither claim 2 nor claim 5 demands this action from the needle. They call for an action of the combination which will draw a loop of needle thread off the needle below the fabric, and carry the same up around the edge, and above the fabric. There both claims leave the loop to have the stitch perfected in either of the two ways already well understood in the art, i. e. by driving the needle through it if it were to be single stitch, or by driving a loop of looper thread through it if it were to be double stitch. The claims, therefore, in our opinion, cover the devices of the patent, whether used in a double or in a single thread machine. *Deering v. Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118.

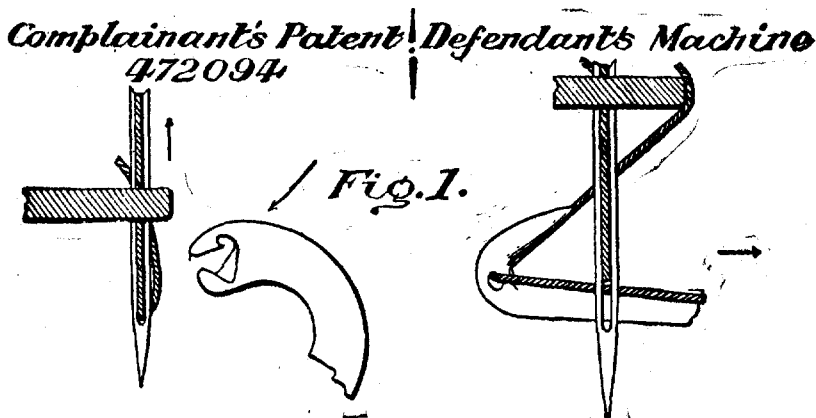
Patent No. 472,095, as already stated, is for alleged improvements on 472,094. The "object is the formation of an overseam of two threads whose successive loops interlock, and which we denominate an 'overlock seam.' In the looper, as modified to effectuate this object, the lower jaw becomes a needle for the lower thread." The

machine, as a whole, contains many parts, but we are, of course, concerned only with the subject of the second claim:

"(2) The looper made with two jaws, one of which is furnished with a hook, and the other with an eye, in combination with a reciprocating needle and operating mechanism for moving the looper in a plane oblique to the plane of movement of said needle, substantially as described."

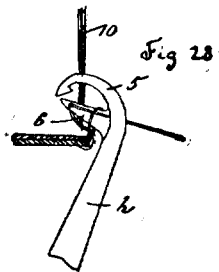
Here we have a two-jawed looper, which the specification shows to be noninverting, moving in a plane oblique to the plane of movement of the needle, one of the jaws being provided with a hook which seizes the thread from one side of the needle below the cloth, brings it up above the cloth on the other side of the needle, and then lets it drop upon the lower jaw, which has an eye in it for the looper thread. There is no change whatever from the single-thread device illustrated in the drawings of No. 472,094, except to deepen the opening between the jaws, straighten the lower jaw, and punch an eye in it, so that, when the forward thrust comes, the loop of looper thread will be pushed forward to the descending needle, instead of the loop of needle thread. We concur with the judge who tried the cause below that it is difficult to see any patentable novelty in this. It was old to have an eye at the end of the looper to carry the second thread when making a double-stitch overseam. Tarbox's somersault looper (49,803, of 1865) has one. And given the noninverting, double-jawed looper of 472,094, the mere mechanical skill of the calling would seem sufficient to so modify it that it would push a loop of looper thread forward through the loop of needle thread to take the second thrust of the needle. In our opinion, claim 2 of 472,095 cannot be sustained.

The question of infringement alone remains to be considered. Undoubtedly, the defendants' device is of a different shape from that of complainant, as the following figures show:



The hook of complainant's upper jaw moves in, catches the needle thread below the fabric, then moves out, drawing out the loop of needle thread left below the cloth by the ascending needle. It next rises, carrying the loop around the edge, and then moves forward;

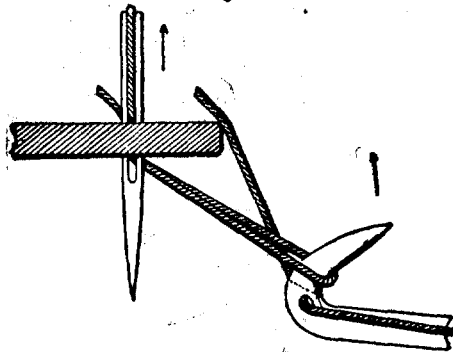
and, as it moves in over the edge of the cloth plate, the loop of needle thread is pushed off the hook dropping on the lower jaw, where (for a single thread) it lies well forward, and, as the inward motion of the looper continues, is brought under the descending needle for completion of the stitch. It will be borne in mind that the figure above marked "Complainant's" is for single stitch only, and that we concur with the circuit court in the conclusion that "a skillful mechanic, being presented with a machine of No. 472,094, and with the prior patents in evidence, and requested to adapt the machine to a double-thread stitch, would have made the change almost as a matter of course." The change must be one which will thrust a loop of looper thread through the loop of needle thread, and present the loop of looper thread to the descending needle. The phrase "double-thread overseam" implies precisely that. That the loop of looper thread could be brought forward by an eye in the looper was shown by Tarbox; and the natural place for the location of the eye is in the lower jaw, since during the forward movement of the looper towards the needle the loop of needle thread rests on the lower jaw. Finally, if the loop of looper thread is to be pushed forward through the loop of needle thread, clearance for the latter must be provided, manifestly by deepening the mouth between the jaws, so that the loop will slide along as the lower jaw carrying the looper thread moves forward towards the needle. This mechanical change is what is shown in No. 472,095, as illustrated by the following figure from that patent:



Inasmuch as claims 2 and 5 of 472,094 cover a combination which takes the loop of needle thread from the lower side of the fabric around the edge to the upper side, leaving the stitch to be completed either as single-thread or double-thread, infringement is not avoided merely by completing it as a double-thread stitch, if the functional operation of the parts performing the operation of the claim are identical, although there may be differences in form. It is apparently not disputed that defendants' looper is an "oblique-plane, non-inverting" looper. Defendants insist that it cannot infringe, because it makes a double-thread stitch. That contention has been already considered and disposed of. The other distinctive feature of the claims is a looper which is double-jawed,—having an upper jaw, provided with a hook, and a lower jaw. If defendants' device contains these elements, it infringes, for in all other respects it is the device

of the claims; and, indeed, with a mere change of timing, defendants' commercial looper may be substituted in complainant's machine, and does the work. Comparing the two loopers,—defendants' and complainant's,—as mechanically modified to make a double stitch, we find a mouth with its opening turned forward (towards the fabric) in complainant's, and back (away from the fabric) in defendants'. The mouth is formed by two jaws opened at one end, and connected together at the other. The upper jaw or member in complainant's device inserts its hook or barb between needle thread and needle, and pulls away from the line of the needle's play; and the loop of needle thread goes with it, even when it rises above the edge of the fabric, because it is still retained in the curved forward (i. e. nearest the seam) portion of the metal jaw which caught it. Precisely this is the action of defendants' device, as may be seen from Fig. 1, ante, and from the figure immediately below, which (except for the dotted line) is taken from defendants' brief.

Fig. 3.



Here, too, the upper jaw or member inserts its hook between needle and needle thread, and pulls away from the line of the needle's play; and the loop of needle thread goes with it even when it rises above the edge of the fabric, because it is still retained in the curved forward portion of the metal jaw which caught it. Defendants' looper, below the dotted line, might be cut away (in which case, of course, the remaining part would have to be connected with the operating mechanism by some prolongation of the upper member), and the operation so far described would still be performed. Indeed, up to this point it is apparent that the operative instrumentalities are substantially identical,—for it surely makes no difference by which end the upper member is connected with the operating mechanism,—performing the same functions, in precisely the same way. Having now raised the loop of needle thread above the fabric, the next step of the process (in complainant's machine) is a forward movement of the looper. This causes the loop of needle thread to slip off the curved portion of the jaw which held it, whereupon it falls upon the lower jaw, which pushes it forward for a sin-

gle-thread stitch, and pushes a looper thread forward through it for a double one. The same action is found in defendants' machine. As the looper moves forward, it reaches a position when the curved metal of the upper jaw (down to the dotted line) no longer holds it. It slips off that portion of the metal. It does not fall upon the lower jaw, since the jaws are here united, but slides down on it, and the further forward movement of the lower jaw completes the stitch. From the moment the loop slides down on to the lower portion of the looper (below the dotted line), the upper portion of said looper (above the dotted line) plays no further part in the operation. Evidently, then, the defendants' looper is composed, as is complainant's, of two parts or members (which, as they form a mouth, may properly be called "jaws"), which, although united together, do not act concurrently, but successively, and the upper one of which has a hooked portion to engage the needle-thread loop. Although there is a difference of form, we are unable to find any substantial difference of parts or of functions, between the two stitch-forming mechanisms, and are therefore of the opinion that defendants' machine infringes claims 2 and 5 of No. 472,094, permitting a high rate of speed to be attained in taking off the loop of needle thread, and bringing it up into position above the fabric (a rate of speed not known to the art before patentees' application), by substantially the same combination of parts disclosed in the patent, and covered by these claims.

The decree of the circuit court is reversed, and cause remitted, with instructions to dismiss the bill as to No. 472,095, and to enter the usual decree as to claims 2 and 5 of No. 472,094. Since appellant prevails as to one patent, and fails as to the other, the decree should be without costs to either side.

WILLCOX & GIBBS SEWING-MACH. CO. v. MERROW MACH. CO. et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 113.

PATENTS—VALIDITY AND INFRINGEMENT—SEWING MACHINES.

The Willcox & Borton patent, No. 472,094, for improvements in sewing machines intended especially for making overseams in sewing knit goods, construed, and held valid, and infringed as to claims 2 and 5.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This cause was submitted upon oral argument May 17, 1898, and an opinion reversing decree of the circuit court and directing the usual decree as to claims 2 and 5 of United States letters patent No. 472,094 was filed October 26, 1898. 93 Fed. 206. An application for rehearing was made by defendants November 18, 1898, and reargument was allowed upon the single "question of similarity of equivalency of defendants' hook looper to complainant's double-jawed looper." After rehearing upon briefs and oral arguments (January 30, 1899), the following memorandum of decision is now filed.

Edmund Wetmore and Chas. Howson, for appellant.
Melville Church and Chas. E. Mitchell, for appellees.

Reargued before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. In the original opinion (93 Fed. 206) this court discussed at considerable length the details of structure, characteristics, and functions of complainant's double-jawed looper and of defendants' hook looper. In the course of this discussion it was remarked that when the upper jaw or member in complainant's device has caught the loop of needle thread, and thereupon pulls away from the line of the needle's play, "the loop of needle thread goes with it, even when it rises above the edge of the fabric, because it is still retained in the curved, forward (i. e. nearest the seam) portion of the metal jaw which caught it." The opinion then proceeds:

"Precisely this is the action of defendants' device, as may be seen [from certain figures referred to]. Here, too, the upper jaw or member inserts its hook between needle and needle thread, and pulls away from the line of the needle's play, and the loop of needle thread goes with it *even when it rises above the edge of the fabric, because it is still retained in the curved, forward portion of the metal jaw which caught it.* * * * Having now raised the needle thread above the fabric, the next step of the process [in complainant's machine] is a forward movement of the looper. This causes the loop of needle thread to slip off the curved portion of the jaw which held it, whereupon it falls upon the lower jaw. * * * *The same action is found in defendants' machine. As the looper moves forward, it reaches a position where the curved metal of the upper jaw [down to the dotted line] no longer holds it. It slips off that portion of the metal.* It does not fall upon the lower jaw, since the jaws are here united, but slides down on it," etc.

In the petition for reargument it was pointed out that the testimony did not warrant the statement italicized above, that the curved forward portion of the metal jaw (in defendants' machine) which caught the loop of needle thread "retains" such loop "even when it rises above the edge of the fabric," and does not part with it until the "looper moves forward"; and attention was called to the fact that complainant's expert admitted that that portion of defendants' hook which he contended was the equivalent of the upper jaw of complainant's looper retained its hold of the loop of needle thread only while moving in a horizontal direction, and lost such hold as soon as it began to rise. A careful re-examination of the parts as reproduced in the models and drawings indicated that, although there might be some slight elevation of the loop before the upper portion of the hook lost it, such elevation must necessarily be inconsiderable; it was not carried substantially above the fabric. Although it was not apparent that it made any material functional difference whether the loop slipped off just as the hook began to rise or later, reargument was ordered, since the precise point had not, perhaps, been quite fully discussed on the original argument. The conclusion heretofore expressed as to the equivalency of defendants' hook looper to the complainant's double-jaw looper remains unchanged by the reargument. We have found, as may be seen by reference to the original opinion, that "no compound motion overseam machine that ran or was capable of running at a speed at all comparable to complainant's has been found in

the prior art"; that "complainant's stitch-making [looper] mechanism is so organized as to permit itself to be driven at that rate, and that it is the first stitch-making [looper] mechanism which could be so driven"; that "the patentees seem to have made an ingenious and meritorious invention of utility and novelty to support a broad patent, and to have sufficiently described such invention"; that the patentees did not, by their description or drawings, "restrict their invention to the single class of machines known as single-thread machines"; that the "claims cover the devices of the patent, whether used in a double or single thread machine"; that, given the single-thread device illustrated in the drawings of the patent, there was no patentable novelty, in view of the state of the art, in adapting it to a double-thread machine by deepening the opening between the jaws, straightening the jaws, and punching an eye in the lower one to carry the second thread; that, "inasmuch as the claims cover a combination which takes the loop of needle thread from the lower side of the fabric around the edge to the upper side, leaving the stitch to be completed either as a single-thread or double-thread, infringement is not avoided merely by completing it as a double-thread stitch, if the functional operation of the parts performing the operation of the claim are identical, although there may be differences in form." Although we did not expressly say so, the above excerpts quite clearly indicate that we are of opinion that complainant was entitled to a fairly liberal application of the doctrine of equivalents.

It will be sufficient to refer to the extended analysis (in original opinion) of the defendants' device, wherein it was found that the metal composing it is in fact a looping device, with two members or jaws united on the side towards the seam instead of on the side away from it; that the upper portion of the metal in defendants' hook performs the same function as complainant's upper jaw, and in the same way, and that the lower part of such metal performs the same function, and in the same way, as the lower jaw of complainant's description and drawings, when modified "as the mere mechanical skill of the calling" would modify such lower jaw when the use of a second thread was desired. The additional illustrative model introduced by complainant on reargument, showing one of defendants' hooks, with metal connection made on the side away from the seam, and the original connection on the side towards the seam cut through, demonstrates the accuracy of these statements far more clearly than pages of description could possibly do. Most persuasive, too, is the fact that with the mere adjustment or change in the timing of complainant's driving mechanism defendants' looper is interchangeable with complainant's looper in complainant's machine. In the original opinion it was held to be immaterial that the loop passed from upper to lower member by a slide instead of by a fall. The further difference now pointed out, viz. that a very slight part of the elevation of the loop in defendants' machine is effected by the upper member, and the elevation completed by the lower member, seems equally immaterial. The change is certainly a trifling one, and we cannot find that there is any functional difference in the operation of the two devices. The object of the looper is to take a loop of needle thread from below the

fabric, and bring it up around the edge of the fabric into position for completing the stitch. In both machines this transit is effected by the successive action of both jaws. The distribution of the period of transit between them must be held immaterial when no functional change is involved in making it earlier in the one than in the other. No cause for modifying the original decision appears.

THE MIAMI.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 83.

MASTER AND SERVANT—INJURY TO SEAMAN—MATE'S NEGLIGENCE—FELLOW SERVANTS—LIABILITY.

Where the mate of a vessel, after giving an order to certain seamen, proceeded to assist in its execution, and by their negligence another seaman was injured, the mate, while so engaged, was not acting as a master or vice principal, but as a co-employé; and hence the ship is not liable for the injuries so received.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York, dismissing the libel. 87 Fed. 757. The suit was for personal injuries sustained by the libellant, the boatswain of the steamship Miami, while lowering a topmast at sea.

Chas. C. Burlingham, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The facts are fully set forth in the opinion of the district judge. We are satisfied from the evidence that the negligent act which caused the precipitate descent of the topmast was not any improper casting off of one of the turns of the chain from around the drum. The subsequent experiments indicate quite clearly that the remaining turns gave a sufficient purchase to control the descent of the topmast, if only the free end of the chain had been held taut, as it might readily have been, and paid out gradually. There is no force, therefore, in any suggestion that an improper or negligent order of the mate caused the accident. That officer undertook to carry out his own order. He cast off the turn (or two), checking any slip of the chain by pressing it against the drum. Had he not released that pressure until the seamen who held the free end had it well in hand, there is nothing in the record to indicate that the chain would have got beyond control. The seamen, however, supposed that he was intending to pay out himself, and had relaxed their hold; while he, supposing they still maintained it, released the pressure, and in a few seconds the weight of the topmast imparted an impetus to the chain which none of them could overcome. The negligence was that of the three men (the mate and the two seamen) in carrying out the instruction to reduce the number of turns around the drum. When participating in this particular work, the mate was not acting

as master or vice principal, but as an ordinary seaman, or, at most, as the foreman of a gang performing ordinary seamen's work. The case is within the rule laid down in *Quinn v. Lighterage Co.*, 23 Blatchf. 209, 23 Fed. 363, and clearly distinguishable from the cases cited by the appellant: *Peterson v. The Chandos*, 4 Fed. 645; *Daub v. Railway Co.*, 18 Fed. 625; *The Sachem*, 42 Fed. 66; *The Titan*, 23 Fed. 413; and *McCullough's Adm'x v. Steamboat Co.*, 20 U. S. App. 570, 9 C. C. A. 521, and 61 Fed. 364.

We concur, also, in the finding of the district court that there is no evidence that the shackle was insufficient. Its breaking seems to have been the result, not the cause, of the accident. The decree of the district court is affirmed, with costs.

THE ALLERTON.

COLUMBIA & WILLAMETTE RIVER OPPOSITION STEVEDORE CO. v.
R. W. LEYLAND & CO.

(District Court, D. Oregon. March 15, 1899.)

Nos. 4,401, 4,402.

1. ADMIRALTY JURISDICTION—CONTRACT FOR STEVEDORES' SERVICES.

A contract for stevedores' services is maritime.

2. MARITIME LIENS—BREACH OF CONTRACT FOR STEVEDORES' SERVICES.

An action in rem will not lie for breach of a contract for stevedores' services, to be rendered generally for the term of one year to the owners of the vessel sought to be attached, where no services were rendered such vessel, to give the libellant the right to a lien thereon.

These are two libels by the Columbia & Willamette River Opposition Stevedore Company for breach of contract,—one against R. W. Leyland & Co., and the other against the ship Allerton and the same respondents.

George E. Chamberlain, for libellant.

James Gleason, for claimant of the Allerton and defendant.

BELLINGER, District Judge. There are two of these cases. One is a libel in personam, as well as in rem, for damages for a breach of a contract for stevedores' services. The other is a libel in personam for a breach of the same contract. The contract was entered into on February 17, 1898, between Leyland & Co. and the libellants for such stevedoring services as might be required by the ships owned by Leyland & Co. at Portland and Astoria during the continuance of the contract, which was for one year. The ships Allerton and Otterspool, owned by said company, arrived at Portland in September and December, respectively, in ballast, for wheat cargoes; and although the libellants were ready and willing to perform the services required of them by their contract in unloading and loading these vessels, and offered so to do, yet said Leyland & Co. refused to permit them to perform such services. Whereupon they bring their libels in this court, and pray that warrants may

issue for the arrest of said vessels, and for an attachment of the property of said owners.

Held:

1. The contract for stevedores' services is maritime.
 2. No services having been rendered either of the vessels in question, and the contract for services being without reference to either of these vessels, no maritime lien exists upon either of them, and actions in rem will not lie. The remedy of libelants is by actions in personam against the owners. The libelants having no right to proceed in rem, the question of joinder of such a proceeding with an action in personam is immaterial. The exception in the case of the Allerton as to such joinder, and to so much of the libel in that case as constitutes a proceeding in rem, is allowed. The remaining exceptions are overruled.
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THE MARY A. TRYON.

(District Court, S. D. New York. March 22, 1899.)

LIEN FOR TOWAGE—CHARTERED BOAT.

A boat cannot be subjected to a lien for towage services rendered under a contract with a charterer in the usual course of his business, the tower having knowledge that it was chartered, unless by a previous understanding to that effect with the owner.

In Admiralty. Lien for towage. Chartered boat.

Benedict & Benedict, for libellant.

James J. Macklin, for claimant.

BROWN, District Judge. The libellant seeks to recover \$295 for towages of the canal boat Tryon on the Hudson river in the months of August, September and October, 1895.

The evidence shows that the boat was chartered by the claimant to John Scott, who was engaged in the ice business, and who was running a number of chartered boats, all of which were towed during that season by the libellant under a contract for towage made in the spring with the libellant's agent; that the libellant knew that the boats were chartered; and that the bills for towages were rendered by the libellant to Scott monthly, pursuant to the contract, charging the towages against him, and specifying the amounts for towing each boat respectively. In August, on account of the previous monthly bills not being satisfactorily paid, one Quigly, who had chartered a boat to Scott, was notified by the libellant that it would look to the owners of the boats for the payment of the towages, and he was requested to notify the other owners of the boats that Scott was running to that effect. This was before claimant's boat was hired. Quigly thereupon withdrew his boat from Scott's employ, and introduced Scott to the claimant, who thereafter on the 19th of August let the Tryon to Scott at the rate of \$4 a day, including the service of a man on board as caretaker. Quigly testifies that when he introduced the matter to the claimant, he told him that the Cornell Company had notified him that they would look to the owners for the

payment of towages, and that he for that reason had withdrawn his boat from Scott's employ. The claimant wholly denies this statement, and testifies that he would not for a moment have let his boat to Scott under such circumstances, as the towages were \$8 a day, and his own pay but \$4; and that it had never been the custom of the libelant or anybody else to his knowledge to collect the towage of chartered canal boats from the owners, but only from the charterers. Scott failed in October; and not until after that was any notice given by the libelant to the claimant that it looked to him for towage or expected him to pay it, although the collecting agent of the libelant had been accustomed to see the claimant during the three months previous almost daily, and the libelant knew that the claimant was the reputed owner of the Tryon. The claimant further testifies that he had been frequently accustomed to have towages done for him by the Cornell Company, and a bill was rendered for the towages trip by trip.

Under the circumstances above stated, I can have no doubt that the contract for the season's towage originally contemplated a personal liability only, without any lien upon the boats towed. *The J. M. Welsh*, 8 Ben. 211, Fed. Cas. No. 7,327; *The Tillie A.*, 84 Fed. 684. The cross-examination of Quigly throws doubt upon his statement that he told the claimant when the boat was hired in August that he had withdrawn his own boat because the libelant would look to the boat for towage, and in view of the claimant's entire denial of it, and the extreme improbability that the claimant would have chartered his boat if thus informed and have incurred such responsibilities greatly in excess of the hire, leads me to credit the claimant's statement rather than Quigly's. It is against conscience that in a business like this towages for the charterer's account, when the tower knows that the boats are chartered, should be imposed upon the owner without a previous understanding to that effect. Knowledge that the boat was chartered, and the necessary implication in such a business as this, that the charterer and not the owner should pay for towages, as well as Quigly's testimony to the ordinary practice to collect of the charterers only, and the libelant's dealing with Scott alone and not with any master of the boat, are sufficient to prevent the libelant's recovery. The case is similar in principle to that of *The Kate*, 164 U. S. 458, 465, 17 Sup. Ct. 135, where it was held that no lien would exist merely upon dealings with the charterer, even if the credit were given to both the charterer and to the vessel, because the charterer had no authority to bind the vessel. In this regard I do not think towages in the usual course of the charterer's business, and not arising in any exceptional emergency, stand in any better position than repairs and supplies. The same rule was re-affirmed still more pointedly in *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, where the supply men had no express knowledge of any charter but had knowledge of facts sufficient to put them on inquiry.

In the present case, moreover, the fact that no notice of any claim for towages was sent by the libelant to this claimant, nor any account of towages till after Scott's failure, notwithstanding the fact that during this delay of three months the claimant was seen frequently by the collecting agent, and the fact that the bills during all this time

were rendered to Scott alone, forbid the finding that the towage was in fact upon the bona fide credit of the boat rather than the personal credit of Scott.

The libel is dismissed with costs.

THE MARY ADELAIDE RANDALL.

(District Court, D. Connecticut. March 24, 1899.)

No. 1,182.

SHIPPING—CHARTER PARTY—CONSTRUCTION—VOYAGE—DISCHARGE.

A schooner was chartered at the port of New York "for as many voyages as vessel [could] make from Fernandina to New York between" November 8, 1897, and June 30, 1898. This period was ordinarily sufficient for five trips, including discharges, which were an important factor. The vessel was to "receive on board during the aforesaid voyage the merchandise hereinafter mentioned." The charterer engaged to furnish a cargo of ties each trip, and to pay "for the use of said vessel during the voyage aforesaid, fifteen cents for each * * * tie delivered, * * * payable in cash on proper delivery of cargo at port of discharge," and also agreed "to pay vessel's wharfage, if any [should be] incurred while discharging under this charter." It was agreed that "the lay days for loading and discharging [should] be as follows: * * * Commencing from the time the vessel is ready to receive or discharge cargo, at least 75,000 feet per running day * * * to be furnished the vessel for loading, and customary dispatch for discharging at port of discharge,"—and that a certain sum should be paid per day for detention by fault of the charterer. On one trip, at the charterer's instance, the vessel went up the river to Bush's Bluff, though it involved a delay. *Held*, that the term "voyage" included the discharge of the cargo, and therefore the vessel was not bound to undertake a fifth trip, where she could not have completed it and have discharged her cargo by June 30th.

This is a libel by George S. Baxter & Co. against the schooner Mary Adelaide Randall, etc., to recover damages for breach of a charter party. Dismissed.

Carpenter & Park, for claimants.

Cowen, Wing, Putnam & Burlingham, for libelants.

TOWNSEND, District Judge. In admiralty. November 8, 1897, libelants and claimants executed the following charter party:

"This charter party, made and concluded upon in the city of New York the eighth day of November, 1897, between J. L. Randall, master and agent for the owners of the Schr. Mary Adelaide Randall, of Port Jefferson, of the burden of 1,108 tons or thereabouts, registered measurement, now lying in the harbor of New York, of the first part, and Messrs. G. S. Baxter & Co., of New York, of the second part, witnesseth: That the said party of the first part agrees in the freighting and chartering of the whole of the said vessel (with the exception of the cabin and necessary room for the crew and the storage of provisions, sails, and cables), or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for as many voyages as vessel can make from Fernandina to New York between the date of this charter party and June 30, 1898, on the terms following: The said vessel shall be tight, staunch, strong, and every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned. The said party

of the second part doth engage to provide and furnish to the said vessel, each trip, a full and complete cargo, under and on deck, of yellow pine railroad cross-ties, sawn and hewn square on four sides, and sawn square at ends, measuring 7"x9"x8½ ft. each. Charterers have privilege of shipping smaller sizes at pro rata rate of freight, and to pay the said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, fifteen (15) cents for each 7"x9"x8½ ft. tie delivered, smaller sizes at pro rata rate of freight, payable in cash on proper delivery of cargo at port of discharge, free of commission or discount. Party of the second part also agrees to pay vessel's wharfage, if any is incurred while discharging under this charter. It is understood the charterers have privilege of loading vessel at Brunswick at same rate and terms. It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched): Commencing from the time the vessel is ready to receive or discharge cargo, at least seventy-five (75) thousand feet per running day, Sundays and legal holidays excepted, to be furnished the vessel for loading, and customary dispatch for discharging at port of discharge; and that for each and every day's detention by default of said party of the second part, or agent, seventy-five (\$75) dollars per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside, within reach of the vessel's tackles. It is agreed that the vessel shall proceed light each trip for Fernandina, and after discharge of cargo at this port to enter upon this charter. The vessel to report to _____, at _____, for cargo. The dangers of the seas, fire, and navigation of every nature and kind always excepted. A commission of five per cent. upon the gross amount of this charter (including demurrage) is due from the vessel to A. Dayton & Co. upon the signing hereof. To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, and also the said vessel's freight, tackle, and appurtenances, and the merchandise to be laden on board, each to the other in the penal sum of estimated amount of this charter.

"In witness whereof, we hereunto set our hands the day and year first above written.

"[Signed]

J. L. Randall.

"[Signed]

G. S. Baxter & Co."

Thereafter claimants entered upon the performance of said charter, and made four round trips. The vessel arrived at New York on the fourth trip from Fernandina on April 22d, completing her discharge May 9th, and then made certain necessary repairs, which were not completed until May 18th. Claimants claimed that there was insufficient time to make another voyage, including discharge, by June 30th, and refused to take another load of ties under the terms of said charter party. The charterers thereupon hired another vessel at an increased freight, and have filed this libel to recover \$454.82 damages for breach of said charter.

The case is peculiarly complicated by several close questions of law and fact. Thus, one of the libelants states that the master of the vessel never said anything to him about not having time to make another trip before June 30th, which statement is not denied by the master. On the other hand, the master testifies, on his direct examination, as to conversations with Mr. Ferguson, another of the libelants, as follows:

"A. My conversation was, with him, that I wouldn't have time to make another voyage on the contract, and unless they would give me a different contract, that would agree to take my cargo when I got in, and pay me the same rate of freight that I had had hitherto, I couldn't think of going out again."

On cross-examination his testimony was to the same effect, namely:

"Q. Did you give them no notice that you elected to terminate your contract, or that it was impossible to carry it out? Nothing but a message over the telephone? A. I had done that several days previous. Q. To whom? A. To Mr. Ferguson. Q. What did you say to him? A. I said that it would be impossible for me to make another voyage under this contract, and if I went again I should have to have a new contract, so as to be sure that they would pay me my freight when I got back. Q. Did you ask them to do that,—to give a stipulation that, if you got back a little later, you would be paid? A. I told them that I would have to have it before I went."

These conversations are not denied by Mr. Ferguson. Again, while the witnesses practically agree that the vessel could have reached the port of New York on her fifth trip from Fernandina by June 30th, their testimony conflicts as to whether or not the discharge could have been completed by that time. Anderson, a witness for libelants, says that 35 days would be a prudent estimate of the length of time for a trip, not including the discharge, at that time of year. And inasmuch as the preponderance of the expert testimony on behalf of the libelants is to the effect that the chances were against the vessel's getting back and discharging by June 30th; and inasmuch as the average of time of previous voyages, including discharges, was about 44 or 45 days, and, if the fifth voyage had consumed the same amount, it would not have been completed by July 1st; and inasmuch as the testimony of the captain to the effect that such a voyage in April and May is ordinarily longer, owing to the condition of wind and weather, than during the preceding months, is uncontradicted, and as the testimony of claimants' witnesses is to the effect that the voyage and discharge could not have been completed until long after June 30th,—I find the chances were so far against the vessel making a fifth voyage, and discharging by June 30th, that she was not bound under said charter party to undertake said trip, provided the term "voyage" be held to include such discharge.

There is a further conflict of testimony as to the length of time occupied in the discharge of vessels; Baxter, one of the libelants, testifying that the Randall could have been discharged in four or five days, if necessary. But Bolander, who is in the employ of libelants, and has charge of unloading their vessels, testifies, on cross-examination, that it remained with the railroad company to tell how quick a cargo should be discharged, and further testifies as follows:

"Q. Did not Capt. Randall come to you repeatedly, and to Baxter & Company, with your knowledge, and ask for a quicker discharge of the Mary Adelaide Randall? A. Yes, sir. Q. Did you tell him that you were discharging him as quick as you could? If not, what did you tell him? A. I don't think we told him we was discharging him as quick as we could. We was doing the best we could. Q. Can you tell the court why it was, the very last time he was there discharging, he was sixteen or seventeen days lying there discharging? A. I don't know whether it was lack of cars, or what the difficulty was."

The average time of discharge on the four trips was 17 days, and I find this to be the time it would probably have required to discharge the vessel, had she taken the fifth trip. In view of the libel-

ants' assertions that the vessel could have been discharged in 4 or 5 days, and their admission that the discharge on these various occasions averaged 17 days, although Capt. Randall was constantly urging the necessity of haste, it may at least be questioned at the outset whether or not the alleged insufficiency of time to complete the fifth voyage, including the discharge, was not due to the inexcusable neglect of the charterer to expedite said discharges.

The controversy between the parties turns chiefly upon the interpretation of the word "voyage" in said charter party. Libelants contend that a voyage means the round trip, which terminates when the vessel reaches the port of discharge. Claimants contend that this charter party is a time contract for the use of the vessel up to June 30th, and that the word "voyage" includes, not only the time of the trip, but the necessary time to discharge the cargo.

The charter party provides for as many voyages as vessel can make from Fernandina to New York before June 30th. "Voyage" (viagrium) is defined as "a transit at sea from one terminus to another." Cohen, Adm. Law, p. 235; Rev. St. § 4511; Arn. Ins. 386. In the Standard Dictionary the word "voyage" is defined as follows: "The outward and homeward passages of a vessel taken together; the whole course of a vessel before reaching her home port." In *The Martha*, 16 Fed. Cas. 860 (No. 9,144), Judge Betts holds that "the voyage denotes the transit to be performed by the seamen, and it is in this sense that the term is used in the law maritime." A voyage is ended when a vessel is safely moored at her last port of discharge after a circuitous voyage. *Granon v. Hartshorne*, 10 Fed. Cas. 967 (No. 5,689). In *The Elizabeth*, 8 Fed. Cas. 484 (No. 4,361), Judge Betts says: "The voyage is ended, within the intendment of the maritime law, when the vessel is safely moored in the port of discharge, and is ready for unloading, although the seaman, by his contract, may be bound to unload the cargo,"—citing *The Martha*, supra; *The Cadmus*, Fed. Cas. No. 2,280.

Therefore, if this instrument is to be construed as a charter party for "as many voyages as vessel can make," etc., using the word "voyage" in its ordinary meaning, the judgment must be for libelants. In the absence of qualifying language, or of other circumstances indicating a contrary intention, it would be presumed that the parties hereto have used said word in its ordinary maritime sense. But I think the other expressions used by the parties indicate that it was their intention that the discharge of the cargo should be considered a part of the voyage. Immediately after the charter for "as many voyages as the vessel can make from Fernandina to New York between the date of this charter party and June 30, 1898," the libellant engages to furnish, each trip, a certain cargo, and to pay "for the use of said vessel during the voyage aforesaid fifteen cents * * * for each tie delivered, * * * payable in cash on proper delivery of cargo at port of discharge; * * * also agrees to pay vessel's wharfage, if any is incurred while discharging under this charter."

The parties have not used the phrase, "voyages from Fernandina to New York," in the sense of the mere actual transit or movement

of the vessel; for it is stipulated that it shall "receive on board during the aforesaid voyage the merchandise hereinafter mentioned." The discharge of the cargo was clearly as much a part of the charter party as the loading; for it was agreed what should be "the lay days, commencing from the time the vessel is ready to receive or discharge," and as to "customary dispatch for discharging at port of discharge," and what should be paid for each day's detention. Furthermore, as if to indicate that the charter for voyages included the discharge of cargo, the libellant agrees to pay vessel's wharfage while discharging as aforesaid.

Apart from the intention to be deduced from the language of the charter party, a consideration of the surrounding circumstances, the situation of the parties, and the object they had in view suggests the same conclusion. The time covered by said agreement was nearly eight months, a period of time ordinarily sufficient for five trips, including discharges. Inasmuch as, under ordinary circumstances, five trips, including discharges, would have been completed by June 30th, the time fixed by the parties, it is fair to presume that they fixed on that date as a time when the engagement of the parties should terminate. Again, the average time for the previous trip from New York to Fernandina, the loading there, and the return to New York, had been only 28 days; the average time for discharging was 17 days. The discharge, therefore, was the chief, the essential, element in said voyages, in determining the length of time required on each adventure, and the mutual rights and obligations of the parties in reference to taking and completing a further trip before June 30th. On the last voyage, claimants, at the request of the charterers, went up the river to Bush's Bluff, although this longer trip probably involved delay, and would have necessarily consumed a longer time, except for the fact that the charterers did not have a sufficient cargo at Fernandina.

The foregoing provisions and conduct of the parties seem to lead to the following conclusions, namely: The charter party, while in terms for "as many voyages as vessel can make," etc., was in fact and in law a time charter,—a hiring of the vessel up to June 30th, to go and come as the charterers might direct,—with an agreement on the part of the master of the vessel that it should make such voyages as the charterers ordered, provided he could have his vessel free to undertake other engagements on or after June 30th. The charter was not for "as many voyages as the vessel might make between Fernandina and New York." No compensation was earned unless, in addition to the transit between the two ports, there should be the due receipt at Fernandina and delivery at New York of a certain specified cargo. This, then, was a contract between the parties for a certain number of voyages, at so much per voyage only, for as many voyages as the vessel could make, and not for a lump sum. It was a contract whereby the charterers agreed to pay to the vessel 15 cents per tie loaded on board said vessel at Fernandina or Brunswick and delivered at a wharf at the port of New York.

An exhaustive examination of American and English authorities fails to show any case exactly in point. Mr. Parsons, in discussing

charter parties, says that, where a charter for a voyage or voyages allows the charterer certain lay days for loading and unloading, "these days for which he pays nothing are a part of the voyage." 1 Pars. Shipp. & Adm. 311. In *Tully v. Howling*, 2 Q. B. Div. 182, a vessel was chartered "for twelve months, for as many consecutive voyages as the said ship can enter upon after completion of the present voyage at and from Sunderland to London." Chief Justice Cockburn said:

"This case seems to my mind perfectly clear. The cases cited by Mr. Webster have no application. They were not cases in which the contract was one that had reference to a given time, or the use of the ship for a given time; and that is the essence of the present contract. The plaintiff says 'I want a vessel from a given date,' or, if you please, 'from the termination of a given voyage.' * * * The bargain is that the plaintiff is to have the use of the ship for twelve months, but the defendant is not in a position to give him the ship for twelve months from the date from which it was agreed the term should begin."

And, on appeal, the judgment of the queen's bench division was affirmed; Judge Mellish saying, *inter alia*:

"In other words, in a charter party for a stipulated time, is the time of the essence of the contract, or is the charterer bound to take the vessel for a time substantially different from the time specified in the charter? We are of opinion that, as in a charter for a voyage, the specified voyage would be of the essence of the contract, and the charterer, if he could not have the use of the vessel for the specified voyage, would not be bound to take her for any other voyage; so, in a charter for time, if the charterer cannot have the vessel for the specified time, he is not bound to take the vessel for a shorter time, or a substantially different time, and, if he cannot get the vessel for the specified time, he may throw up the charter."

These citations are pertinent in support of the view, already taken, that this charter is for the hire and use of the vessel for so many voyages as can be completed within a fixed time, and also as to the respective rights and obligations of the parties. Here the vessel was to be free for other charterers on July 1st. The charterer, therefore, cannot oblige the vessel to undertake another adventure, which would detain it beyond the specified time. Here it is not claimed that the delay for repairs was through the fault of the vessel. *Havelock v. Geddes*, 10 East, 555.

Let the libel be dismissed, with costs.

BOWEN et al. v. SIZER et al.

(District Court, S. D. New York. March 25, 1899.)

1. SHIPPING—DEMURRAGE—MARITIME RULES—CONSTRUCTION.

Maritime rule 5 provides that the demurrage charge for delay of a vessel discharging a lumber cargo shall be at the rate of 15 cents per M. feet, board measure, of entire cargo delivered. *Held* that, in the absence of clear proof of a change in the custom, seven-eighths inch dressed boards will be treated as inch lumber, in determining the amount of the demurrage chargeable.

2. SAME.

A special provision of a charter party that the freight on the dressed lumber shipped should be subject to a deduction of one-fifth cannot extend

to the construction of maritime rules relating to demurrage, so as to entitle the consignee to a deduction in measurement for dressed lumber in computing the demurrage due, except on clear evidence that it was so intended.

3. SAME.

Where two bills of lading were given requiring delivery of part of a cargo at different ports, they constitute independent contracts, and hence the consignee was entitled, under maritime rule 4, to one full calendar day after the vessel's arrival at the most distant port to furnish a berth for discharge before being liable for demurrage.

4. SAME.

A vessel is not ready to discharge, within maritime rule 5, regulating the length of time within which a consignee of lumber should receive it, without liability for demurrage, and requiring him to receive, in questionable weather, "if the vessel is ready to discharge," where the stevedores refused to work on account of rain.

In Admiralty. Demurrage.

Alexander & Ash, for libelants.

Conway & Westbrook, for respondents.

BROWN, District Judge. In the absence of any stipulated lay days, the parties have agreed that the rules established by the maritime association of this port in reference to the time for finding a berth and the rate of delivery of Southern pine should govern in this case.

Rules 4 and 5 provide that the consignee shall have "one full calendar day" after the vessel reports arrival, in which to furnish a berth for discharge, and allow a consignee for receiving cargo "one running day (Sundays and legal holidays excepted) for each 25,000 feet of lumber 1½ inches in thickness or less," and also require the consignee to "receive cargo in questionable weather, if vessel is ready to discharge."

Rule 7 provides that the charge for demurrage shall be "at the rate of 15 cents per 1,000 feet board measure of entire cargo delivered."

In the present case there were two bills of lading given by the vessel for delivery of lumber to the defendants as consignees; one at the port of New York, "101,194 feet dressed lumber more or less, 90,770 feet rough lumber, one-fifth off for dressed"; the other described the vessel as bound for Yonkers, New York, and was for the delivery of "142,768 feet dressed lumber more or less, one-fifth off for dressed."

On delivery the cargo was measured. The rough lumber turned out 93,102 feet, being an inch thick; the dressed lumber was seven-eighths of an inch thick, and reckoning that as an inch for the purpose of measurement, turned out 243,793 feet. The dressed lumber, therefore, according to this measurement turned out 869 feet less than the feet described in the bill of lading, and the rough lumber 2,332 feet in excess; or taking the lumber altogether there were 1,463 feet more than the aggregate feet stated in the bills of lading, disregarding the provision for one-fifth off.

There was no difference between the parties as to the amount of freight to be paid, or the mode of computing it. In the bill of lading it was stated at \$1.90 per thousand feet. From this price one-fifth was deducted, and with this deduction the computation was made

upon the feet as measured, reckoning for the dressed lumber the seven-eighths of an inch thickness as a full inch. \$500 was paid on account of the freight, leaving \$47.46 unpaid. The stevedore, who was paid by the master of the vessel, was also paid by the 1,000 feet, by the same method of computation; namely, reckoning the dressed lumber seven-eighths of an inch thick as an inch thick. The libelants claim that the dressed lumber should be computed by strictly solid measure, that is, reckoning the dressed boards at their exact measure of seven-eighths of an inch only for the purpose of computing the 25,000 feet required to be received per day.

I do not think the evidence is sufficient to sustain the libelants' contention that the rule of the maritime association requires a delivery of 25,000 feet of dressed lumber one full inch thick, without allowance for dressing. For a long period board measure has been estimated and computed in the rough, that is, in its sawn state before dressing. When afterwards dressed by planing on both edges and on both sides and thereby somewhat reduced in measurement, the long-established custom undoubtedly has been, as between buyer and seller, to compute the measurement in the same way, that is, according to its rough condition, seven-eighths inch dressed boards being thus treated as inch boards. The rules of the maritime association do not state in what way the "feet of lumber" are to be measured or how "board measure" under rule 7 is to be computed. In order to construe either rule 5 or 7 resort must be had to extraneous evidence. The long-established method of computation in the trade as between buyer and seller, or consignor and consignee, should be applied in construing these rules, unless a custom to compute differently is established clearly and beyond doubt. This certainly has not been done in the present case. Previous long-settled customs cannot be disturbed by new meanings given to current phrases, except by very convincing testimony. The burden of proof is upon the party alleging the change. *Macy v. Perry*, 91 Fed. 671.

As a vessel in making up a full cargo can carry about one-seventh more in number of dressed boards than of boards undressed, it is evident that she can afford to carry dressed boards at a less freight. That is, therefore, a proper subject to be regulated in fixing the rate of freight in the bill of lading; and that was obviously the purpose of the clause "one-fifth off" in the present case.

Any such special stipulation by the parties in the bill of lading cannot extend to the construction of the rules of the maritime association, except upon clear evidence that it was so intended. These bills of lading make no reference to those rules, nor to the mode of computing the lay days or the rate of discharge required. The maritime rules should therefore be interpreted according to the long and well-settled custom in determining "board measure," or in computing the "feet of lumber," which, as I have said, in the case of dressed boards is computed in the rough, without allowance for any short measure arising merely from dressing.

2. The bill of lading for delivery of boards at Yonkers required delivery at a different place from those delivered at New York. It was an independent contract, and I think under rule 4 of the maritime asso-

ciation the consignee was entitled to a full calendar day after the vessel reported at Yonkers. There were also one or two working days in which the stevedore employed by the schooner refused to work on account of rain, so that the vessel was not "ready to discharge" under rule 5 on those days. Making these deductions and the Sundays, I do not find that the vessel was detained beyond the lay days allowed by the rules of the maritime association, as above construed.

The claim for demurrage is, therefore, disallowed; the claim for freight is allowed, namely, \$47.45, with interest from October 22, 1898.

THE LAKME.

(District Court, D. Washington, N. D. March 25, 1899.)

1. SEAMEN—CONTRACT OF EMPLOYMENT—PAROL EVIDENCE TO VARY—SHIPPING ARTICLES.

Seamen who have signed shipping articles for a voyage are bound thereby, and cannot vary, add to, nor take from the terms of the written contract by parol evidence of an additional verbal agreement.

2. SAME—CONSTRUCTION OF SHIPPING ARTICLES—EXTRA WORK.

Under shipping articles containing no express stipulations in regard to hours of work, seamen are bound to do whatever is required of them for the safety and cleanliness of the ship and the preservation of the cargo, at whatever hours required by the master, on week days, Sundays, holidays, or at night, whether the vessel is under way, at anchor, or in port; but it is not their duty to perform labor in handling the cargo on Sundays or holidays, or outside of the usual working hours constituting a day's labor, when the vessel is in port, and there are no circumstances of peril which render it necessary.

3. SAME—COMPENSATION FOR WORK OUTSIDE OF CONTRACT.

Seamen may be required to perform extra work in maneuvering the ship or handling cargo by the master at any time, he being the sole judge of its necessity; but when required to do such work not contemplated by their shipping articles, and which is merely for the advantage of the owners or charterers, they are entitled to recover reasonable extra wages therefor, or, if induced by promise of payment, to recover the amount agreed upon.

4. SAME—LIBEL FOR EXTRA WAGES—COSTS.

Where seamen justly entitled to extra wages claim a greatly excessive amount, and bring action therefor, they will not be allowed full costs. In this case three-fourths of their taxable costs awarded to libelants.

This was a libel by D. Springer and others against the steamer Lakme to recover extra wages as seamen.

R. W. Emmons, for libelants.

W. H. Gorham, for claimant.

HANFORD, District Judge. The libelants in this case served as mariners on board the steam schooner Lakme on a voyage from Seattle to St. Michaels and return, and they have received payment of the full amount of wages for the time of their service at the rate stipulated for in the shipping articles, which they signed; but they have brought this suit to recover payment for alleged overtime at the rate of 40 cents per hour. The testimony of the master and all of the crew who have appeared as witnesses is to the effect that, at the time of hiring

the men, the captain informed them that they would be paid for overtime at the rate of 40 cents per hour. No such agreement, however, is contained in the shipping articles. The testimony of the libelants also shows that at Seattle, before the departure of the vessel on her voyage, they were required to work on Sundays and after working hours on week days, and that at one or two points between Seattle and St. Michaels they were also required to work on Sunday and during the hours of the night, and on arrival at St. Michaels they discharged cargo on Sunday and on the 4th of July. They kept an account of the extra hours and Sunday and holiday work, and obtained certificates of the officers that their account of overtime is correct. There is a clear preponderance of the evidence, however, that at Seattle the vessel was loaded and her fuel and cargo was stowed by stevedores, and the crew of the vessel did not work on Sundays, or at any other time, except to perform the usual and ordinary duties of seamen in taking care of the vessel, and moving her when necessary, and cleaning up. There is also direct contradiction in the evidence as to the work alleged to have been required of the crew on Sundays at intermediate places, but it is shown by clear and uncontradicted evidence that the libelants were employed in discharging cargo at St. Michaels on the 3d day of July, which was Sunday, and also on the 4th day of July; and, according to the captain's evidence, on those two days they each worked about 25 hours. The evidence fails to show that there was any emergency or reason for working the crew in discharging the cargo on those days, except to gain time for the advantage of the charterers, and it is not probable that the crew would have worked willingly without being induced by the promise of the captain that they should be paid at the rate of 40 cents per hour.

It is the contention of the libelants that they are entitled, by virtue of the verbal contract which they made with the captain, to be paid for all of their overtime at the rate of 40 cents per hour. This claim is resisted on the grounds that the alleged verbal contract is invalid, if made, for the reason that it is not set forth in the shipping articles, and the libelants did not do any work on the ship in addition to what they were obligated by the terms of their contract to perform for the wages stipulated for in the shipping articles. As to these controverted points the decision of the court is as follows:

1. Seamen who have signed shipping articles for a voyage are bound by the terms of their contract, and it is not permissible for them to vary, add to, or take from the terms of the contract, as written, by introducing parol evidence that there was any different or additional understanding. It is necessary for the protection of seamen that ship owners and masters be held to strict performance of their part of shipping contracts, and justice requires that the same rule be applied in determining the rights of the parties, whether it be invoked by the seamen or by their adversaries. *The Triton*, Fed. Cas. No. 14,181; *The Warrington*, Fed. Cas. No. 17,208.

2. By a contract of hiring like the one which these libelants signed, containing no extraordinary provisions or express stipulations in regard to the hours which seamen may be required to work, seamen

become obligated to do whatever is required of them for the safety and cleanliness of the ship and preservation of her cargo, at whatever hours may be required by the master, on week days, Sundays, holidays, and at night, whether the vessel is under way, or at anchor, or moored in port; but it is not their duty to perform labor in handling the cargo on Sundays or holidays, or before or after the usual working hours constituting a customary day's labor, when the vessel is in port, and there are no circumstances of peril creating a necessity for working extra hours. The monthly wages specified in the shipping articles are legal compensation for all the labor, perils, and hardships required in navigating and taking care of the vessel and cargo under the captain's orders, and for handling the cargo in lading and stowing and unlading on ordinary working days and during the customary working hours; but when seamen are required or induced by the master to do extra work in handling the cargo, in port, for the mere advantage of the owners or charterers, such extra work is outside of the terms of the contract contained in the shipping articles, and in all such cases the law recognizes the scriptural rule that the laborer is worthy of his hire.

3. Seamen are not exempt from working on Sundays and holidays, even when in port, if the master deems it necessary for them to work. *Johnson v. The Cyane*, Fed. Cas. No. 7,381. He is the sole judge of the necessity, and seamen are obliged to obey his orders in maneuvering the ship and working cargo at all times. But it does not follow from this rule that they are not entitled to compensation for working on Sundays and holidays when the ship is in port, and there is no actual emergency. Where they perform such extra labor under compulsion, they are entitled to receive a reasonable amount of extra wages; and where the service is performed voluntarily, but under inducement by promises of the master for extra compensation, they are entitled to receive the reward promised.

4. I am convinced by the evidence that the libelants did not perform any work outside of their ordinary duties as seamen on board the *Lakme*, at Seattle or elsewhere, prior to arrival of the vessel at St. Michaels. At that place they did perform 25 hours' labor for the benefit of the charterers, which was not required of them by the contract contained in the shipping articles, and they were induced to perform said labor by the promise of the master that they should be paid for it at the rate of 40 cents per hour.

A decree will be entered awarding to each of the libelants the sum of \$10, and three-fourths of their taxable costs. I deem it proper to make a reduction of the costs to be recovered by the libelants, for the reason that the amount claimed by them for extra time is grossly excessive, and it is probable that, if they had claimed no more than they earned, this litigation might have been avoided.

THE L. B. X.

(District Court, W. D. Missouri, C. D. March 29, 1899.)

1. MARITIME LIENS—VESSEL IN ESSE—REPAIRS.

Where, after a vessel had been launched and navigated, it was discovered that her engine was inadequate, and it became necessary to supplant it with another, the contract to furnish such new engine is a maritime contract for the repair of a vessel in esse, and hence creates a maritime lien on such vessel for the price of the engine, under Rev. St. Mo. § 770, providing that all boats shall be subject to a lien for repairs, and admiralty rule 12, permitting suits in rem by material men for supplies or repairs, etc., against the ship.

2. SAME—REPAIRS TO BE COMPLETED ON LAND.

Where a new engine was specially manufactured at libelant's factory for a vessel then in port, to which it was shipped on completion, and it was agreed that the libelant should retain title in the engine until it had been set up, and found to work satisfactorily, the delivery was not complete until after the engine had been placed and operated on the vessel, and hence was not a contract for repairs to be completed on land, so as to prevent the attachment of a maritime lien therefor.

3. SAME—WAIVER.

The owner of a vessel, on contracting for repairs, agreed to pay cash on delivery, but thereafter, being unable to do so, agreed that libelant should have a lien on the repairs and vessel for the same. After the repairs had been delivered, the owner refused to give notes in form agreed, and thereupon libelant objected to the note offered, and offered to return it, and waive security on the vessel, if the owner would divide the payments as requested, to which no reply was made. *Held* not to constitute a waiver of libelant's maritime lien on the vessel.

4. SAME—BURDEN OF PROOF.

Since a maritime lien for repairs attaches to the vessel by operation of law, the burden is on the one claiming a waiver thereof to show affirmatively that the lien was waived as part of the contract.

5. SAME—NOTES TAKEN IN PAYMENT.

The mere giving of notes in payment of repairs on a vessel does not of itself create a waiver of the contractor's maritime lien therefor. The notes not being paid, he may return them, and enforce his lien.

6. SAME—EQUITABLE MORTGAGE.

The lien was not lost by the acceptance of a note containing a provision rendering it an equitable chattel mortgage.

Wash Adams and Charles B. Adams, for libelant.

S. D. Chamberlin and Edward L. King, for claimant.

PHILIPS, District Judge. This is an action in admiralty for the enforcement of a maritime lien on the defendant stern-wheel boat, navigating the Missouri river in this district, for an alleged repairing of said boat by libelant with a 38 horse power gasoline engine, with necessary fixtures and appurtenances for operating same on said boat. One Henry Strutman, who claims to be the master and owner of said boat, interposed as claimant. The answer admits the furnishing of the engine and appurtenances by the libelant, but claims (1) that the engine, etc., was not for furnishings made, or repairs, for said boat, but the same was for the equipment of a vessel, either not yet completed, or, if completed, was simply a substitute for another engine on the vessel, and the new engine was not, therefore, a necessary repair within the purview of a maritime lien; and (2) that by special contract or

agreement between the contracting parties a maritime lien was waived. The court referred the matter to John Montgomery, Jr., Esq., as commissioner, to take the evidence, and report the same, with his findings and conclusions, to the court. His report having been filed herein, finding the issues for the libellant, the claimant has filed exceptions thereto, which have been heard, and submitted to the court. The commissioner has found the fact to be that this steamboat had been engaged for some months prior to the negotiations between the parties for the engine in question in navigating the Missouri river; that it was first equipped with an engine which proved to be inadequate and insufficient to accomplish the work in which the vessel was engaged; and, therefore, it was necessary, in the opinion of the master and owner of the vessel, that the engine in use should be entirely removed, and one of libellant's manufacture should be substituted therefor. The contention that, to constitute a repair within the meaning of the law, it must be for some alteration, improvement upon, or rearrangement of an existing structure on the vessel, is not supported either by reason or established authority. This vessel having theretofore been launched, and actually engaged in navigation, the material furnished was not for the original construction of the vessel; in other words, it was not furnished under a contract to create a new boat.

"But whatever is done to or about an existing ship has a direct reference to commerce and navigation. A ship in esse as a maritime subject gives a maritime character to all transactions connected directly with it. The cases are distinguishable thus: One class founded upon contracts for repairing and rebuilding of vessels, all such contracts to be maritime, because they affect vessels in esse; the other class, founded upon contracts for the building of proposed vessels, hold such contracts to be nonmaritime, because they touch maritime subjects only by relation to proposed vessels, the future existence of which is contingent upon the performance of the terms of the contract in each case." *The Manhattan*, 46 Fed. 797.

As said in *The Eliza Ladd*, 3 Sawy. 519, 523, Fed. Cas. No. 4,364:

"A contract, made after a vessel is launched and afloat, to furnish her with a particular means of propulsion,—as sails or steam paddles,—or to change the mode of her propulsion, is a maritime contract. Certainly it is not a contract to be performed on land. Neither is it a contract to build, any more than any contract for repairs."

A water pump furnished to a water craft used for pumping out a dry dock has been held to be for maritime service, for which a lien in admiralty may be enforced. *Winslow v. A. Floating Steam Pump*, 2 N. J. Law J. 124, Fed. Cas. No. 17,880. Likewise casts furnished for a foreign vessel are materials for which a lien obtains. *Zane v. The President*, 4 Wash. 454, Fed. Cas. No. 18,201. It is suggested in argument, but not specifically pleaded, that no maritime lien obtains in this case for the further reason that the repairs in question, if any, were made on land, and not on the vessel. The facts are, as found by the commissioner, that the steamboat was in port at Jefferson City; and the libellant had its factory at Kansas City, Mo., where the engine and appurtenances were manufactured under contract especially for this vessel. When completed it was to be shipped f. o. b. to the claim-

ant at Jefferson City, to be placed by him on the vessel at that port. But this is not all. By reason of claimant's failure to comply with the terms of his contract with libelant in paying for the engine when ready to be placed upon the vessel, upon his further insistence it was further agreed between them that the engine should be put in place upon the vessel, the libelant retaining temporary title thereto until the claimant could test the engine in the operation of the vessel; and, if it proved satisfactory, it was to be finally received and paid for by him. And it was accordingly so placed upon the vessel, and tested to the satisfaction of the claimant. Therefore, from claimant's standpoint of view, the delivery was not completed until the engine was finally put in place and operated for some time upon the vessel. Under such circumstances it would be to allow the claimant to take advantage of his own default and wrong, after thus insisting upon making a test in the actual working of the engine on his vessel, to hold that this was a contract to be wholly completed on land. Nor, under such circumstances, can it in law or morals affect the material man's lien that the contract contemplated that the master of the vessel should receive and place the engine in position on the vessel, as this arrangement pertained rather to the matter of the cost of repair than to the right to a maritime lien. The statute of this state (Rev. St. § 770) expressly declares that "every boat or vessel, etc., used in navigating the waters of this state shall be liable and subject to a lien in the following cases: In the building, repairing, etc., thereof." The twelfth admiralty rule provides that "in all suits by material men for supplies or repairs or other necessities, the libelant may proceed against the ship, etc., in rem, or against the master or owner alone in personam." When this is viewed in connection with the rule as originally adopted in 1844, it shows the purpose to give the material man a lien for all supplies or repairs, with or without the existence of a local law giving such lien.

2. The persistent contention of claimant to avoid the enforcement of a lien upon his vessel for this essential equipment of the vessel after it entered upon navigation, to enable it to accomplish its required propulsion, is as reprehensible in morals as it is unfounded in fact and law. A brief reference to the negotiations between these parties leading up to the obtaining possession of the engine and its equipments can leave no doubt in any fair and unprejudiced mind that this claimant deceitfully and cunningly intended from the outset to obtain possession of this engine without paying for it. The negotiations began in the fall of 1896, by correspondence between the claimant and libelant. In his letters the claimant stated that his boat had been upon the river for some time, and the engine in use thereon was insufficient, and he wished to obtain one of the libelant's manufacture. The price first demanded by libelant for the engine and appurtenances was \$1,200. This demand was not acceded to by the claimant. Later, during the winter of 1896-97, the claimant visited Kansas City, when, by verbal negotiations between them, the kind and quality of engine desired by claimant was agreed upon; and,

in consideration of a cash payment to be made therefor on the delivery of the engine and material at Jefferson City, f. o. b., the libelant agreed to take \$900, and the claimant assented thereto. He stated, both in his correspondence and in his conversation with the libelant, that he could secure the payment of the contract price by giving certain of his relatives as sureties, and, finally, that through their assistance he could obtain the whole of the purchase money therefor; and the minds of the parties met upon the proposition that the libelant would proceed with the manufacture of the engine, with its appurtenances, and that the claimant would deposit the \$900 with the Merchants' Bank of Jefferson City, Mo., to be paid over to the libelant upon the delivery of the engine, etc. After this the claimant, by letter, objected to some part of the equipment to be furnished by libelant, and insisted upon the substitution of something else, which the libelant claimed would materially add to the expense of construction; but this change was ultimately conceded by the libelant, to end the controversy. About the time the construction of the engine and equipments were completed and the claimant was notified of its readiness for delivery, the claimant wrote to libelant to delay delivery for a few days on account of ice in the river obstructing navigation, and because he wanted "a couple of days on the money now out," but requesting him to ship the "pulley and clutch," which was part of the machinery, and also the pump. With this request libelant complied, replying that the engine was ready for shipment, and it would ship just as soon as it received from said bank a letter advising it of the money being on deposit, as agreed upon. Nothing more was heard from the claimant until about a week thereafter,—February 17, 1897,—when he wrote that his son-in-law had failed to sell property as expected, and he had failed to obtain the money; and then began to talk about giving security for the money. To this libelant replied, expressing surprise at the news of the failure to have the money ready, and asked the claimant how much time he wanted, and how much cash he could pay down; and inquired, if his father and the security he spoke of were good, why he did not obtain the money from the banks. After waiting a week without hearing from the claimant, the libelant wrote him again, saying that it had not heard from him, and that the engine was ready and waiting. After the lapse of another week the claimant wrote: "I ain't got the money yet. Let us go partners in the boat;" and, further, that he would be able in two or three months "to buy you out again"; that there was no money to be had at local banks. He again adverted in this letter to his father and his son-in-law, stating that he was greatly needing the engine, and that he was losing business by not being able to get started with his boat, and offering to pay if he got the money; and as evidence of the fact of the absolute necessity of this engine to his boat he used this language: "I know you are disappointed, but not as bad as I am. You can sell your engine, but I can't sell my boat without an engine." After another delay he wrote that he had \$400 which he could pay; but not to send the engine until he saw the custom officers, to know what changes he would have to make in the registry of his boat. After some correspondence respecting this mat-

ter, and further delay, he wrote that he had only \$300, and offering to give his note with 6 per cent. interest, and the "engine for security"; and that he would pay as fast as he got the money. To properly appreciate and understand this proposition to give the engine for security, it is well to revert to the fact found by the commissioner, and sustained by the weight of the evidence, that in the interviews between the parties at Kansas City in the winter preceding it was then understood between them that for any deferred payments of the purchase money the libelant was to have a lien upon both the engine and the boat. To the last-named letter from claimant the libelant replied, noting the offer to pay \$300, and for time, etc., reminding him that the contract was strictly for cash, and therefore the price was low, but was willing to try and help him out in the matter, and asked him by return mail to say how much time he wanted on the balance, suggesting that if he could make it in 2, 3, 4, 5, and 6 months, divided up to suit himself, it would be satisfactory; "but if we sell on time we ask that you remit us draft for first payment. As soon as this is received we will ship engine; and when it is set up and running on your boat you are to make us the notes, making payments inside of six months, and with 8 per cent. interest instead of 6, as we are obliged to pay eight per cent. here for our money." This letter was dated March 18, 1897. Instead of meeting this proposition, the claimant seems to have called to his assistance a lawyer, who wrote for him on the 19th of March, stating that he (Strutman) "desires me to say—and I know the fact to be—that he has \$300.00 in bank for you. He is willing to pay you this money when the engine in satisfactory condition is delivered f. o. b. to him here. He will give you time notes, as you suggest, at eight per cent. for the balance of the \$600.00." Libelant telegraphed on the 20th: "Will ship as per letter of 18th. Answer promptly." On this day claimant telegraphed the libelant: "You money ready here if engine satisfactory. If it will not work, consider deal off." Thus it is made manifest that the claimant did not accede unconditionally to even the last proposition made him by the libelant to settle this matter; but began to impose other conditions, such as that the engine must be satisfactory, and if "it will not work, consider deal off." After this, on the 22d, he telegraphed libelant: "Send as per my attorney's letter; money ready." The engine was shipped to Jefferson City, and the bill of lading was sent to said bank with the notes to be executed by the claimant, bearing date of March 24, 1897, with a lien reserved therein on the boat. Instead of claimant complying with the modified arrangement, his attorney wrote on the 27th of March, stating that the bill of lading for the engine had been received by the bank, and "that you demand the \$300.00 and \$600.00 in notes before he (Strutman) gets the engine, or has a chance to examine and try it. His agreement was to pay \$300.00 down upon delivery; * * * and he would give you the notes as soon as he had a chance to try the engine,—it proving satisfactory." The letter then further naively suggested that the engine, under the law, was subject to be taken for the purchase money; and further suggesting that a bill of sale could

be given by Strutman for the engine before making the notes, to be released on making the notes. So, again, did the claimant fail to comply with the terms of his own proposition by declining to give the notes, or any notes at all, and imposing the additional condition that he was to take the engine and test it on the boat before either paying the money or giving the notes.

As by claimant's repeated receding from proposition after proposition, and cunning jugglery, he had gotten the engine delivered at Jefferson City, so that the libelant was much at his mercy, the libelant wrote said lawyer on the 29th of March, consenting that on the payment of the \$300 down, and giving the bank the bill of sale for the engine, conditioned upon the release when the notes were signed, Strutman could take the engine, set it up on the boat, and test it, "and within two weeks sign the notes for the balance." The \$300 was afterwards paid, but the notes were not given in any form at that time. Strutman and his lawyer afterwards, on the 27th day of April, 1897, induced said bank to take from Strutman a single note for the balance of the purchase money, \$565.03, payable to libelant October 27, 1897, the consideration of which was expressed to be for one No. 9 Weber gasoline engine, with appurtenances, sold and conveyed by Strutman to libelant, with a condition something after the character of a chattel mortgage, to be discharged upon the payment of said sum of money. There is no pretense of authority from libelant to said bank to take such a note. The agent of the bank who had this matter in charge for libelant testified that it was not the note authorized to be taken, and when it was forwarded to the libelant it immediately, on April 29, 1897, returned the same to the bank, and wrote Mr. Strutman, advising him of its return, and stating that it was not in accordance with the agreement in any respect; that he was to pay the balance on the engine within six months after the engine was shipped, and therefore the notes should bear interest from the 24th of March; and further reminding the claimant of his agreement to give security by a lien on both the engine and the boat, and requesting him to go to the bank and give a note of date March 24, 1897, covering both the engine and the boat. This the claimant failed and refused to do; and again, on the 5th of May, 1897, libelant wrote the claimant, complaining of his refusal, and reminding him of his promise during the negotiations to give a mortgage on the engine and the boat. The answer to this from Strutman came on May the 18th, in which, without at all denying the statement in the letter to him about his promises, he simply said that he was working "to make money with the intention to pay for the engine to keep from paying eight per cent." To this claimant replied on the 22d of May, 1897, upbraiding him for not keeping his promises, and advising him that libelant had written to the bank that, if the claimant did not want to give the boat as security, if he would divide up the payments, one-third in two months, one-third in four months, and one-third in six months, it would waive the security on the boat. To this claimant made no reply, nor did he go to the bank and make the notes accordingly;

but on the 25th of June he wrote the libelant without saying a word about the settlement of the contract, but only in commendation of the efficiency of the engine, and promising to pay "a nice chunk of money on or immediately after pay day, July 5th." No payment was made, however, until August 2d following, of \$102. From all of which it is apparent that the libelant never consented to waive his maritime lien except upon conditions with which the claimant never complied; and therefore the implied lien which the law gives remained in force. *Rubber Co. v. Ohrndorf*, 29 C. C. A. 188, 85 Fed. 348-353.

Counsel for claimant presents his case as if it devolved upon the libelant to show a specific agreement between the parties that a lien upon the boat should be retained. The law gave the lien absolutely; and, therefore, it devolved upon the claimant to show affirmatively that this lien was waived as a part of the contract. No unprejudiced mind can read the correspondence and the testimony of the parties without being persuaded that it never was the intention of the libelant to waive his right to security upon the boat except upon the condition either of a cash payment, which was originally agreed upon, or the giving of personal security; or, finally, when driven to it by the bad faith and sharp practice of the claimant in getting the engine delivered at Jefferson City, and his refusal to do anything except upon his own terms, libelant proposed to waive the security on the boat if the claimant would make certain notes, which he never made, and if he would make certain payments, which he never made. Had the claimant paid the \$300 and given notes for the balance, that of itself would not have amounted to a waiver of the lien. "The notes being unpaid, he may return them, and enforce his lien." *The Kimball*, 3 Wall, 37. This is precisely what the libelant did with the note of April 27, 1897, delivered to the bank by claimant; the return of which is again offered at this trial. Even if the note of April 27, 1897, were construed as an equitable chattel mortgage, and even if it had been accepted by the libelant, as the mortgage is but an incident of the note, that of itself was not sufficient to waive the maritime lien. *The D. B. Steelman*, 48 Fed. 580. And what adds conclusiveness against the contention of claimant is the fact that the letter of his counsel, suggesting the matter of the bill of sale of the engine, conveyed the idea that this was only a temporary arrangement for the protection of the libelant while the engine was being tested on the boat, to end when the test was satisfactory. And even then he did not give such bill of sale on taking the engine and putting it up, but a month later, allowing himself six months from the 27th day of April, 1897, in which to pay, instead of six months from the date of delivery of the engine, to which libelant refused to accede. The result of all of these maneuvers of the claimant is that for two years he has had the use of the engine, without paying therefor, during which he has, by his meritless litigation, piled up costs equal to the original debt. He, with a show of virtue, offers to allow judgment in personam for the balance due on the contract; but this loses its flavor of fairness in the

fact that he knows such judgment would bear no fruit for his creditor. The exceptions to the commissioner's report are overruled, and decree ordered for the libelant.

THE ANACES.

(Circuit Court of Appeals, Fourth Circuit. March 30, 1899.)

No. 2801.

1. MARITIME LIENS FOR TORTS—AMERICAN DOCTRINE.

It is the settled rule in the United States that there is a maritime lien for the injury inflicted by a maritime tort, with but few exceptions, such as that made by admiralty rule 16 in the case of suits for assault and beating.

2. SAME—PERSONAL INJURIES—NEGLIGENCE OF SHIP OFFICERS.

Under the maritime law, as administered in the United States, a stevedore, injured while in the employ of a master stevedore engaged in loading a ship, through the negligent operation of a steam winch belonging to the ship, and under the management of its officers, may maintain a libel in rem against the ship therefor.

3. ADMIRALTY PLEADING—SUFFICIENCY OF LIBEL.

While the burden rests upon a libelant—alleging, in a suit against a ship, that he was injured through the inexperience and incompetence of a man who was operating a steam winch, to which duty he was assigned by the master—to prove that the master failed to exercise proper care and diligence to ascertain the qualifications of the man for the work, or failed to remove him after his incompetency was known to some officer of the ship, an allegation in the libel that the master relieved a competent man from the work, and put in his place an ordinary laborer, who was unacquainted with the operation of the winch, and who was not even connected with the ship, is a sufficient allegation of negligence on the part of the master, where the libel was not excepted to, and was met by an allegation in the answer that the man was competent.

Appeal from the District Court of the United States for the Eastern District of North Carolina.

This is a libel in rem in admiralty instituted by McCollum, the appellant, against the British steamship *Anaces* to recover damages for injuries received by the libelant while working, as a stevedore, stowing cotton in the hold of the steamship. The case stated by the libelant is that, while he was at work in the hold, several bales of cotton were suddenly dropped upon him; that he was one of a number of stevedores employed by a master stevedore who had a contract to load the ship; that it was the custom of the port, and one of the terms of the contract for the stevedoring, that the steamship should furnish and operate the winch for hoisting and lowering the cotton, and should provide a man of skill and experience to operate it, so as not to endanger the stevedores working in the hold; that the injury to the libelant was caused by the negligence and incompetency of the man employed by the ship's officers to operate the winch; that the man employed by the master of the ship to operate the winch was an ordinary laborer, entirely inexperienced and unskilled, who was intrusted with a duty requiring experienced judgment in order to avoid injuring the stevedores working in the hold, and that the master in employing an incompetent man, without experience, to operate the winch, was guilty of negligence, and failed in a duty which the owners of the ship owed the libelant; that the injury was caused by the incompetency of the winchman, and through no fault of the libelant. The steamship was arrested, and released upon stipulation. The master appeared as claimant, and filed an answer controverting the allegations of the libel; denying that the winchman was incompetent; alleging that he was a highly-skilled man,

selected by the head stevedore, and that the libelant was injured through his own recklessness in not heeding warnings given him. When the case was called for trial it appears that the respondent made a motion orally to dismiss the libel because improperly brought as a libel in rem. This defense was not made in the answer, and should properly have been made before answer, by exception (Ben. Adm. §§ 466, 468); but the court heard the motion, and dismissed the libel, as stated in the decree, "for the reason that a libel in rem for the causes set forth in the libel will not lie in this court." 87 Fed. 565. From this decree the libelant has appealed.

Iredell Meares (Bellamy & Son, on the brief), for appellant.
George Rountree, for appellee.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

MORRIS, District Judge (after stating the facts as above). The district judge held that the only remedy in admiralty for a personal injury to one lawfully upon the ship, resulting from the negligent failure of the officers of the ship to perform a duty necessary for his safety, is by libel in personam, and that a libel in rem cannot be maintained.

Admiralty rule 23 provides that:

"All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession or otherwise, as the case may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and occupations and places of residence of the parties."

The only action for tort which by express rule is forbidden to be brought in rem is that mentioned in rule 16, which declares that all suits for assaults and beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, shall be in personam only. It is admitted that the libel charges a maritime tort, and that the admiralty has jurisdiction (*Leathers v. Blessing*, 105 U. S. 626), and that many maritime torts give a maritime lien, with a right to proceed in rem to recover the damage sustained; but endeavor has been made to show that maritime torts of the particular kind alleged in this libel do not have that privilege. It is admitted that negligence in navigation, resulting in a collision causing injuries to persons, gives a lien, and that suits for injuries to passengers caused by negligence of the ship's officers can be enforced in rem. And it is hardly denied that personal injuries resulting from defective appliances, or want of proper construction of the ship, give a lien; but it is argued that personal injuries which are caused by negligent misuse of a proper appliance do not give a lien, although they do give an action in admiralty against the owners of the ship. This is an attempt to make a distinction which does not find countenance in the reported decisions of admiralty courts of the United States. In *The A. Heaton*, 43 Fed. 592, Mr. Justice Gray, sitting in the circuit court, hearing an appeal from the district court of Massachusetts, in a very careful and learned opinion, said:

"In England, indeed, it appears unsettled whether a libel in rem can be maintained in admiralty for a personal injury. But on principle, as observed by a recent English writer, it would seem difficult to deny the justice of the

view that personal injuries inflicted by a ship might confer a maritime lien, or formulate a satisfactory reason why damages occasioned to a man's property should give rise to rights of a higher nature, or be the subject of a more effective remedy, than an injury occasioned under the same circumstances to his person. 4 Law Quar. Rev. 388. In this country it has been established by a series of judgments of the supreme court of the United States that a libel in admiralty may be maintained against the ship for any personal injury for which the owners are liable under the general law, independently of any local statute. Accordingly, passengers have often maintained libels, as well against the ship carrying them as against other ships, for personal injuries caused by negligence for which the owners were responsible. *The New World*, 16 How. 469; *The Washington*, 9 Wall. 513; *The Juniata*, 93 U. S. 337; *The City of Panama*, 101 U. S. 453, 462. The sixteenth admiralty rule, which directs that 'in all suits for an assault or beating upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only,' does not affect libels for negligence."

In *The John G. Stevens*, 170 U. S. 114, 120, 121, 18 Sup. Ct. 544, Mr. Justice Gray, speaking for the supreme court, said:

"The foundation of the rule that collision gives to the party injured a jus in re in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. The principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established and more fully carried out in this country than in England. Henry, Adm. Jur. & Proc. § 75; Mars. Mar. Coll. (3d Ed.) 93."

And he cites the following passage from *The Malek Adhel*, 2 How. 210, 234:

"The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself used as the means of the mischief, as the best and surest pledge for the compensation to the injured party."

He cites also the following from *The China*, 7 Wall. 58, 68:

"The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel, or by abandoning it to the creditors. But, while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors."

The case of *The John G. Stevens* is also an authority against the suggestion, made in argument, that the fact that there was no contract in the present case between the libellant and the vessel was a reason for holding that he had no maritime lien for his injuries. On page 124, 170 U. S., and page 549, 18 Sup. Ct., it is said:

"It was argued that the liability of a tug for the loss of her tow was analogous to the liability of a common carrier for the loss of the goods carried. But even an action by a passenger, or by an owner of goods, against a carrier, for neglect to carry and deliver in safety, is an action for breach of a duty imposed by the law, independently of contract or of consideration, and it is therefore founded in tort. *Railroad Co. v. Derby*, 14 How. 468, 485; *Railroad Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120. In *Norwich Co. v. Wright*, 13

Wall. 104, 122, Mr. Justice Bradley, referring to Macl. Shipp. (1st Ed.) 598, laid down these general propositions: 'Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other, if they arise from the same cause.' * * * This court more than once has directly affirmed that a suit by the owner of a tow against her tug, to recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto*, and not *ex contractu*. In *The Quickstep*, 9 Wall. 665, 670, a libel by the owner of a tow against her tug set forth a contract with the tug, for a stipulated price, to tow directly, and a deviation and an unreasonable delay in its performance, and that the tug negligently backed into the tow and injured her. An objection that the libel could not be maintained because the contract alleged was not proven was overruled by this court. Mr. Justice Davis, in delivering judgment, said: 'The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true, it asserts a contract of towage; but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libelant in the destruction of his boat by the carelessness and mismanagement of the captain of the *Quickstep*.'

It would appear, therefore, to be the settled rule in the United States that there is a maritime lien for the injury inflicted by maritime torts, with but few exceptions,—for instance, that made by rule 16, that suits for assault and beating shall be in personam only. In our Reports are many such actions in rem in the district and appellate courts in which the maritime lien has not been questioned, and many of them are suits by stevedores and others not having direct contractual relations with the ship. *The Rheola*, 19 Fed. 926. This was a libel in rem by a stevedore, one of a number employed by a master stevedore to discharge the ship, who was injured by the breaking of a defective chain furnished by the ship. On appeal to the circuit court, Judge Wallace said:

"As the libelant was not directly employed by the master, and could only look to the master stevedore for his pay, there was no privity of contract between him and the shipowners. Nor did the relation of master and servant, in its technical sense, exist between the libelant and the shipowner. But it is conceived that this does not in the least affect the obligation of the master not to be negligent towards the libelant, or the degree of care which it was incumbent upon him to exercise. The libelant was performing a service in which the shipowners had an interest, and which they contemplated would be performed by the use of the appliances which they agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger that they were to the master stevedore, his employer. This was no express obligation on their part, to either, to provide safe and suitable appliances; but they were under an implied duty to each, and the measure of duty towards each was the same."

Steel v. McNeil, 60 Fed. 105, in the circuit court of appeals for the Fifth circuit, was a libel in rem by one of a number of stevedores, not in the immediate pay of the ship, who was injured by a block which had been negligently rigged with an insufficient shackle bolt by the ship's crew. The libel was maintained.

The Panama, 101 U. S. 453-462, was an action in rem by a passenger who fell into a hatchway negligently left open by some of the crew of the ship. The court said:

"Injuries of the kind alleged give the party a claim for compensation, and the cause of action may be prosecuted by a libel in rem against the ship; and the rule is universal that, if the libel is sustained, the decree may be enforced

in rem, as in other cases where a maritime lien arises. These principles are so well known, and so universally acknowledged, that argument in their support is unnecessary."

The *Elton*, 83 Fed. 519, was a case heard in this court on appeal from the district of South Carolina. The libel was in rem for injuries to a stevedore resulting from unsafe appliances furnished by the ship, and the decree against the ship was affirmed.

Among other cases, the following may be cited in which libels in rem have been maintained for personal injuries,—many of them by stevedores and others not directly employed by the ship: The *Kate Cann*, 2 Fed. 241, 8 Fed. 719; The *Lord Derby*, 17 Fed. 265; The *Helios*, 12 Fed. 732; The *Calista Hawes*, 14 Fed. 493; The *Max Morris*, 24 Fed. 860, affirmed in 137 U. S. 1, 11 Sup. Ct. 29; The *Guillermo*, 26 Fed. 921; The *Daylesford*, 30 Fed. 633; The *Carolina*, Id. 199; *Crawford v. The Wells City*, 38 Fed. 47; The *Protos*, 48 Fed. 919; The *Nebo*, 40 Fed. 31; The *Frank and Willie*, 45 Fed. 495; The *William Branfoot*, 48 Fed. 914, affirmed in this court, 3 C. C. A. 155, 52 Fed. 390; The *Manhanset*, 53 Fed. 843; The *France*, Id.; The *Para*, 56 Fed. 241; The *Joseph B. Thomas*, 86 Fed. 658; The *Saratoga*, 87 Fed. 349.

Every consideration of justice and of convenience urges that the maritime lien, if it exists, should be maintained in cases like the present one. The owners of the vessel almost invariably are unknown and inaccessible. To require the libellant to serve process on them is practically to deny him any remedy. Under the statutes of the United States, the owners of all the vessel property, foreign and domestic, are given, to the fullest extent, the privilege of limiting their liability to the value of their interest in the vessel. The injured party cannot touch their property, outside of their interest in the ship, if they claim to limit their liability; and there are strong reasons of justice and convenience why he should have a maritime lien upon that specific property, and why distinctions, not founded in reason, between claims of the same general merit, should not gain a place in a system of jurisprudence which is intended to approach natural justice.

It is urged for the appellee that the case of *Currie v. McKnight* [1897] App. Cas. 97, in the house of lords, is a persuasive decision, of high authority, to establish the contention that there is no maritime lien in the present case. In *Currie v. McKnight* the master of the vessel against which the maritime lien was asserted had, in order to release her from a position of peril, wrongfully cut the moorings of another ship, and caused her to drift ashore and receive damage. By the judgment of the house of lords it was declared to be the admiralty law, as established in England since the case of *The Bold Buccleugh*, 7 Moore, P. C. 267, that when a ship is carelessly navigated, so as to occasion injury to another vessel, the injured vessel has a remedy against the corpus of the offending ship, and that this right arises from the fact that the offending ship is the instrument which causes the damage, and it was stated that in the case in hand it appeared from the findings of fact that the damage was not caused by any movement of the vessel proceeded against, in the course of her navigation, but was occasioned by the act of her crew in removing an obstacle to her

starting on her voyage. As the result of the judgments delivered in the case, the ruling was that, under the English law, to render a ship liable to a maritime lien the ship itself must be the instrument which causes the damage. Whether the reasoning of the judgments delivered in *Currie v. McKnight* would be held satisfactory in our courts, which have made, not solely the fact that the ship is the direct instrument which causes the damage the test of a maritime lien, but also the fact that the maritime tort has resulted from the negligent failure of those in charge of the ship to observe some duty in the management of the ship which the law imposes upon them in respect to persons lawfully on the ship, it is not now necessary to discuss; for the case alleged in the libel in the present case charges that it was the negligent misuse of the ship's steam winch which caused the libelant's injury. It is, in effect, the same as if the charge was that a part of the ship itself, as a spar or a block, had, by fault of the ship's officers, fallen upon the libelant. It was therefore the ship itself which, through the negligent management of the officers, caused the damage, and this is within the test attempted to be set up in *Currie v. McKnight*. We think, therefore, that it is plain that the case stated in the libel in the present case entitled the libelant to proceed in rem under the maritime law as administered in our courts.

After ruling upon the point we have just discussed, the district judge considered the sufficiency of the allegations of the libel as to the negligence charged, and ruled that the libel was insufficient, in not charging that the incompetency was known, or could with reasonable care have been known, to the ship's officers. This objection, if relied upon by the respondent, should have been taken before answer, by an exception, so that, if held good, the libelant might, if so advised, have amended. But we are of the opinion that the allegations of the libel are sufficient. The libel alleges the duty of the ship to operate the winch, and that it required an experienced and skillful man to operate it, so as to avoid injuring the stevedores who were in the hold receiving the cotton as it was lowered down; that the cotton which fell on the libelant was dropped upon him in the hold by the negligent operation of the winch; that the master of the ship had taken away an experienced person who had before been operating it, and had substituted an ordinary laborer, entirely inexperienced in handling a winch driven by steam; and that, by reason of the neglect by the master of the ship of the duty to employ a competent winchman, the libelant was injured. It is contended for the appellee that the mere employment of an incompetent winchman would not make the ship liable, unless it was further alleged and proved that the incompetency was known to the master, or might have been known to him. The admiralty courts discourage prolixity and technicalities in pleading. The libel should state the facts necessary to give the court jurisdiction. It should not contain conclusions of law, but a statement of facts, in the form prescribed by admiralty rule 23, expressed with brevity, clearness, and certainty. 1 *Conk. Adm. (2d Ed.)* 72. The gravamen of this libel is the neglect of duty by the officers of the ship, in not providing a competent winchman. The allegation is that the regular winchman was sent to other duties by the master, and that

in his place he put an ordinary laborer, without experience or skill. It is true that the libelant must sustain the burden of showing that, with reasonable care, the master could have ascertained his incompetency, but that will be a deduction to be drawn from the facts proved.

It seems to have been supposed, and has been urged, that this was a case for the application of the doctrine of fellow servant; but the libelant's case, as stated in his libel, is not affected by that doctrine. Granting that the winchman was a fellow servant with the libelant, still the libelant has a cause of action, if the master of the ship placed, as his fellow servant in charge of steam machinery requiring skill to operate it, a man without skill, if it be shown that the master did not take reasonable precautions to ascertain that the man possessed the requisite skill. If it was a duty really requiring skill and experience, the master could not, without liability, pick up any ordinary laborer, and, without inquiring, put him in charge of the winch, to the injury of his fellow employés. In the case of fellow servants, it is said that the master does not warrant the competency of any of his servants, but that it is his duty to select them with discretion, having regard to their duties, and to exercise ordinary care and prudence in ascertaining their fitness for their employment. In order to recover, the libelant must prove, not only that the winchman was incompetent, but that the master failed to exercise proper care and diligence in ascertaining his qualifications, or failed to remove him after his incompetency had come to the knowledge of some officer of the ship. *Railway Co. v. McDaniels*, 107 U. S. 454, 458, 2 Sup. Ct. 932. This is the burden of proof which rests upon the libelant, but it would seem that the allegation that the master ordered the experienced man who was at the winch to do other work, and put in his place an ordinary laborer, not connected with the ship, and without experience in operating a winch, sufficiently raised the issue, in a case in which the libel was not excepted to, and in which it was met by the averment in the answer that the winchman was a competent man, of several years' experience in operating winches. The decree appealed from is reversed.

MEMPHIS & C. PACKET CO. v. OVERMAN CARRIAGE CO. et al.

(Circuit Court, S. D. Ohio, W. D. March 9, 1899.)

No. 1,754.

1. SHIPPING—COLLISION OF STEAMER WITH BRIDGE PIER—UNSEAWORTHINESS.

A court cannot find that the sinking of a steamer by collision with the pier of a bridge was due to unseaworthiness, merely from doubtful inferences, where there is direct and positive evidence of other facts which would alone account for the disaster.

2. SAME—NEGLECT OF OFFICERS IN NAVIGATION OF VESSEL.

The *Longfellow*, a large river steamer, was starting on a trip from Cincinnati to New Orleans, carrying passengers and a valuable cargo. She had pilots on board, and was assisted by a tug. While the smokestacks were lowered to permit her passage under the suspension bridge at Cincinnati, as was frequently the case, the pilot house became so filled with

smoke that the pilot could not see to navigate the vessel past the railroad bridge below, but she continued at full speed; and, her side striking one of the piers, she was broken in two by the current and sunk,—some of her passengers being drowned, and her cargo lost. The river was high and the current strong. No effort to stop the vessel was made until too late to avoid the collision. No arrangement appeared to have been made with the tug to secure efficient aid in the management and handling of the vessel. *Held*, under the facts shown, that the disaster was due to negligence of the officers and pilots, in failing to make such arrangements, and in not stopping and backing at once when the smoke so obscured their vision as to make the attempt to pass the lower bridge at that time unsafe.

3. SAME—LIABILITY OF OWNERS—RIGHT OF LIMITATION.

Where the owners of a steamer started her on a voyage on a clear morning in a seaworthy condition, properly manned and equipped, and furnished with licensed and experienced master and pilots, and the assistance of a tug, the negligence of her officers and pilots in permitting her to come in collision with a bridge pier must be held to have been without the priority or knowledge of the owners, so as to entitle them to a limitation of their liability for damages resulting from such collision to passengers and cargo.

4. SAME—ELECTION OF MASTER TO CONTINUE VOYAGE.

A hasty exchange of opinions between a pilot and master of a river steamer, in the face of immediate danger, as to the best means of avoiding such danger, though the pilot advises the stopping of the vessel, which is not done, does not constitute a deliberate election by the master to continue the voyage against the advice of the pilot, within the meaning of Rev. St. § 4487, so as to render the owners absolutely liable for damages thereafter arising to the persons or baggage of passengers, and especially where it was at the time too late to avoid the injury which resulted.

This was a libel filed by the Memphis & Cincinnati Packet Company, owner of the steamer Longfellow, to obtain exemption from, or limitation of, liability for damages to passengers and cargo resulting from the sinking of the vessel through a collision with the pier of a bridge.

Johnson & Levi and W. H. Jones, for libellant.

Oscar M. Gottschall, Joseph Wilby, Thomas McDougall, Alfred C. Cassett, and Scott Bonham, for respondents.

THOMPSON, District Judge. About half past 6 o'clock on the morning of the 8th of March, 1895, the steamboat Longfellow, owned by the libellant, left the port at Cincinnati, Ohio, on a voyage to the port of New Orleans, La., and return. There was no fog. The morning was clear. The chimneys were lowered to enable the boat to pass under the bridges which cross the Ohio river at the port of Cincinnati, and extended horizontally aft. As she was passing under the Suspension bridge, the smoke from the chimneys filled the pilot house, and hid from the pilot's view the piers of the next bridge below,—the Chesapeake & Ohio Railroad bridge,—so that he was not able to observe and direct the course of the boat, safely, between the piers. The river being at flood stage, and the boat under full headway, she soon ran upon one of the piers of the railroad bridge; striking the pier with her starboard side, near the boilers, with such force as to cause her to careen upon her side, break in two, sink, and become a total wreck,—causing thereby the death of a number of persons, and the loss of her cargo. On the 23d of May, 1895, this

libel was filed against the respondents named therein, and all others who might intervene, setting forth the loss of the boat and its cargo, and the loss of life caused thereby, and alleging that the boat, when she started on the voyage, was "staunch and seaworthy, fully equipped with all the necessary machinery, tackle, and appliances" required by law, and "manned by a full corps of efficient and duly-licensed pilots, engineers, etc., and in charge of a competent and duly-licensed master," and that the disaster occurred "without any fault or negligence" on the part of the libelant, "or of any of the officers or crew" of the boat, and without the privity or knowledge of the libelant, and further alleging that the libel was filed for the purpose of contesting all claims of the respondents and interveners for losses and damages arising from the sinking and destruction of the boat. The libelant prays that if, upon final hearing, it be determined that libelant is not liable for the loss and damages occasioned by the disaster, it be so decreed, or if it be found that the libelant is liable therefor, in a sum greater than the value of the vessel and her freight pending at the time of the disaster, then that it be decreed that the libelant be discharged from all other and further liability upon payment of the value of the boat and her freight into court, and that meantime the respondents and all interveners be enjoined from prosecuting suits against libelant for said losses and damages. To this libel John J. Clayton, as administrator of the estate of Mary Elizabeth Aull, deceased, who lost her life by the sinking of the boat, intervening, files an answer and cross libel, and denies that said boat, on the 8th day of March, 1895, was staunch and seaworthy, or fully equipped, or in charge of a competent master, or that the libelant is entitled to exemption from, or to limitation of liability for, damages for causing the death of Mary Elizabeth Aull, and by way of cross libel alleges that said vessel was sunk, and the death of Mary Elizabeth Aull was caused, by the failure of the officers of the boat to comply with title 52 of the Revised Statutes of the United States, by their failure to warn the passengers of the boat of the danger they were in, by the refusal of the master to stop the boat, although admonished by the pilot that by reason of the smoke further navigation was unsafe, and by reason of gross negligence in the navigation of the vessel, and therefore the libelant is not entitled to exemption from liability for the death of the said Mary Elizabeth Aull, nor to have such liability limited to the value of the boat and its pending freight; that the disaster occurred within the boundaries of the state of Kentucky; and that under the statutes of Kentucky the cross libelant is entitled to recover damages for the wrongful act of the libelant in causing the death of Mary Elizabeth Aull, and that the amount claimed is \$20,000. Other cross libels have been filed by the representatives of the other persons who lost their lives, and many answers and cross libels have been filed, setting up claims for the loss of baggage, goods, etc. Issue is joined upon these answers and cross libels by reply. It is claimed by the respondents and interveners that the boat was lost by reason of negligence of the officers, and her unseaworthiness, and the questions presented are: (1) Was the destruction of the boat, and the consequent loss of life and property, due to negligence and unsea-

worthiness? (2) If so, was such negligence and unseaworthiness without the privity or knowledge of the libellant?

First, was the destruction of the boat due to negligence and unseaworthiness? If not, then libellant is not liable to answer in damages to any of the respondents; but, if it was, then it is liable in the amounts found by the master, unless it appear that the losses and injuries complained of were without the privity or knowledge of the libellant, in which case the liability would be limited to the value of the vessel and the freight pending at the time of the disaster.

Was she seaworthy? It is said that she was an old boat lengthened by cutting her in two and adding 30 feet in the center, making her about 300 feet long, and leaving her structurally weak; that she was unwieldy, and slow in answering her helm; that she was rotten, because the pier cut into her without a jar; that she had been injured a month before by colliding with the same pier on which she sunk; that she was injured by grounding near Paducah, Ky., a few days before she sunk; that she was unruly in backing; that she was overloaded; and therefore for these reasons was not seaworthy. On the other hand, there is evidence that the injuries which she received were slight, and had been repaired, and that she was staunch and seaworthy. Upon all the evidence, I would not be inclined to find that she was unseaworthy; but, in the view I take of the case, it is not necessary to nicely weigh the evidence in order to determine whether she was up to the mark in all points of seaworthiness. As I see the case, it is not shown that the disaster was due to unseaworthiness. No witness states that she was unseaworthy. No witness states that the disaster was due to unseaworthiness. No one offers an opinion or draws an inference upon any knowledge of her, or of her action at the time of the disaster to that effect, except the witness Wood, who expresses the opinion that she was rotten, because the pier seemed to crash into her without a jar. That, however, may have been due to the manner in which she struck the pier. But let that be as it may; the weight of the evidence is opposed to the opinion expressed by Mr. Wood. The suddenness of the destruction of the boat may be accounted for by the great force with which she struck the pier, and the pressure of the current on the ends, which broke her in two, and carried the parts on either side of the pier. The water was high, the current rapid, and she was under a full head of steam; and, as Capt. McKay says, the current caught her on the port guard, and tripped her up, and gradually rolled her over. Counsel, in argument, ask the court to draw inferences of unseaworthiness upon facts which may or may not justify them, and then found upon these inferences a finding that the collision and its consequences were due to unseaworthiness. But such a finding ought not to be based upon doubtful inferences. If overloading rendered her unmanageable, and forced her upon the pier, that could have been shown. If she was unruly in backing, and slow in answering her helm, and in consequence thereof the officers and crew were unable to prevent her from running upon the pier, that could have been shown. If she was weak and rotten, so that she went to pieces, causing a loss of life and property, which would

not have followed had she been staunch and strong, that could have been shown, and not left to conjecture and inference.

After the disaster, in preparing to prosecute claims, it was learned that she was an old boat; that she had been lengthened; that sometimes she did not answer to her helm as she should; that she was slow in backing; and these facts are now brought to the attention of the court, and the court is asked to infer a condition of unseaworthiness which caused this disaster. Now, in the face of positive testimony as to seaworthiness, and in view of the evidence which shows what it was that caused her destruction, the court cannot, upon mere inference, say, not only that she was unseaworthy, but that that condition caused the disaster. Was it due, then, to negligence in the navigation of the boat? As I have said, the water was high, the current rapid; the passage under the railroad bridge was known to be dangerous; the boat had many passengers, and a large cargo of valuable property; and a high degree of care—a degree of care proportionate to the danger—was required of the master and the pilots in making the passage, in order to secure the safety of the boat, its passengers, and cargo. Did they exercise the care required? I think not. I do not think any arrangement was made with the towboat to insure efficient aid in the management and handling of the boat, and I think it was negligence on the part of the master and pilot not to stop and back up the moment the smoke obscured their vision. Had there been proper co-operation between the master of the towboat and the master of the Longfellow, and had they united in an effort to stop and back her as soon as the smoke obscured their view, the collision, in my opinion, could have been prevented. The situation required that they should do so; but, instead, they allowed the boat to run at full speed in the darkness caused by the smoke until they found they were about to strike the pier. Then they became panic-stricken, and threw away the still possible chance of escape. Any one who will read (and I will not take the time to do it) the testimony of those who had an opportunity to see and know just how this disaster occurred will at once be convinced that there was a condition of panic there, in which they lost their heads, and failed to do the things that ought to have been done, looking to the safety of the boat and its passengers and cargo. The witnesses Wood, Mrs. Wood, Miss Dalrymple, McKay, Whitten, Trunnel, and Williams agree that when near the Suspension bridge the smoke obscured the view, and that a short time afterwards it was apparent that the boat would strike the pier of the railroad bridge, and that she did strike it, and became a total wreck; but, as to everything else they are in confusion. Wood, his wife, and Miss Myrtle Dalrymple, who were in the pilot house, say that the pilot called to the captain, "Captain, captain, I can't see anything, for this smoke; stop her, stop her;" and again, later, "Stop her; I can't see anything, for this smoke;" and the captain answered both times, "Go ahead; you are all right; go south of the pier." But Capt. McKay, who was a lake captain of long experience (he had spent 34 years in the navigation of the Great Lakes), who also was

in the pilot house, and had the same opportunity of observing what was going on and of hearing what was said, says:

"I think we were about a thousand feet from this abutment [meaning the pier]. About that time some one on the deck hallooed, 'Take the Kentucky side.' And just about this time this pilot that was not on duty, he says, speaking to the pilot at the wheel, 'Then why in hell don't you do it?'"

He did not hear the pilot call to the captain, "Stop her; I can't see, for the smoke;" but, he heard the direction, "Take the Kentucky side;" and that was the course the boat was then taking, and an attempt was made to run to the Kentucky side of the pier.

Capt. Kirker says:

"I says to the pilot— I ran back, and just at that time the mate came up, and I was speaking to him; and as I turned away from him I seen the pier. I hallooed to the pilot: 'You are off the pier. You are headed to the pier. Stop her and back her. Stop her and back her,'—which he did."

Then Whitten, the pilot, says:

"Then I hollered the second time, and the answer came, 'You are pointed down to the left of the pier.' I says, 'My Lord! I had better get there, then;' and I tried to get into the Kentucky shore as close as I could get there,—to get in to the left of the pier. Somebody hollered to stop her and to back her. That was 120 or 200 yards out, under pretty good headway,—a good current. She wouldn't stop. I hollered that she was sinking before she hit the pier. I knowed that she was."

Then he says, on cross-examination, referring to the captain:

"He hollered that I was pointed to the left of the pier. Then I hollered that I had better get there, and I tried to get there. Then I stopped, and commenced backing her."

And he says, when recalled:

"Q. Whether you ordered or asked Captain Kirker, or told Captain Kirker, to stop the boat. A. No, sir; I didn't ask Captain Kirker to stop the boat. Q. I will ask you whether you gave any order of that kind to any other person. A. I hollered to Captain Williams to stop his boat and to back her."

Now, Williams, the captain of the towboat, says:

"And we had her down the middle of the river, a little to the right of the center of the Suspension bridge, and headed down for the center of the Chesapeake & Ohio bridge. As we were going under the Suspension bridge, the pilot on the Longfellow hollered down to me that he could not see, and motioned that the chimneys—that the smoke was blowing in his face; and a little while after that the boat took a very heavy sheer towards the Kentucky shore, and I hollered back to him that the boat was heading down inside of the pier. * * * I hollered back, he had better stop her and back her,—that I thought he would hit the pier; and he hollered back that he wanted to go down inside of that pier, and not to stop her. So I kept on, and said, 'All right,' and kept on."

And then he says again:

"A. Yes, sir; and then the boat after that took a swing to the left, and I hollered down that he was headed towards the Kentucky side of the pier, and I reached over to stop my boat; and the pilot hollered down not to stop her, and the captain repeated what he said, and told me not to stop her, and I said, 'All right,' and let her go, and never stopped her."

So to my mind it is apparent, as this testimony shows, that they were in a state of confusion. There was no cool-headed judg-

ment. There was no united action, or effort to do something practical to prevent her from running upon the pier. Knowing the dangerous condition of the passage, knowing that the smoke was likely to obscure the view as it generally does, the prevailing winds being from the southwest, if the captain and pilot had been alive to the danger, as it was their business to be, and had made the necessary arrangements with the captain of the towboat to have efficient co-operation and aid from him, and if they had been on the lookout for the smoke interfering with navigation, and all had united in some practical effort, the boat could have been stopped and backed, and, if necessary, could have been turned to the shore and moored until some other arrangement could have been made which would have insured a safe passage. So that I feel constrained to say that the disaster was due to the negligence of the captain and pilots in not taking the necessary precautions to insure the safe passage of the bridge.

In the next place, was this negligence without the privity and knowledge of the libelant? I think so. The libelant had furnished the boat with a licensed and experienced master, with licensed and experienced pilots, and had taken the precaution to hold her over until the morning of the 8th to avoid the fog; had furnished the master a tug, to aid and assist him in the passage of the bridges; and had done, it seems to me, all that was reasonably necessary to promote the safety of the voyage,—and is not responsible, therefore, for the negligence of the officers and crew. If libelant furnished experienced officers, duly licensed, and took, as it seems to me it did, all the precautions which were necessary to send her forth in safety, it was not responsible for the matters intrusted solely to the masters and pilots in the course of navigation. I find that this disaster was due to the carelessness of the officers—the master and pilots—in navigation, and that the libelant had no privity or knowledge thereof, within the meaning of the statute, so as to deprive it of the right to have its liability limited as provided by the statute, unless made liable under the provisions of section 4487, Rev. St. This section provides:

"On any steamers navigating rivers only, when, from darkness, fog, or other cause, the pilot or watch shall be of opinion that the navigation is unsafe, or, from accident to or derangement of the machinery of the boat, the chief engineer shall be of opinion that the further navigation of the vessel is unsafe, the vessel shall be brought to anchor, or moored as soon as it can prudently be done: provided, that if the person in command shall, after being so admonished by either of such officers, elect to pursue such voyage, he may do the same; but, in such case both he and the owners of such steamer shall be answerable for all damages which shall arise to the person of any passenger or his baggage, from such causes in so pursuing the voyage, and no degree of care or diligence shall, in such case, be held to justify or excuse the person in command or the owners."

Now, it is claimed in this case that the pilot called the attention of the master to the danger of continuing the voyage while the view was obstructed by the smoke, but that the master disregarded the protest, and continued the voyage, to the destruction of the boat. This claim is based upon the testimony of the Woods and Miss Dal-

rymple. Their testimony is contradicted by the pilot and the master, and is inconsistent with the testimony of the disinterested witnesses who had equal means of knowledge. Of all the witnesses who have testified, these are the only witnesses who say that the pilot complained that the smoke obscured his view, and requested the captain to stop the boat. Capt. McKay, a man of experience in navigation, who was in the pilot house at the same time, and whose attention certainly would have been attracted by a statement of that kind, did not testify to it. But, if the testimony was not contradicted,—if it stood alone, uncontradicted,—it could hardly be said that the hasty exchange of opinions between the pilot and master as to what was best to be done in the emergency which confronted them could be regarded as an opinion on the part of the pilot that the vessel should be moored, and an election on the part of the master to proceed, within the meaning of the statute. When you look at the circumstances, assuming that there was such communication between the master and pilot as testified to by the Woods and Miss Dalrymple,—assuming that to be true,—what was meant? In the excitement of the occasion, panic-stricken as they evidently were, was it anything more than an exchange of opinion as to what was best to be done? Was it a deliberate statement on the part of the pilot that it would be unsafe to continue the voyage, and on the part of the captain an election to continue the voyage; or was it the hasty suggestion that passes from one to another on such an occasion, one saying, "Stop her;" another, "Back her;" another, "Point her to the Kentucky shore;" and others making other suggestions as to what was best to be done? But the admonition of the pilot came too late. If any such communication took place between the master and the pilot, it was immediately preceding the collision, when the election of the captain could in no way affect the result which followed. I think the communication which passed between them was at a time when it was no longer possible to avoid the collision. I think an examination of the evidence would be convincing to any one that the point had been reached when it was impossible to avoid the danger of the collision which followed. I am of the opinion, therefore, that the libelant is entitled to have its liability limited to the value of the vessel and her pending freight, and it will be so decreed.

In re ROGERS et al.

THE MAGENTA.

THE NIAGARA (four cases).

(District Court, S. D. New York. March 22, 1899.)

COLLISION—VESSEL OVERTAKING ASTERN—CONVERGING COURSES.

A tug, while proceeding down North river on a course $1\frac{1}{4}$ points east of a course straight down stream, at the rate of six knots per hour, was struck and capsized by a steamer proceeding straight down the river from behind, going at a speed of 12 knots. No signals were given by the steamer until she was but 800 feet astern of the tug, when she blew two whistles, but these were neither heard nor answered by the tug. The steamer made no change of her wheel until she was so near the tug that a collision was imminent. Held, that the tug under the rules then existing was under no obligation to notice or to answer the steamer's whistle astern, and that the latter was responsible for the collision in attempting to pass so near, in view of the converging courses of the two vessels.

In Admiralty. Collision.

Carpenter & Park, for petitioners and the Niagara.

Hyland & Zabriskie and Mr. Hough, for the Magenta.

Foley & Wray, for other damage claimants.

BROWN, District Judge. The above libels grow out of a collision which occurred about in the middle of the North river, off Dey street, about 3 o'clock in the afternoon of October 16, 1896, in clear weather, between the small steam tug Niagara, 58 feet long, and the freight and passenger steamer Magenta, 210 feet long, which overtook and ran into the port quarter of the Niagara and capsized her, causing the death by drowning of four persons on board, for whose representatives the last four libels were filed. The second libel was to recover for the loss of the Niagara, and the first libel was for a limitation of liability of the owners of the Niagara in case they should be held in fault, which the petition denies. The owners of the Magenta and the other damage claimants answer the petition, alleging the fault of the Niagara and their losses thereby.

At the time of collision, the tide was flood and the wind light. The Niagara was coming down river unincumbered and bound from pier 9, Hoboken, to pier 6, East river, and as the evidence shows, she was heading somewhat towards the New York shore, i. e., a little off pier 1, North river, and towards Governor's Island. The Magenta makes daily trips between New York and Keyport, and had left her slip, near Gansevoort street, and was coming down nearly in mid-river. The Magenta was going at the rate of at least 12 knots by land, the Niagara at about 6. When the Magenta was above Chambers street and the Niagara several streets below Chambers and some 200 feet to the westward of the Magenta's course, the Niagara received a signal of one whistle from the ferryboat Cincinnati, then at least a quarter of a mile distant, which was crossing the river from the Pennsylvania Railroad slip, Jersey City, to Cortlandt street, New York. An answer

of one whistle was given by the Niagara and also by the Magenta; and the ferryboat crossed the line of the Niagara's course about 200 feet ahead of her. From the distance traversed by the ferryboat before this collision, viz. from 500 to 700 yards, it is evident that these whistles were given from $1\frac{1}{2}$ to 2 minutes before collision, and that the Magenta at that time must have been at least 800 feet astern of the Niagara, as she was gaining on her at the rate of 600 feet per minute, except in her retard just before collision. She was then also from 150 to 200 feet to the eastward of her and perhaps more. The witnesses for the Magenta testify that as soon as the Cincinnati had crossed the bows of the Niagara, the Magenta gave the Niagara a signal of two whistles, indicating that she intended to pass her to the eastward on her port side, and then slowed; and that getting no answer, she repeated the signal when very near, and reversed, getting $1\frac{1}{2}$ turns before collision. These whistles, if given, were not noticed on the Niagara and they were not answered. The Niagara was struck about 10 feet from her stern and a hole cut in her side. The Magenta's stem was carried away to port.

There is no question but that the Magenta, as the overtaking vessel, was bound to keep away from the Niagara, and to keep away by a reasonable margin in proportion to her high speed. The Magenta's contention is that the vessels were moving upon parallel courses until a few moments before collision, when the Niagara, as the Magenta contends, sheered several points to port, making collision unavoidable, and turning so much as to make the collision nearly at right angles.

In the considerable evidence taken, there is the usual conflict as respects details. My conclusion, however, upon the whole testimony is, that the Magenta's contention is not established; that the Niagara made no such sheer as alleged, and did not turn nearly at right angles except through the Magenta's blow. The evidence of the Magenta's own witnesses shows that the Magenta was not heading at all to the eastward of a course straight down river, but a little, if anything, to the westward of that course; and abundant testimony for the Niagara shows that her course was at least one point to the eastward of straight down river and that there was no sheer on her part before collision. Their courses were closing in, therefore, by a little over a point; and this furnishes sufficient explanation of the collision without resorting to the very improbable hypothesis of a sheer by the Niagara to the eastward, for which there was no call and no reason. I have no doubt that the supposed sheer of the Niagara before collision, has no other basis than the inference drawn from the evident rapid sideway approach of the two vessels from the time when the Magenta drew up near to the Niagara. But this, as I have said, is sufficiently explained by the difference in their courses. A convergence of one point and a quarter would bring the Magenta one foot nearer the Niagara's line with every four feet of her own gain upon her; so that the whole estimated eastward separation of their courses of 150 or even 200 feet at the first two whistles, would

therefore be covered while the Magenta gained about 600 or 800 feet on the Niagara, which, allowing for some diminution of the Magenta's speed, would have occupied less than two minutes while advancing about 1,500 feet from above Chambers street to the place of collision off Dey street.

No reliance can be placed on the general statements of several of the witnesses that the two boats were going down on parallel courses. Seen at a little distance they would present that appearance, and accurate observation alone could distinguish the precise direction of each. There is no indication of any such precise observation, and several of the witnesses who testify, were not in a position to be able to tell within a point or two the direction of either vessel. The Niagara from a point a few hundred feet off Pavonia Ferry, laid her course for a little off pier 1; that was her natural course; it would make her head at least $1\frac{1}{4}$ points to the east of a course straight down river and it would bring her about in mid-river at the place of collision. I have no doubt upon the testimony that she preserved that course, and that the Magenta saw and knew that their courses were converging. Her officers must have seen some time before that she was working across from the Hoboken side, unless there was gross inattention as to where the Niagara came from, until very near, which I do not believe. The Magenta took no proper or timely steps to avoid collision. Her signals of two whistles, which were not heard either on the Niagara or on the Cincinnati, if given as alleged, were given not over 20 and 15 seconds respectively prior to collision. If as her officers say she made no change of her wheel, and expected the Niagara to get out of her way upon giving these signals, such signals were too late. The Niagara was not under any obligation to get out of her way, and would not have been had these alleged whistles been noticed. Under the rules then existing, the Niagara was under no obligation to notice or to answer those whistles astern of her, but only danger signals, when danger of collision arose; and her failure to hear and answer made no difference whatever in the duty of the Magenta to keep out of the way, or in the proper mode of doing so. When aware of the Magenta's near presence, the Niagara hooked up strong; that was all she could do.

Persuaded that the Niagara neither made any attempt to cross the bow of the Magenta, nor crowded upon her course, but that the Niagara held her own course without any substantial variation, and owed to the Magenta no other duty than that, I must find that the attempt of the Magenta to pass so near to the Niagara, whether her course was in fact laid so as to pass to the eastward or to the westward of her, was at the Magenta's own risk; and that the Magenta was solely to blame for the collision.

Decrees accordingly.

STRONG v. UNITED STATES.

(Circuit Court, D. Connecticut. April 5, 1899.)

No. 897.

COURTS—ACT DECREASING JURISDICTION—EFFECT ON PENDING CASES.

Act June 27, 1898, repealing so much of Act March 3, 1887, § 2, as conferred on the district court concurrent jurisdiction with the court of claims of actions by United States officers for compensation, and providing that no person shall recover in the court of claims for such compensation who has not complied with Act July 31, 1894, requiring monthly and quarterly accounts of officers to be sent to the proper authority at Washington within 10 and 20 days, respectively, after the expiration of the period to which they relate, does not, though containing no saving clause as to pending suits, apply to such suits.

Lewis E. Stanton, for plaintiff.

Charles W. Comstock, for the United States.

TOWNSEND, District Judge. Motion to dismiss. On August 18, 1890, the plaintiff was appointed a marshal of the United States for the district of Connecticut, which office he held until August 28, 1894. On September 3, 1896, he brought suit against the government of the United States in this court by virtue of the provisions of section 2 of the act of March 3, 1887, which suit is still pending. The provisions of said section are as follows:

"Sec. 2. That the district court of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit court of the United States shall have such concurrent jurisdiction in all cases where the amount of such claims exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury."

On June 27, 1898 (30 Stat. 494, c. 503), said section was amended by adding thereto, at the end thereof, the following:

"The jurisdiction hereby conferred upon the said circuit and district courts shall not extend to cases brought to recover fees, salary or compensation for official services of officers of the United States or brought for such purposes by persons claiming as such officers or as assignees or legal representatives thereof."

Counsel for the United States moves to dismiss this action on the ground that by said amendment so much of said statute as conferred concurrent jurisdiction in such cases with the court of claims was repealed, and contends that the language, "cases brought to recover fees," etc., covers pending cases. Counsel for the plaintiff contends that the jurisdiction of this court in cases pending before it is not affected by said amendment, because said amendment does not operate as a repeal as to pending suits, and that the amendment is to be interpreted as though the language was, "to cases hereafter brought," etc.

This question has not been, so far as I know, judicially determined. As counsel has said, it is a question of great importance. Cases like the one under consideration are now pending in the various district and circuit courts of the United States, brought therein by officers of

the United States on the faith of the remedial statute of 1887, providing for concurrent jurisdiction with the court of claims. A considerable portion of such claims would now be barred by the statute of limitations in said act of 1887, which provides that suits thereon must be brought within six years after the right accrued. If, therefore, the construction contended for by the attorney for the United States be adopted, this statute, manifestly intended as a remedial one, in order to permit persons having against the United States lawful claims, not more than six years old, to prosecute them in the federal courts within their own states, instead of at Washington, becomes, by reason of this amendment, most oppressive.

Counsel are at issue as to whether or not the amendment under consideration operates as a repeal of the law which confers jurisdiction on this court. It is, of course, conceded that, if said law had been wholly repealed, this court would have no jurisdiction, and the suit would be dismissed. It is true, as contended by counsel for plaintiff, that, strictly speaking, the law, as a whole, is not repealed; for a large share of the concurrent jurisdiction of this court is not affected by the amendment. But it does not necessarily follow, as contended by him, that "the amendment repeals nothing which relates to any past transaction or pending suits." In *Insurance Co. v. Ritchie*, 5 Wall. 541, a suit was brought by virtue of an act passed in 1864, providing that the provisions of an act of 1833 should extend to certain classes of cases. While said suit was pending, the act of 1864 was repealed by an act which further provided that the act of 1833 should not be so construed as to apply to said cases covered by the act of 1864. The supreme court said:

"This is equivalent to a repeal of an act giving jurisdiction of a pending suit. It is an express prohibition of the exercise of the jurisdiction conferred by the act of 1833. * * * It is clear that, when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction; and it is equally clear that, where a jurisdiction conferred by statute is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction."

See, also, *Norris v. Crocker*, 13 How. 429.

In the case at bar it seems clear that the amendment which provides that the concurrent jurisdiction of the circuit court shall not extend to cases brought to recover salaries is so far a repeal of the statute conferring such jurisdiction. The question then arises whether the term "brought" can be so construed as to mean "hereafter brought." In consideration of this question, it is proper to refer to the first section of the amendment, which amends the first section of the act of 1887. The first section of said act provides as follows:

"That the court of claims shall have jurisdiction to hear and determine * * * all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

The amendment of 1898 provides:

"That no suit against the government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this act unless an account for said fees shall have been rendered and finally acted upon according to the provisions of the act of July thirty-first, eighteen hundred and ninety-four, chapter one hundred and seventy-four, twenty-eighth Statutes at Large, page one hundred and sixty-two. * * *

Said act of July 31, 1894, provides as follows:

"Sec. 12. All monthly accounts shall be mailed or otherwise sent to the proper officer at Washington within ten days after the end of the month to which they relate, and quarterly and other accounts within twenty days after the period to which they relate, and shall be transmitted to and received by the auditors within twenty days of their actual receipt at the proper office in Washington in the case of monthly, and sixty days in the case of quarterly and other accounts. * * *

"Sec. 13. Before transmission to the department of the treasury, the accounts of * * * marshals, * * * made out and approved as required by law, * * * shall be sent with their vouchers to the attorney general and examined under his supervision." 28 Stat. 162.

This amendment, then, provides that no suit, under the act of 1887, shall be brought unless the provisions of the act of 1894 shall have been first complied with. In view of the fact that no person, bringing the suit under said act of 1887, prior to 1894, could have known of the requirements of the act of 1894, congress cannot be supposed to have intended that the amendment should apply to suits brought before the passage of said act of 1894. It is therefore reasonable to conclude that congress intended to provide for cases to be brought after the passage of the amendment of 1894. Inasmuch as the amendment of the first section must be construed to apply only to suits brought after a certain date, and inasmuch as there is no reason why the line should be arbitrarily drawn, and as the party who had brought suit prior to 1894 would not be in fault because of his own failure to comply with the provisions of said act of 1894, and especially as certain of the essential conditions precedent of the act of 1894 are beyond the control of the claimant, it is only reasonable to apply to said second section the same rule of interpretation, especially in view of the manifest injustice resulting from a contrary interpretation. In *Parsons v. Circuit Judge*, 37 Mich. 287, where an amendment adopted more than 20 years after the passage of an act provided that actions on judgments "heretofore rendered" should be brought within 10 years after entry thereof, it was held that the word "heretofore" meant only before the passage of the amendment. In support of this view, the familiar rule of construction and interpretation may be invoked, that an amendment to a statute is not to be so applied as to defeat the plain intent of the legislature in amending it. *Black, Interp. Laws*, 357. The principle which is controlling in every doubtful case where it is applicable is forcibly stated in *U. S. v. Heth*, 3 Cranch, 399, where Mr. Justice Patterson said:

"Words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satis-

fied. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties, or will affect or interfere with their antecedent rights, services, and remuneration, which is so obviously improper that nothing ought to uphold and vindicate this interpretation but the unequivocal and inflexible import of the terms and the manifest intention of the legislature."

The opinions of the different justices in said case are instructive upon the question herein. The case was one where, by a change in the law, the compensation of revenue officers on account of duties "arising on goods imported was reduced, and the question was whether the reduced compensation applied to goods heretofore or hereafter imported." They took the ground that, where an individual has performed services under the expectation of a certain compensation, it could not have been the intention of the legislature to defeat such reasonable expectation suggested by the laws of the United States; that the phrase, "arising on goods imported," might mean either heretofore or hereafter imported; that the latter meaning should be preferred, because consistent with the principles of natural justice, because the words should be taken more strongly "contra proferentem," and because, where a government has once adopted a certain rule of justice for its conduct, it is fair to infer, in the absence of clear proof of a contrary intention, that it will thereafter follow the same rule. See, also, *Griffin's Case*, 11 Fed. Cas. 24. Nothing has been brought to the attention of the court to show that congress intended that the amendment should affect pending suits.

Since writing the foregoing opinion, I have read the opinions of the circuit court of appeals for the Fifth circuit in the case of *U. S. v. McCrory*, 91 Fed. 295, and of Judge Kirkpatrick in the Third circuit in *Fairchild v. U. S.*, 91 Fed. 297. In view of these decisions, I should feel constrained to revise the opinion already expressed, except for the fact that the attention of said judges does not seem to have been called to the effect of the first section of the act in question upon the construction of the second section; and, furthermore, because the repealing act referred to in *Re Hall*, 167 U. S. 38, 17 Sup. Ct. 723, cited in said opinions, specifically provided that "all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid." 29 Stat. 669. The insertion of said language in said act, and the omission thereof from the act of 1898, seem to have a direct bearing upon the question herein. The motion is denied.

VAN DOREN v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. March 28, 1899.)

No. 12 September Term.

1. JURISDICTION OF FEDERAL COURTS—PLACE OF BRINGING SUIT—RESIDENCE OF PARTIES.

A failure by a plaintiff to comply with the provision of the act of August 13, 1888 (25 Stat. 433), requiring that suit shall be brought only in the district of the residence of either the plaintiff or the defendant, where

the jurisdiction is founded only on diversity of citizenship, does not affect the general jurisdiction of the court over the cause, and is waived by a general appearance without objection.

2. DEATH BY WRONGFUL ACT—ACTIONS FOR DAMAGES—WHAT LAW GOVERNS.

Under a statute giving a right to sue for the recovery of damages resulting from injury occasioned by negligence, unlawful violence or a wrongful act, the tort constituting the gist of the action is not the resulting death, but such negligence, violence or act, although death must result before the statutory cause of action accrues. The right of action under such a statute depends upon the *lex loci* of the injury, and not the *lex fori*, and it is immaterial whether the death occurred within or outside of the state in which the injury was received.

3. SAME—ACTION IN ANOTHER STATE.

Where a right to maintain an action for damages for such death has become vested under a state statute, the action may be prosecuted in another state, unless contrary to its policy, in any court having jurisdiction of the subject-matter and of the parties.

4. AMENDMENT OF PLEADING—CHANGING CAPACITY IN WHICH PLAINTIFF SUES.

Where a plaintiff who is both widow and administratrix of the decedent, in bringing an action under a statute to recover damages for his death, sued in the wrong capacity, the court should, in furtherance of justice, on seasonable application, allow an amendment changing the capacity in which suit was brought in order to conform to the statute, where such amendment will not change the issues, the measure of recovery, nor in any way prejudice the defendant.

5. SAME—POWERS OF CIRCUIT COURTS—CONFORMITY TO STATE PRACTICE.

The several provisions of the law now embodied in Rev. St. §§ 914, 918, 954, being in *pari materia*, and included in the codification of June 22, 1874, must be construed together, and full effect should, as far as possible, be given to each of them, and, when so construed, section 914 does not compel a circuit court to conform in subordinate details to state practice as to the allowance of amendments to pleadings, where such conformity would result in substantial injustice to litigants; nor, where such result would follow, are its powers limited or affected by a judicial interpretation by a state court of a state statute relating to such matters, though it has by rule adopted the state practice, but not such judicial interpretation, as its own.

6. SAME—POWER TO PERMIT AMENDMENT AFTER FINAL JUDGMENT.

A circuit court has no power to allow an amendment to a declaration not applied for until after the close of the term at which a demurrer to such declaration was sustained and final judgment rendered for defendant.

7. APPEAL—DISPOSITION OF CAUSE ON REVERSAL.

Where a declaration in a circuit court in a case in which the decision of the circuit court of appeals is final was perhaps fatally defective on one ground, but was amendable, and a demurrer, which under the practice of the court was confined to the causes specified, did not assign such ground, but was erroneously sustained and judgment rendered for the defendant, the circuit court of appeals will reverse the judgment and permit the plaintiff to apply to the circuit court for leave to amend.

8. ACTION FOR DEATH FROM NEGLIGENCE, &c.—DEFECT OF PARTIES.

Whether the declaration in this action, brought by the administratrix of the decedent in the circuit court in New Jersey, is fatally defective because under the statute of Pennsylvania, where the injury occurred, the action was required to be brought by the widow—*quære*.

In Error to the Circuit Court of the United States for the District of New Jersey.

James L. Kelly (Aaron V. Dawes, of counsel), for plaintiff in error.
Alan H. Strong, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an action of tort brought by the plaintiff in error against the Pennsylvania Railroad Company for the recovery of damages for the death of Henry Van Doren which, as alleged in the declaration, resulted from injuries received by him in Pennsylvania through the negligence of the defendant. Laura L. Van Doren is both widow and administratrix of the deceased. She declared in the latter capacity. A general demurrer to the declaration was filed; the defendant subsequently specifying causes of demurrer as follows:

"1. Because the said declaration does not allege that the plaintiff is a resident of the state of New Jersey.

"2. Because neither the negligence of the defendant nor the injury to said Henry Van Doren from which the said supposed cause of action arose occurred within the state of New Jersey."

By the practice in the court below, conforming by virtue of section 914 of the Revised Statutes of the United States to that of the state courts of New Jersey, the defendant was confined to the causes of demurrer specified. The court below sustained the demurrer on each of the grounds above mentioned and gave final judgment for the defendant November 10, 1897. Subsequently the plaintiff applied to the court "to permit Laura L. Van Doren to declare as the widow of Henry Van Doren in conformity with the requirement of the statute of Pennsylvania, and to substitute the widow of Henry Van Doren for his administratrix as the plaintiff." This application was refused, the learned judge below saying, "Though it happens that the administratrix and widow are one in name, the right of action is different and suit should be begun *de novo*. The motion to amend is denied." The errors assigned are as follows:

"First. That the said judge adjudged that because the injury mentioned in the said record occurred in the state of Pennsylvania, the same was not cognizable before the United States circuit court for the district of New Jersey.

"Second. Because the said judge illegally adjudged that the said declaration lacked an allegation of the residence of the plaintiff.

"Third. Because the said judge illegally gave judgment in favor of the defendant, whereas by law upon the record judgment should have been given for the plaintiff.

"Fourth. Because the said judge illegally gave judgment final in favor of the defendant, whereas by the law of the land judgment should have been given in favor of the defendant with leave to the plaintiff to amend her declaration."

By the act of congress of August 13, 1888, relating to the jurisdiction of circuit courts of the United States, it was provided that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 Stat. 433. Diversity of citizenship as between the parties sufficiently appears on the face of the declaration, but there is no allegation of the residence of either party in the district of New Jersey. Such residence was not necessary to the general jurisdiction of the court over

the cause. A failure to comply with the provision requiring it may be waived by the defendant, and is waived by a general appearance without objection. In *Interior Construction Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, where the provision in question was under consideration, the court said:

"The circuit courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action should be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

A general appearance having been entered in this case without an objection that neither of the parties resided in New Jersey, the court below was clearly in error in sustaining the demurrer on the first ground.

Was the demurrer sustainable on the second ground? Section 19 of the Pennsylvania act of assembly of April 15, 1851 (P. L. 669), is as follows:

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

Section 1 of the Pennsylvania act of April 26, 1855 (P. L. 309), is as follows:

"The persons entitled to recover damages, for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors."

Section 2 of the same act provided that "the declaration shall state who are the parties entitled in such action," and that "the action shall be brought within one year after the death, and not thereafter."

Sections 1 and 2 of the New Jersey act of assembly of March 3, 1848 (1 Gen. St. N. J. p. 1188), are as follows:

"Section 1. That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow

and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person; provided, that every such action shall be commenced within twelve calendar months after the death of such deceased person."

These several statutory provisions were in force at the time of the alleged injury resulting in death and still continue operative. The widow of Henry Van Doren, instead of suing as such widow under the Pennsylvania statute of April 15, 1851, brought an action as his administratrix, basing it upon the New Jersey statute above mentioned. A civil action to recover damages for death resulting from negligence was unknown to the common law. It can be maintained only by virtue of a statute creating it; and any recovery must be within the measure of relief accorded by the statute and at the suit of the person or persons on whom the statute confers the right of action. It appears from the declaration that Henry Van Doren died in New Jersey as the result of his injury in Pennsylvania. Both the alleged negligence and such injury, aside from death, wholly occurred in the latter state. Did the New Jersey statute on the one hand, or the Pennsylvania statute on the other, create the cause of action in this case? An action under either of these statutes is founded in tort. The tort, which is the gist of the action, is negligence, unlawful violence or a wrongful act proximately causing personal injury resulting in death. While the action lies to recover damages for death, death does not constitute the tort. The fact of death is not the tort, but its consequence. Negligence, unlawful violence or a wrongful act is the tort, although death must result from injury caused by such negligence, violence or act before the statutory cause of action accrues. In the absence of any statutory provision confining the action to cases where both the injury and resulting death occur within the state, it is immaterial in an action under the statute of the state in which the injury was received, whether death occurred within or without its limits. In either case death results from tort committed within the state and the loss to surviving relatives is the same. That the place of death should, in the absence of a statute so providing, determine the existence or nonexistence of a cause of action is uncalled for by any principle of state policy and repugnant to justice. We have failed to discover any case in conflict with this conclusion. It is true that Mr. Justice Field, in delivering the opinion of the court in *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270, used language which at first sight may seem to bear to the contrary. That case was an action to recover damages for death under a statute of Wisconsin which created a right of action "whenever the death of a person shall be caused by a wrongful act, neglect, or default," subject to a proviso that "such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." Rev. St. Wis. § 4255. The action was brought in the state court and removed to the circuit court for the Eastern district of Wisconsin. The injury resulting in death was received in that state, but the case does not

disclose where the death occurred. Mr. Justice Field, after referring to the statute, said:

"It is undoubtedly true that the right of action exists only in virtue of the statute, and only in cases where the death was caused within the state. The liability of the party, whether a natural or an artificial person, extends only to cases where, from certain causes, death ensues within the limits of the state."

This language was used with reference to the words "death caused in this state" on the assumption that those words required that death should occur therein, and was simply an interpretation of that statute. The point, however, was not involved in the case. So far as the Wisconsin statute was concerned the decision turned on the question of the validity of the limitation to the state courts of the remedy given by the statute. In *Rudiger v. Railroad Co.*, 94 Wis. 191, 68 N. W. 661, the precise point was involved. There the injury was received in Wisconsin and death occurred in Minnesota, and the action was brought under the Wisconsin statute above referred to. The only question presented was whether a death occurring outside the state, but resulting from wrongful and negligent acts within the state, was embraced within the statute. The supreme court of Wisconsin, in holding that the action would lie, said:

"The cause of action is obviously the wrongful act or neglect. The proviso contains two limitations upon the right to prosecute the action, and requires (1) that 'such action shall be brought for a death caused in this state, (2) in some court established by the constitution and laws of the same.' It is not made of the substance of the right of action that the death should have occurred within the state, but the gist and substance of the provision is that the death shall have been caused by a wrongful act, neglect, or default occurring in this state; but in what state the damages ensued thereon was not, we think, intended to be made material. In the construction of the act we ought not to restrict its beneficent provisions by a strained or fanciful construction, which a consideration of the former state of the law, and the defect to be remedied, satisfies us was not intended. The statute is a remedial one, and should be construed, not strictly, but so as to advance the remedy, and suppress the supposed wrong and injustice existing under the former condition of the law. The legislature doubtless had in view the result ensuing from such wrongful act, neglect, or default, and, if it had been intended that the action should not be maintained when caused by a wrongful neglect or default occurring in this state if the consequence or death occurred outside of the state, it seems reasonable to suppose that they would have expressly so provided."

We are therefore of opinion that the widow of Henry Van Doren had under the Pennsylvania statute a vested right of action to recover damages for the death of her husband which unquestionably could have been prosecuted either in a court of that state or in the circuit court for the Eastern district thereof. Why should it not be prosecuted in the circuit court for the district of New Jersey? It is true that the New Jersey statute has no extraterritorial operation and does not create a right to maintain an action in that state to recover damages for death resulting from personal injury caused by negligence in Pennsylvania. The right of action necessarily depends in such a case upon the *lex loci* of the injury, and not the *lex fori*. On the other hand,

the Pennsylvania statute could not confer jurisdiction on either the state or federal courts in New Jersey. That statute, however, created a substantial right capable of enforcement in New Jersey by any court otherwise possessing competent jurisdiction, unless such enforcement would conflict with the policy of that state. In our opinion there would be no such conflict. The leading case on this subject is *Dennick v. Railroad Co.*, 103 U. S. 11, where an action had been brought under the New Jersey statute above referred to in a state court of New York by an administratrix, appointed in the latter state, to recover damages for the death of her husband resulting from injury alleged to have been caused by negligence on the part of the defendant in New Jersey. The action was removed to the circuit court for the Northern district of New York. The circuit court held that the action could not be sustained. The supreme court reversed the judgment. Mr. Justice Miller, in delivering the opinion of the court, said:

"It must be taken as established by the record that the accident by which the plaintiff's husband came to his death occurred in New Jersey under circumstances which brought the defendant within the provisions of the first section of the act making the company liable for damages, notwithstanding the death. It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial."

The learned judge below, in sustaining the demurrer on the second ground, namely, "because neither the negligence of the defendant nor the injury to said Henry Van Doren from which the said supposed cause of action arose occurred within the state of New Jersey," was clearly in error. Confined, as the defendant was, to the two causes specified, the demurrer should have been overruled.

If the application by the plaintiff for leave to amend was seasonably made, should it not have been granted? She asked to be allowed "to declare as the widow of Henry Van Doren in conformity with the requirement of the statute of Pennsylvania, and to substitute the widow of Henry Van Doren for his administratrix as the plaintiff." The proposed amendment would not, if properly allowed, have changed the cause of action or affected in any manner the measure of proof necessary to establish the alleged tort. It would not have changed the issue to be tried or have

increased or diminished the amount to be recovered. It could not have operated to the prejudice of the defendant. It would merely have changed the capacity in which the suit should be prosecuted by Laura L. Van Doren from that of administratrix to that of widow of the decedent, thereby conforming to the Pennsylvania statute. It could have been of no consequence to the defendant who should ultimately receive the amount of any verdict against it, if the final judgment rendered in the action would bar a second suit for damages for the death of Henry Van Doren; and that the judgment would have operated as such bar we have no doubt. In fact it appears from the declaration that Henry Van Doren left to survive him several children, and under the intestate laws of Pennsylvania, the widow and children would share in the amount of any recovery in the same manner and proportions as they would under the intestate laws of New Jersey had the injury been received in the latter state and the action been successfully prosecuted under the statute thereof. *Pepper & L. Dig. Pa. pp. 2408, 2410; 2 Gen. St. N. J. p. 2389.* Nor would such an amendment have been repugnant to the one-year limitation prescribed by the Pennsylvania statute. *Railway Co. v. Cox, 145 U. S. 593, 603, 12 Sup. Ct. 905.* With such an amendment, properly allowed, the declaration would have set forth a clear right of action under that statute. If a person who is both widow and administratrix sues in the wrong capacity the action may be defeated and great hardship result unless an amendment be allowed permitting her to prosecute the action in the right capacity. There is abundant authority to the effect that under a general power to allow amendments necessary for the determination of the real question in controversy between the parties, an amendment touching the capacity in which the plaintiff sues or declares should, when properly applied for, be permitted where substantial justice requires it. *Wood v. Circuit Judge, 84 Mich. 521, 47 N. W. 1103,* is a case much in point. There an action had been brought on a policy of life insurance payable to the wife of the deceased or his "heirs, administrators or assigns." The wife died before her husband and suit under the advice of counsel was erroneously brought by the administrator c. t. a. of the wife instead of by the decedent's heirs. An application by petition was made to the court below to strike out the name of the administrator and substitute the heirs as plaintiffs. This application was denied. The supreme court of Michigan allowed a writ of mandamus to compel the court below to permit the amendment, saying:

"We are asked to issue a writ of mandamus directed to said circuit judge, commanding him to enter the order prayed for in said petition, and to vacate his order denying the same. It is contended that mandamus will not lie to review the exercise of judicial discretion, and that in this case the respondent denied the proposed amendment in the proper exercise of such discretion. But this is a case where the right of action will be lost unless the amendment is permitted, and great injustice be done to the heirs of Frank Silvers, who cannot be said to be responsible for the mistake made in the name of the plaintiff in the commencement of the action, and we cannot believe that the learned circuit judge would have refused such amendment had he supposed he had power to make it. The point is made here, as it undoubtedly was

before him, that the allowance of this amendment would permit the introduction of a new and distinct cause of action against the insurance company. If so, the circuit judge would have no authority to grant it. But we do not think that it introduces any new cause of action. The real plaintiffs in the action, as commenced in the first place,—the persons to be benefited by this insurance certificate,—were the heirs at law of Frank Silvers. If the policy had vested, as at first supposed, in Josie Silvers before her death, and it was a part of her estate, under her will it descended to Frank Silvers, her husband, and, he dying intestate, it then went to his heirs at law. Under our rulings it never vested in Josie Silvers, but belongs to the heirs at law of Frank, so that the real persons interested and sharing the money to be obtained from it are the same in both cases, to wit, the heirs at law of Frank Silvers. In both cases it is really a claim of these heirs against the insurance company, and the only difference is in the mode of its transfer to them,—a mere technicality in the legal steps necessary to be taken to collect it. Clearly in this case the money due upon this insurance certificate is payable to the heirs of Frank L. Silvers, and it would be a denial of justice not to permit this amendment. * * * The amendment is in the furtherance of justice, and the insurance company cannot be surprised by it; neither will it be deprived of any substantial or essential rights in the premises, in my opinion."

While we express no opinion on the propriety of proceeding by mandamus under such circumstances, the application to amend should in our judgment have been granted in this case if within the power of the court and seasonably made.

Had the court below power, on proper application, to allow the amendment? Section 954 of the Revised Statutes of the United States, taken from the judiciary act of September 24, 1789, provides that in civil cases in any court of the United States the court "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." Section 918 taken from the act of March 2, 1793, as modified by the act of August 23, 1842, is as follows:

"Sec. 918. The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Section 914, taken from the act of June 1, 1872, is as follows:

"Sec. 914. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

These several provisions are not only in *pari materia* but are included in the codification of the statutes of the United States of June 22, 1874, as in force December 1, 1873, and "general and permanent in their nature." Having thus been adopted and enacted as a whole, they must be construed together and full effect should, as far as possible, be given to each of them. While it was the clear intention of congress that the practice and pleadings in civil actions at law

in the circuit court should generally conform to the practice and pleadings in like causes in the courts of record of the state in which the circuit court should be held, exact conformity is not required, but only conformity "as near as may be." Circuit courts, subject to the requirement of such general conformity, may in any manner not inconsistent with any law of the United States or with any rule lawfully prescribed by the supreme court "regulate their own practice as may be necessary or convenient for the advancement of justice," and permit parties to "amend any defect in the process or pleadings, upon such conditions" as they shall, in their discretion and by their rules, prescribe. The circuit courts are not bound to conform to state practice or pleadings in subordinate details where such conformity would result in gross or substantial injustice to litigants. Nor where such result would follow are their powers with respect to practice or pleading directly or indirectly limited or affected by any judicial interpretation by a state court of a state statute relating to such matters. In *Railroad Co. v. Horst*, 93 U. S. 291, the court said:

"The conformity is required to be 'as near as may be'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as congress expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely inumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

In *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, the court, after referring to several of the sections of the Revised Statutes, including among others sections 914, 915, 916 and 918, said:

"We think it is sufficiently made to appear, by these citations from the statutes, that while it was the purpose of congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

In *O'Connell v. Reed*, 56 Fed. 531, 5 C. C. A. 586, the circuit court of appeals for the Eighth circuit, in discussing section 914, said:

"Under this act, wherever the pleadings, practice, and modes of procedure in the state courts, as they have been established by the statutes of a state, and the decisions of its highest judicial tribunal, do not impede the administration of the law, or the efficiency of the federal courts, they are, and ought to be, followed in those courts. In other words, in matters where it is important that the rule of practice or procedure in the state and federal courts shall be uniform, but largely immaterial what that rule should be, the pleadings, practice, and procedure in the federal court must, under this statute, conform to those in vogue in the state courts under the statutes of the state.
* * * But, on the other hand, the courts of the United States are not subordinate to the courts of the states. They constitute an independent judiciary system, the judges of which do not derive their powers from the states, nor can the legislation of the states, or the decisions of their courts, determine the limits of those powers, or prescribe the duties their exercise imposes.
* * * It was not the intention of congress to require, by the passage of this act of conformity, the adoption by the circuit courts of any rule of pleading, practice or procedure enacted by state statute, or announced by the decision of a state court, which would enlarge or restrict the jurisdiction of the

federal courts, or prevent the wise administration of the law in the light of their own system of jurisprudence, as defined by their own constitution, as tribunals, and the acts of congress upon that subject. On the other hand, that act expressly reserves to the judges of those courts the right, and, we think, imposes upon them the duty, in the exercise of a wise judicial discretion, to reject any statute, practice or decision that would have such an effect."

The rule of the court below touching practice therein is as follows:

"It is ordered by the circuit court of the United States for the district of New Jersey that this court adopt the rules of practice and proceeding now in force in the highest courts of the state of New Jersey (the court of chancery, when the equity rules do not apply, and so far as they are applicable, and the supreme court), and such changes therein as shall be made from time to time."

We are not aware of the existence of any rule of practice or procedure in any of the state courts of New Jersey to the effect that where an action for damages for death resulting from personal injuries received elsewhere than in New Jersey is brought by a person in a wrong capacity no amendment can be allowed changing that capacity to one in which the suit can properly be maintained. In so far as there may be a practice on this point in the courts of New Jersey it must result from the construction, either judicial or otherwise, of the statute of that state relating to amendments. That statute is of the most comprehensive character. 2 Gen. St. N. J. p. 2556, § 138. It is as follows:

"138. That in order to prevent the failure of justice by reason of mistakes and objections of form, it shall be lawful for the court, or any judge thereof, at all times, to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made."

In *Lower v. Segal*, 59 N. J. Law, 66, 34 Atl. 945, the supreme court of New Jersey held, on demurrer to a declaration, that an administratrix, who was also widow of the decedent, could not maintain an action in that state under the Pennsylvania statute to recover damages for the death of her husband resulting from alleged negligence of the defendant in the latter state, and that to warrant a recovery the widow, in the character of widow, should have sued. Subsequently the plaintiff applied to the same court for leave to amend the process and declaration "in such manner that the action may appear to be one brought by the widow of the deceased." *Lower v. Segal*, 60 N. J. Law, 99, 36 Atl. 777. The court denied the application on several grounds, and, among other things, said:

"Furthermore, I am of opinion that we are not required to make such an amendment by the provisions of section 138 of the practice act (2 Gen. St. p. 2556), which directs us to make all amendments necessary for the determination in an existing suit of the real question in controversy between the parties. In considering whether these provisions require the amendment now asked for, it is obvious that the question presented is the same as would be presented if the present plaintiff were John Doe, administrator of the deceased, and cannot be affected by the fact that the plaintiff is both the administratrix and the widow of deceased. The right of the widow to turn this action into one in her own behalf cannot be greater than her right to intervene with

a similar motion, in an action brought by some other person as the personal representative of her husband. * * * In my judgment, the provisions of section 138 do not apply to such a case, and do not require the amendment to be made. The amendment would not continue the existing suit except in mere form, but would create and institute a new suit, with a new question, and in a controversy between different parties."

Entertaining high respect for the supreme court of New Jersey, we are nevertheless of the opinion that the court below was under no obligation to follow the above decision. It was not even a determination by the court of last resort in that state; nor do the reasons advanced by the court in that case commend themselves to our judgment so far as the point now under consideration is concerned. It further seems to us that the result reached in that case is inconsistent with the ruling of the court of errors and appeals of New Jersey in *Farrier v. Schroeder*, 40 N. J. Law, 601. In the latter case it appears that the plaintiff had brought an action of covenant on certain sealed instruments running to her agent, and after the overruling of a motion for a nonsuit on the ground that the evidence showed a right of action, not in the plaintiff, but in her agent, who might maintain a second suit against the defendant for the same matter, leave was granted by the court below to amend by substituting in the process and pleadings the name of the agent for that of his principal. The court of errors and appeals in affirming the judgment said, with respect to section 138, that "the power of amendment could hardly be conferred in terms more comprehensive and explicit." The amendment upheld by the court of last resort in New Jersey, allowing the substitution of one person for another as plaintiff, necessarily involved a larger exercise of the power of amendment than could the granting of leave to amend by merely changing the capacity in which the person sues, where the cause of action and the persons to be benefited by the recovery remain the same, and where the judgment would bar a second suit for such cause of action. We have no doubt that the court below had power to grant the application to amend and should have granted it, if made at the proper time. The application, as may fairly be inferred from the record, was not made until on or about April 28, 1898. The granting of it would have involved the opening of the judgment on the demurrer. The term during which that judgment was rendered had theretofore expired, and the court below was consequently powerless to allow the proposed amendment. *Bronson v. Schulten*, 104 U. S. 410; *Phillips v. Negley*, 117 U. S. 655, 6 Sup. Ct. 901.

Assuming that the declaration is fatally defective in that *Laura L. Van Doren* declared as administratrix instead of widow, the case presents itself to us in the following phase. The defendant was confined to the causes of demurrer specified. Those causes did not include the above defect and the demurrer should have been overruled. Had it been overruled the plaintiff might have had an opportunity to correct by amendment the fault remaining in the declaration. Substantial justice requires that such an amendment should be allowed, as a second suit for damages for the death of *Henry Van Doren* would be barred by the one year limitation in the Pennsylvania statute. Under the authorities the plaintiff is entitled to be placed in a

position where the court below, in the light of this opinion, may allow a proper amendment to be made in furtherance of justice. In *The Caroline v. U. S.*, 7 Cranch, 496, the court reversed a decree of forfeiture on the ground of defectiveness in the statement of facts in the libel, directing "that the cause be remanded to the said circuit court, with directions to admit the libel to be amended." In *House v. Mullen*, 22 Wall. 42, the court held that a demurrer to a bill in equity for misjoinder of parties complainant had properly been sustained, but said that "to prevent what may be a great injustice, we must reverse the present decree and remand the case, with directions to allow plaintiffs to amend their bill as they may be advised." *U. S. v. Boyd*, 15 Pet. 187, presents in some of its features a strong analogy to the case in hand. The court below had sustained a demurrer to a replication assigning breaches of the condition of an official bond of a receiver of public moneys. The action had been brought in the circuit court for the district of Mississippi and by a statute of that state demurrants were confined to causes specially alleged in the demurrer. The assignment of several breaches in the replication was not specified as a ground of demurrer. The court, after holding that the demurrer had been erroneously sustained below, said:

"That several breaches had been assigned, is not alleged as a special cause of demurrer, and therefore could not have been noticed by the court, had no provision existed justifying more breaches than one; even had such replication been contrary to the strict rules of pleading by the common law. It is proper to remark, that when this case is remanded to the circuit court for further proceedings to be had therein, it will be in the condition it would have been, had that court overruled the demurrer; and subject to additional pleadings, or an amendment of the present ones, according to the rules and practice of the circuit court, and on such terms as it may impose."

Section 10 of the act of March 3, 1891, establishing the United States circuit courts of appeals, contains the following provision:

"Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination."

Under this provision this court has power, like that possessed by the supreme court, to reverse the judgment below and permit the plaintiff to apply to it for the allowance of an amendment. *Hubbard v. Trust Co.*, 30 C. C. A. 520, 87 Fed. 51; *Insurance Co. v. Barker*, 88 Fed. 814, 32 C. C. A. 124; *Hunt v. Howes*, 74 Fed. 657, 21 C. C. A. 356.

We are, however, by no means clear, in view of a recent decision by the supreme court, that an amendment of the process or declaration is necessary for a recovery in this case. In *Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, it appears that the plaintiff below as administrator brought an action in the supreme court of the District of Columbia to recover damages for the death of his intestate through alleged negligence of the defendant in Maryland. A statute in force in the District of Columbia provided that damages not exceeding \$10,000 might be recovered for death from negligence within the district; that the action should be brought in the name of the

personal representative of the deceased within one year after such death; and that the damages recovered should not be appropriated to the payment of the debts of the deceased, but inure to the benefit of his or her family and be distributed according to the statute of distributions.

A statute of Maryland also provided for the recovery of damages for death resulting from negligence. Section 2 of the latter statute (Pub. Gen. Laws, art. 67) was as follows:

"Sec. 2. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the state of Maryland, for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above mentioned parties, in such shares as the jury by their verdict shall find and direct: provided, that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of the deceased person."

A demurrer to the declaration was sustained and judgment rendered accordingly, which was affirmed by the court of appeals of the District. The plaintiff carried the case to the supreme court of the United States. Mr. Justice Brewer, in delivering the opinion of the court, said:

"The court of appeals was of opinion that the action could not be maintained under the statute of the District of Columbia, because that authorized recovery only in case the injury causing death is done within the limits of the District, nor under the Maryland statute because of the peculiar form of remedy prescribed therein. * * * It has been held by this court in repeated cases that an action for such a tort can be maintained 'where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.' * * * What are the differences between the two statutes? As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in this district the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative. For purposes of jurisdiction in the federal courts regard is had to the real rather than to the nominal party. * * * It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party. Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute

of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But by each the important matter is the award of damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. It is true that the beneficiaries of such an action may not in every case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely to be dependent on the party killed, and the remote relatives can seldom, if ever be regarded as suffering loss from the death. We cannot think that those differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland."

While it may not be necessary to amend the process or declaration to warrant a recovery by the plaintiff in this case, we think that in order to remove all doubt on the point she should be accorded an opportunity to amend, if she shall so elect.

The judgment below is reversed, with costs, and with leave to the plaintiff to apply within 60 days to amend in such manner as to make the action conform to the Pennsylvania statute.

MONTANA ORE-PURCHASING CO. et al. v. BOSTON & M. CONSOL.
COPPER & SILVER MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 449.

JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

To give a court of the United States jurisdiction of a cause, on the ground that it presents a federal question, such question must appear from plaintiff's statement of his own cause of action, and his right to the relief sought must depend directly upon the construction of some provision of the constitution or laws of the United States. Jurisdiction cannot be sustained upon allegations that defendant does or may assert some right under such constitution or laws as a defense.

Appeal from the Circuit Court of the United States for the Southern Division of the District of Montana.

John J. McHatton, Joel F. Vaile, and Clayberg & Corbett, for appellants.

Louis Marshall and John F. Forbis, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellee was the complainant in a bill in equity brought to restrain the appellants, the Montana Ore-Purchasing Company and Augustus Heinze and Arthur P. Heinze, from taking ores from certain mining properties. It was alleged in the bill that the complainant was the owner of the Pennsylvania lode claim, and that the defendants claimed the right to follow certain veins which had their apices in the claims lying northward of the complainant's claim; that the defendants claimed or owned a por-

tion of the Johnstown lode claim, and a portion of the Rarus lode claim, and a portion of the Little Ida lode claim, all of which claims lie north of, and partly adjoining, the Pennsylvania claim; that the Rarus, the Johnstown, and the Little Ida are mineral lode claims, located under the laws of the United States relative to the appropriation of mineral lands, and that said claims have been patented by the United States under the statutes relative to the patenting of mineral lands; that the defendants claim the right to enter upon the Pennsylvania lode claim, and mine the ores therein, by reason of the fact that certain veins owned by them have their tops or apices within a portion of their said claims so patented to them, and that they have the right to follow said veins on their downward course, so as to invade the Pennsylvania claim; that the complainant denies the fact that said veins, even if they had their apices on defendants' ground, are veins such as can be followed on their dip beyond the lines of the defendants' possessions; that the veins are broken and intersected by faults in such a manner that they cannot be traced or followed from the ground of the defendants into the Pennsylvania claim; that the veins upon which the defendants have been extracting ore within the premises of the complainant, if such veins have their apices on defendants' ground, do not, in their course or strike, depart from the end lines of the defendants' claim or possessions, but depart from the side lines thereof in such a manner as to prohibit the defendants from following the same beyond the said side lines into the ground of the complainant, and that none of said veins, in their course or strike, depart from the end lines of said claim or possessions of the defendants, but that the ground claimed by the defendants was so located as not to have any end lines whatever, as provided by the statutes of the United States, and that in consequence of the failure upon the part of the locators of the grounds claimed by the defendants to mark the same with end lines parallel or to locate the same along the veins, or otherwise than across the veins, the defendants have no extralateral rights in any of the veins on the ground; that the defendants claim to own a portion of the ground patented under both said Johnstown and Rarus patents, and they assert that, by virtue of the Rarus patent, they have acquired 1,318 linear feet of what is designated as the "Rarus Lode," but that the fact is that the surface ground patented in the Rarus lode claim does not include to exceed more than about 300 feet of said Rarus lode; that the defendants also claim that, by reason of the fact that said lode passes through the east end line of the Rarus claim as patented, and the west end line of the original location of said Rarus claim, they are entitled to follow said vein, on its course or dip into the earth, without the lines of the Rarus claim, as originally located and as patented; that a large portion of the ground which the defendants claim was originally included within the location of the Rarus claim has been patented under the Johnstown patent, and the defendants claim that only the surface ground of the Johnstown claim was patented to the patentee named therein, and that their extralateral rights on said vein should be determined by the Rarus patent, and not by the Johnstown patent, whereas the complainant

alleges that all veins whose apices lie within the Johnstown patent must be governed and regulated in extralateral rights under the Johnstown patent. The bill further alleged that the defendants claim that they have the right to follow the veins within the lines of the original Rarus location by virtue of the Rarus patent, and that they have the right to follow any vein having its apex within the Johnstown or the Rarus patent into the Pennsylvania claim at any point east of the intersection of the south side line of the Johnstown patent with the south side line of the original Rarus location; that it is claimed by the defendants that the apex of the veins from which they have extracted the ores in question is divided; that a portion is claimed by the defendants as upon the Rarus claim, and a portion upon the Johnstown claim, and a portion upon the Pennsylvania claim, and that they have the right to follow the said vein beneath the surface, under and by virtue of either or all said claims, at their election; that there are involved in the matters in controversy numerous questions of the construction of the statutes of the United States relative to locating, purchasing, and patenting mineral lands, and the right of one claimant to follow the veins in the premises of another, under the circumstances and situation of the parties, and the construction of the statutes in relation to patenting mining claims, and the question whether a claim can be patented to one person of the surface, and to another the right to mine beneath the surface, and the right of the land department to segregate the surface from the mine in the ground, granting one to one person and the other to another, and also the question when an apex of a vein is divided upon the surface, part being within the premises granted in one patent and part within another, what, if any, extralateral rights are granted to either party. The defendants F. Augustus Heinze and Arthur P. Heinze answered, denying that they claimed any interest in any of the lode claims mentioned in the bill. The defendant the Montana Ore-Purchasing Company answered separately, denying that the questions arising in the case involve the construction of any of the statutes of the United States, and denying that by virtue of the Rarus patent it acquired 1,318 linear feet of the Rarus lode, or that it claims any title in this action, under the said patent, as against the complainant, and alleging that it relies solely upon its ownership of a portion of the Johnstown lode claim. It denied that it contends that the Rarus patent granted the surface ground to the full extent of 1,318 linear feet, or that it contends that by reason of the ownership of that lode for that length, or by reason of the fact that the same passes through the east end line of the original location of said claim, it is entitled to follow said veins on their course or dip without the lines of the Rarus claim. It alleged that in this action it makes no claim of any right under the Rarus patent to enter upon the veins within the ground claimed or owned by the complainant, but that it asserts the right to do so by reason of its ownership of a portion of the Johnstown lode, and the fact that the top or apices of the veins or lode in question are within said portion of the Johnstown lode claim. It denied that it contends in this action that only the surface ground of the Johnstown claim

was patented to the patentee therein, or that all or any veins lying within the original location lands of the Rarus claim were patented to the claimant thereof. It denied that it claims or contends that its extralateral rights should be determined by the Rarus patent, and not by the Johnstown patent, but alleged that it contends and claims in this action, and so far as this controversy between the defendant and complainant is concerned, that its extralateral rights to the veins in question should be determined by its ownership of that parcel of ground now included within the Johnstown claim, and not by the Rarus. It alleged that it relies, not upon any combination of the two patents in this action, but upon its ownership of the parcel of ground conveyed to it by the owners of the Johnstown claim. It denied that it claims that the apex of the veins from which the ores in question were extracted is divided, and denied that the apex is divided. It alleged that it claims that the vein or lode from which the ores in question have been extracted has its apex within the Johnstown lode claim, and passes through the end lines thereof. It denied that it claimed, by reason of a divided apex, any right to follow the vein beneath the surface, and without the lines of the Johnstown claim.

On the former appeal of this case, it was held that the circuit court was without jurisdiction thereof, for the reason that no federal question was suggested by the allegations of the bill. *Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co.*, 29 C. C. A. 462, 85 Fed. 867. The jurisdiction is now again challenged upon the same ground. When the case was remanded, the bill was amended, and new averments were inserted, for the purpose of showing that the case presents questions of the construction of statutes of the United States. The cause of suit remains unchanged. It is the question of the complainant's right to enjoin the defendants from mining the ores beneath the surface of the complainant's claim. The complainant asserts that right upon the ground that no vein having its apex in the defendants' claim passes in its strike through the end lines thereof, so as to confer extralateral rights; and, further, that no such vein is continuous or unbroken in its downward course beneath the complainant's claim. These are plain questions of fact, involving, as we have heretofore decided, no construction of the laws of the United States. If the facts are as they are alleged to be in the bill, the inquiry will close with their proof, and the defendants will be enjoined. The new allegations of the amended bill are, in substance, that the defendants, as owners of the Rarus lode claim, to which a patent has been issued, claim to own 1,318 linear feet of the Rarus lode beneath the surface, although owning but 300 feet in length of the surface which covers that lode; that they claim extralateral rights upon the Rarus lode to the full extent of 1,318 linear feet; that they claim the right to follow the veins lying within the lines of the original Rarus location by virtue of the patent to the Johnstown lode claim, or by virtue of both the Johnstown and the Rarus patents, and to follow the same beneath the complainant's claim; that they contend that they cannot be enjoined from extracting ores from the complainant's premises unless the complainant

shall first show that the apices of the veins from which such ores are extracted are within the surface lines of the complainant's premises; that they claim that the apex of the vein from which the ores in controversy have been taken is divided, a part being on the Rarus and part on the Johnstown and a part upon the Pennsylvania; that, by reason of such division, they assert the right to follow the vein without the lines of the Rarus and Johnstown claims; that, in determining the rights of the defendants under those various contentions, it will become necessary to construe the mining laws of the United States. It will be observed that it is not in the statement of the complainant's own case, but in the defense which it anticipates from the defendants, that the presence of a federal question is suggested. The complainant's cause of suit is complete without these allegations. None of them is a necessary averment to the relief which is prayed for.

Upon the authority of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, the objection to the jurisdiction must be sustained. It is the distinct doctrine of the decision in that case that a court of the United States has no jurisdiction of a cause, upon the ground that a federal question is presented, unless the right of the plaintiff to the judgment or decree which he seeks depends directly upon the construction to be given to some provision of the constitution or a statute of the United States, and that, if in his bill or his declaration he asserts no right under such constitution or statutes, the jurisdiction cannot be sustained upon his allegation that the defendant will rely upon such rights. It was a case in which the state of Tennessee brought suit against a bank organized under the laws of that state to recover taxes which had been imposed on the bank by the general revenue act of the state. It was alleged in the bill that the bank claimed immunity from taxation solely upon the ground that the act imposing the tax was void, as violative of the provision of the constitution of the United States which prohibits a state from passing a law impairing the obligation of a contract. The court said:

"The only reference to the constitution or laws of the United States is the suggestion that the defendants will contend that the law of the state under which the plaintiffs claim is void, because in contravention of the constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States does not make the suit one arising under that constitution or those laws."

We are unable to distinguish the principle which was decided in that case from the question which is involved in this. In that case it was alleged in the plaintiff's statement of its own case that its right to the relief sought was contested by the defendant under a claim of protection from the constitution of the United States. In the present case it is alleged that the relief which the plaintiff seeks will be opposed by the defendant upon the ground of the protection afforded it by a patent the construction of which involves the application of statutes of the United States. In *City of Fergus Falls v. Fergus Falls Water Co.*, 19 C. C. A. 212, 72 Fed. 873, the circuit court

of appeals for the Eighth circuit, by Caldwell, Circuit Judge, following the doctrine of *Tennessee v. Union & Planters' Bank*, said:

"The averments of the complaint, beyond those which state a cause of action upon the contract in suit, are mere surplusage. When the statement of the plaintiff's cause of action in legal and logical form, such as is required by the rules of good pleading, does not disclose that the suit is one arising under the constitution or laws of the United States, then the suit is not one arising under that constitution or those laws, and the circuit court has no jurisdiction."

In that case it was alleged in the complaint as the ground of the jurisdiction that the defendant, a municipal corporation, by a resolution of its council, had declared null and void the contract which was sued upon, thereby impairing the obligation of the contract.

Not only are the jurisdictional averments of the amended bill insufficient to show that federal questions are involved, but all those averments were put in issue by the defendants' answer, and were thereby eliminated from the controversy. The defendant corporation denied that it relied upon any of the contentions which the bill so averred it would rely upon. In *Robinson v. Anderson*, 121 U. S. 522, 7 Sup. Ct. 1011, the court said:

"Even if the complaint, standing by itself, made out a case of jurisdiction,—which we do not decide,—it was taken away as soon as the answers were in; because, if there was jurisdiction at all, it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be, and these were of no avail, as soon as the answers were filed and it was made to appear that no such defenses were relied upon."

It is objected that the denials of the answer do not fully and explicitly traverse the new averments of the amended bill, but that they are denials only that the defendant relies in "this action" upon the alleged rights and claims, and that the defendant disclaims only for the purpose of this present suit, without waiving its right to assert such claims in some other suit or proceeding hereafter. No exception, however, was taken to the answer for insufficiency. It was accepted as responding to the allegations of the amended bill. We think it was properly so accepted. If, in view of some possible other action affecting other interests, the defendant has attempted to reserve the privilege to assert other rights under the Rarus patent, it is immaterial to the present controversy. It is only to the rights asserted by the complainant in this suit that the defendant must make answer. It is required to make its defense to the allegations of the bill, and to show cause why the relief prayed for should not be decreed. It has answered as to its rights to extract the ores in question. It says that it claims nothing by virtue of the Rarus patent, but that it relies solely upon the fact that the ores it has taken belong to a vein which has its apex in the Johnstown lode claim, and in its strike passes through the end lines of said claim, and in its downward course extends beneath the surface of the complainant's claim. Upon such a bill and such an answer, all questions concerning the right of the defendant to mine the ores in controversy are determinable, and the decree, if against the defendant, would be as effective to bar it from hereafter asserting rights under the Rarus patent as would be a decree upon any other form of answer.

For want of jurisdiction, the decree of the circuit court must be reversed, and the cause remanded, with instructions to dismiss the amended bill.

CŒUR D'ALENE RY. & NAV. CO. et al. v. SPALDING.¹

(Circuit Court of Appeals, Ninth Circuit. February 27, 1899.)

No. 451.

1. JURISDICTION OF FEDERAL COURTS—INJUNCTIONS STAYING PROCEEDINGS IN STATE COURT.

Rev. St. § 720, prohibiting the granting of an injunction by a court of the United States to stay proceedings in any court of a state, except where authorized in bankruptcy proceedings, applies to injunctions directed to parties engaged in proceedings in the state court.

2. SAME.

A circuit court of the United States cannot enjoin the further prosecution of a suit in a state court on the ground that such suit has been removed to the federal court, from which the injunction is sought, where, though a petition and bond for removal have been filed, no action thereon has been taken by the state court, nor has any copy of the record been entered in the federal court.

3. REMOVAL OF CAUSES—NATURE OF SUIT—ANCILLARY PROCEEDINGS.

A petition to a state court, asking the appointment of a receiver in aid of execution, as authorized by a state statute, and that a judgment previously obtained in such court be declared a first lien on property as against others claiming an interest therein, is purely an ancillary proceeding for the enforcement of the judgment, and is not removable.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

The material facts in this case are as follows:

On the 24th day of March, 1887, an action was brought by William L. Spalding in the district court of Kootenai county, territory of Idaho, against the Cœur d'Alene Railway & Navigation Company, for \$36,587, on account of labor performed and materials furnished by plaintiff in the building of the defendant's railway in the counties of Kootenai and Shoshone, in said territory of Idaho. On April 25, 1896, nine years after the commencement of the action, a judgment was rendered in said court in favor of the plaintiff, Spalding. The defendant appealed to the supreme court of the then state of Idaho for a reversal of said judgment, and on the 26th of November, 1897, the supreme court affirmed the judgment of the lower court in said cause. 51 Pac. 408. Thereupon executions were issued from the offices of the clerks of the district court in Kootenai and Shoshone counties, who thereafter made return that no property belonging to the defendant, Cœur d'Alene Railway & Navigation Company, had been found in their respective counties from which to satisfy the said judgment or any part thereof. Thereafter, on the 3d day of May, 1898, the plaintiff filed his petition in the same district court against the Cœur d'Alene Railway & Navigation Company and against the Northern Pacific Railroad Company and the Northern Pacific Railway Company. In this petition the recovery of the judgment against the Cœur d'Alene Railway & Navigation Company was set forth. It was also alleged that executions had been issued and returned unsatisfied; that the property of the Cœur d'Alene Railway & Navigation Company situated in the said judicial district in the state of Idaho consisted of warehouses, wharves, steamboats, barges, right of way, and other railroad property, known as the Cœur d'Alene Railway & Navigation Company's rail and steamboat line, between Cœur d'Alene city, in Kootenai county, in said state, and the town of Burke, and the Montana line, in Shoshone county, in said state, the same constituting and being a continuous transportation line between the points stated. It was al-

¹ Rehearing denied May 23, 1899.

leged, further, that the petitioner was informed and believed that the said property belonging to the Cœur d'Alene Railway & Navigation Company was, subsequent to the date of the contract entered into between the petitioner and Cœur d'Alene Railway & Navigation Company, by a pretended lease, or a pretended mortgage, or a pretended sale, the exact nature of which the petitioner could not state, transferred to the Northern Pacific Railroad Company, and by the Northern Pacific Railroad Company, by a pretended transfer, delivered to the Northern Pacific Railway Company; that, by reason of said pretended purchase, the exact nature of which the petitioner could not state, the said Northern Pacific Railway Company claimed the ownership of all of the said property of the Cœur d'Alene Railway & Navigation Company; that the transfer of this property to the Northern Pacific Railway Company, without first satisfying the judgment of the petitioner, was in violation of section 2673 of the Revised Statutes of the State of Idaho, and of sections 14, 15, and 16 of article 11 of the constitution of the state of Idaho, and was therefore void, as against the judgment of the petitioner; that the Northern Pacific Railroad Company and the Northern Pacific Railway Company claimed to have some interest in and to the property described, the exact nature of which was to petitioner unknown; that the said interest, if any they had, was subordinate and inferior to the rights of the petitioner. Wherefore petitioner prayed that any and all claims, or pretended claims, of the Northern Pacific Railroad Company and of the Northern Pacific Railway Company should be declared subsequent, subject, and inferior to the judgment of the petitioner; that a receiver be appointed by the court to take possession and control of all the properties described, and to proceed with all due diligence to sell the same, and apply the proceeds of said sale towards the payment of the judgment of the petitioner; and for that purpose that the said receiver be directed and empowered, whenever necessary or proper, to manage, operate, and control the steamboats, railroads, and other property, and to take all steps necessary in the premises, which may from time to time be necessary and proper, under the directions and order of the court, and to apply the proceeds derived from the operation or sale of said property to the payment of said debt; and for such other and further relief as to the court might seem equitable, proper, and just.

On the day that this petition was filed in the state district court, the defendants filed a petition with the clerk of the court for removal of the cause to the United States circuit court for the district of Idaho, accompanied by the usual bond. The petition alleged, among other things, that the suit was of a civil nature, and was brought to subject the property of the defendant the Northern Pacific Railway Company to the payment of the judgment against the Cœur d'Alene Railway & Navigation Company for the sum of \$30,000, and for the appointment of a receiver for the railroad, steamboats, wharves, rolling stock, franchises, and other property of the Northern Pacific Railway Company, and that this was a separable controversy, which could be tried between the petitioner, the Northern Pacific Railway Company, and the plaintiff. The petitioner further alleged that the suit was wholly between citizens of different states, to wit, between the petitioner, the Cœur d'Alene Railway & Navigation Company, a corporation organized, created, and existing under and by virtue of the laws of the state of Montana, the Northern Pacific Railroad Company, a corporation organized, created, and existing under and by virtue of an act of congress of the United States approved July 2, 1864, and the Northern Pacific Railway Company, a corporation organized, created, and existing under and by virtue of the laws of the state of Wisconsin, as defendants, and William L. Spalding, a citizen of the state of Idaho, as plaintiff; that the Cœur d'Alene Railway & Navigation Company had been improperly and unlawfully joined as a defendant for the fraudulent and unlawful purpose of attempting to prevent the removal of the cause to the circuit court of the United States; that the Cœur d'Alene Railway & Navigation Company had no interest whatever in the result of the controversy involved, and was not a necessary or proper party to the suit.

It appears that on May 6, 1898, a certified copy of this petition was presented to the judge of the state court, who refused to grant the order of removal, or take any action with reference to the removal, of the cause. Thereupon notice was given to the defendant by the plaintiff that he would apply

to the said state court on the 20th day of May, 1898, for the appointment of a receiver of the property mentioned in the petition. Thereafter, on May 9, 1898, the present bill of complaint was filed in the circuit court in and for the district of Idaho, Northern division, by the Cœur d'Alene Railway & Navigation Company, the Northern Pacific Railroad Company, and the Northern Pacific Railway Company to enjoin the plaintiff, William L. Spalding, from further prosecuting his suit in the state court against the complainants, and from applying or presenting a motion to the judge of said court for the appointment of a receiver for the property described in the proceedings. The bill alleges that the property over which a receiver is attempted to be appointed is of the value of more than \$3,000,000, and part and parcel of the transcontinental line of railway operated as an entirety between Lake Superior and Puget Sound, and that great and irreparable damage would result to the complainant the Northern Pacific Railway Company from any interference with such operation by the appointment of a receiver as petitioned.

Thereafter, on May 13, 1898, the defendant, Spalding, demurred to the bill of complaint, on the ground that the circuit court was without jurisdiction to grant the relief prayed for in the bill of complaint, for the reason that the alleged action which the complainants were seeking to have transferred to the circuit court was but a proceeding ancillary to, and inseparably connected with, the original judgment in the state court. On May 20, 1898, the judge of the circuit court denied the application for provisional injunction, enjoining and restraining the respondent from prosecuting the proceedings in the state court, and from presenting a motion in said court for the appointment of a receiver of the property in controversy. From this order the present appeal is prosecuted.

C. W. Bunn, for appellants.

Willis Sweet and Turner & Forster, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The appeal is prosecuted under the provisions of section 7 of the act of March 3, 1891, as amended by the act of February 18, 1895. It is assigned as error that the court erred in denying the motion of the appellants for a provisional injunction. Section 720 of the Revised Statutes provides that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. This prohibition applies to injunctions directed to parties engaged in proceedings in the state court. *Diggs v. Wolcott*, 4 Cranch, 179; *Peck v. Jenness*, 7 How. 612; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 U. S. 340; *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385.

It is contended by appellants that this prohibition does not apply to a case removed from the state court to the United States court, where the injunction sought is against the party seeking to prosecute his case in the state court.

In the case of *French v. Hay*, 22 Wall. 250, cited as authority for this doctrine, the facts show that an injunction was necessary in that case to preserve the prior jurisdiction of the United States circuit court, and the decision of the supreme court was placed upon that ground. The facts of the case were these: French had obtained a decree against Hay in a state court of Virginia under very peculiar circumstances, and had sent a transcript of this decree to Philadelphia, where Hay resided, and had brought suit upon it there.

In the meantime Hay had removed the original case from the Virginia court to the United States circuit court, and had filed the record in that court. He had also filed a bill in the circuit court to set aside and annul the decree. In this situation of affairs, Hay obtained from the circuit court an injunction restraining French from proceeding further in Pennsylvania or elsewhere, to enforce the decree obtained in the Virginia court, and at a later date the circuit court annulled and set aside the Virginia decree, and dismissed the bill upon which it was founded. On appeal to the supreme court, the action of the circuit court was affirmed, both as to the injunction and the decree; the court holding that the prohibition of the statute against granting of injunctions by the courts of the United States touching proceedings in state courts had no application to such a case, for the reason that the prior jurisdiction of the court below took the case out of the operation of that provision. The enjoined party was seeking to execute in a state court of Pennsylvania a decree obtained in a state court of Virginia, notwithstanding the fact that the case upon which the decree was founded had been transferred to the United States circuit court. The Virginia court had been deprived of its jurisdiction over the case by the act of removal, but by taking a transcript of the decree to the Pennsylvania court a new jurisdiction had been obtained for the case that would have defeated the jurisdiction of the circuit court. In speaking of the relief which the complainant was entitled to have in the circuit court under these circumstances, the supreme court said:

"If it could not be given in this case, the result would have shown the existence of a great defect in our federal jurisprudence, and have been a reproach upon the administration of justice. In that event, the payment of the annulled decree may be enforced in Pennsylvania, and Hay, notwithstanding the final decree in that case and in this case, would find himself in exactly the same situation he would have been if those decrees had been against him instead of being in his favor. They would be nullities as regards any protection they could have given him. Instead of terminating the strife between him and his adversary, they would leave him under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice."

In the case of *Wagner v. Drake*, 31 Fed. 849, also cited by appellants, the cause had been duly and regularly transferred to the circuit court, and the record of the state court filed in that court. The court held that section 720 of the Revised Statutes does not apply to proceedings in a state court in a case that has been legally removed from the state court into the United States court, but the injunction was refused in that case on the grounds that the jurisdiction of the circuit court was doubtful, and because it did not appear that the injury to the plaintiff would be irreparable, but, on the contrary, capable of being fully compensated by damages recoverable in an action at law, in the event of the removed case being decided in his favor.

A case more in point is that of *Railroad Co. v. Scott*, 13 Fed. 793. In that case proceedings had been instituted in the county court of Tarrant county, in the state of Texas, for the condemnation of certain lands of the defendant's railroad, and, under the laws of Texas,

the preliminary proceedings had been taken, up to the report of the commissioners as to the amount of damages the defendant was entitled to, and including the filing of objections to the report by the dissatisfied parties. Thereupon the complainant filed in said county court its petition and bond for removal of said cause to the circuit court, but it does not appear that the record was in fact removed to the circuit court. Notwithstanding the filing of the petition and bond for removal in the state court, the defendant proceeded with the cause in that court, and the complainant petitioned the circuit court for an injunction to restrain the defendant and his attorneys from taking any further proceedings in the state court. The petition was denied, on the ground that the state court had prior jurisdiction of the case, and the question whether that jurisdiction had ended was in dispute between the parties.

In the present case the appellants allege in their bill that they presented their petition to the state district court for the removal of the cause to the circuit court. The cause here referred to is the petition of Spalding to the state district court, in the form of a complaint against the Cœur d'Alene Railway & Navigation Company, the Northern Pacific Railroad Company, and the Northern Pacific Railway Company for the appointment of a receiver to take possession and control of certain property described in the petition as having belonged originally to the Cœur d'Alene Railway & Navigation Company, and transferred by this corporation to the Northern Pacific Railroad Company, and by the latter corporation to the Northern Pacific Railway Company. The petition also asks that the pretended claims of the Northern Pacific Railroad Company and the Northern Pacific Railway Company be declared subsequent, subject, and inferior to the judgment of the petitioner in the original case. The appellants further allege in their bill that they filed the petition for removal with the clerk of the district court of the First judicial district of Idaho in and for the county of Kootenai, and presented a certified copy of the petition to the judge of the district court, with a certified copy of the bond on removal, and requested the judge to sign an order for the removal of the cause to the United States circuit court, but he refused to do so, or to take any action with reference to the removal of said cause whatsoever. It does not appear that any further action was taken in the matter of the removal. No transcript of the record was taken from the clerk's office of the district court and filed in the clerk's office of the circuit court, nor was the circuit court asked to issue a writ of certiorari to the state court commanding that court to make a return of the record in the cause to the circuit court.

The removal act of March 3, 1887, as corrected by the act of August 13, 1888, provides for the removal of cases from the state court to the United States circuit court upon the filing of a petition in the state court, and the giving of the removal bond, to be conditioned for the entering by the defendants in "such circuit court, on the first day of its then next session, a copy of the record in such suit." It is also provided that "it shall be the duty of the state court to accept said petition and bond and proceed no further in

said suit; and the said copy being entered as aforesaid, in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court." The jurisdiction of the circuit court attaches when the requisite petition and bond have been filed in the state court, but the entering of a copy of the record in the circuit court is necessary to enable that court to proceed in the case. *Railroad Co. v. Koontz*, 104 U. S. 5; *Railway Co. v. Rust*, 17 Fed. 275; *Mining Co. v. Bennett*, 5 Sawy. 289, Fed. Cas. No. 8,968.

When such a record is filed in the circuit court, that court has not only the jurisdiction of the case which attaches when the state court must "proceed no further," but it has the prior jurisdiction which comes with the record, as if the case had been originally commenced in the circuit court. This latter jurisdiction the circuit court had not acquired when the present bill was filed, but, by bringing an original suit in the circuit court, the plaintiffs have endeavored to transfer the cause to that court by a method of procedure different from that contemplated by the removal act. This fact was, of itself, sufficient to justify the court in denying the petition for an injunction in this case.

The case upon its merits raises the question as to whether the proceedings in the state court were removable under the statute. The petition asked the appointment of a receiver to take possession and control of all the properties claimed to be subject to the lien of the original judgment. This is one of the equitable remedies which is wholly ancillary or provisional. It does not, either directly or indirectly, affect the nature of any primary right, but is simply a means and instrument by which a primary right may be efficiently preserved, protected, and enforced in judicial proceedings. 1 Pom. Eq. Jur. § 171.

The purpose of the Idaho statute upon this subject is to provide this equitable remedy as ancillary to its judicial system. Section 4329 of the Revised Statutes reads as follows:

"A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof: (1) In an action * * * by a creditor to subject any property or fund to his claim, * * * on the application of the plaintiff, * * * and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; * * * (3) after judgment to carry the judgment into effect; (4) after judgment * * * in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment."

The petition for the appointment of a receiver under this statute was clearly a proceeding of a supplementary character only. It was for the purpose of carrying into effect the judgment previously obtained, and was entirely ancillary to, and dependent upon, the original suit. The same may be said with respect to the petition to the state court to declare a priority in favor of the judgment in the original suit. It was purely an ancillary proceeding to enforce a judgment.

In *Railroad Co. v. Chamberlain*, 6 Wall. 748, two appeals were taken from the circuit court for the district of Wisconsin. The Milwaukee & Minnesota Railroad Company filed a bill against Cham-

berlain to set aside a lease of their road executed to him by the La Crosse & Milwaukee Railroad, with intent to hinder and delay their creditors; also to set aside a judgment which the company had confessed to Chamberlain. The Milwaukee & St. Paul Company was admitted as defendant, on the ground that it had become the owner of the lease and judgment. The latter company filed a cross bill against the Milwaukee & Minnesota Company and Chamberlain, setting forth the indebtedness of the La Crosse & Milwaukee Company to Chamberlain; that complainant had become the equitable owner of this debt; that the lease and judgment were liens on a portion of the road, which was largely incumbered by prior mortgages; that the mortgages, together with the judgment, far exceeded the value of the road; and praying that the judgment might be decreed a valid and subsisting lien on the road, appurtenances, and franchises, and that they be decreed to be sold to satisfy it. The trial court dismissed the bill in the principal suit, and decreed in favor of the Chamberlain judgment, but dismissed the cross bill, for the reason that the two companies were incompetent to litigate the matter on account of the residence of the parties, both being corporations of one state. The supreme court held the dismissal of the cross bill to be in error, as the filing of the cross bill was for the purpose of enforcing the judgment which was in the circuit court, and could be filed in no other court, and was but ancillary to, and dependent upon, the original suit, an appropriate proceeding for the purpose of obtaining satisfaction. A suit or proceeding which is merely ancillary or auxiliary to the original action, or a mere graft upon it or dependence of it, as distinguished from independent and separate litigation, is not removable to the federal court. *Bank v. Turnbull*, 16 Wall. 190; *Buell v. Construction Co.*, 9 Fed. 351; *Poole v. Thatcherdeft*, 19 Fed. 49; *Hospes v. Car Co.*, 22 Fed. 565; *Ladd v. West*, 55 Fed. 353; *Black*, Dill. Rem. Causes, § 32.

It follows that the petition in the state court for the appointment of a receiver, and for a determination of the priority of the judgment in the original case, was not removable, and the circuit court was right in refusing an injunction to restrain the proceedings in the state court. Decree affirmed.

APPLETON WATERWORKS CO. et al. v. CENTRAL TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Seventh Circuit. March 31, 1899.)

No. 560.

1. FEDERAL AND STATE COURTS—JURISDICTION OVER PROPERTY—APPOINTMENT OF RECEIVER.

The filing of a bill in a federal court against a corporation for the foreclosure of a mortgage on its property, and, as a necessary incident, the appointment of a receiver therefor, together with the entry thereon of an order by the court to show cause against the appointment of a receiver, and enjoining any transfer of the property, or any similar order tending towards possession of the property by the court, give the court jurisdiction over the mortgaged property, even before the service of process on

the corporation, of which it cannot be deprived by the appointment of a receiver by a state court in a suit, commenced subsequently, to which another corporation in actual possession of the property was not made a party.¹

2. RECEIVERS—CONSTRUCTIVE POSSESSION OF PROPERTY.

Whether the appointment of a receiver for the property of a corporation vests him with constructive possession of property in the actual possession of an adverse claimant, depends on whether such claimant is a party to the suit, and his rights are subject to adjudication therein.

3. SAME—FORECLOSURE SUIT—PROPERTY IN POSSESSION OF ADVERSE CLAIMANT.

While a claim of paramount title adverse to the mortgagor cannot be tried in a suit to foreclose the mortgage, yet, where such claim rests upon a tax title subsequent to the mortgage, derived from an officer of the mortgagor, a corporation, who occupied such a fiduciary relation to the property that the acquisition of the title by him amounted to a payment of the tax, such relation alone renders the claim subject to inquiry and adjudication in the foreclosure suit; and an allegation and showing of such facts, without contradiction, are sufficient to authorize the court to appoint a receiver for the property, though in the possession of the claimant, which authority will be exercised where it is further alleged, and fairly appears from the showing made, that, through collusion with the mortgagor, the claimant, for the comparatively insignificant amount of the taxes, has obtained possession of the entire property and franchises of the mortgagor corporation, and is receiving the income therefrom.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This was a suit in equity by the Central Trust Company of New York against the Appleton Waterworks Company for the foreclosure of a mortgage, and the appointment of a receiver. A supplemental bill was afterwards filed, making John M. Baer (as receiver of the Appleton Waterworks Company), the American Loan & Trust Company, the United Waterworks Company, and the New England Waterworks Company additional defendants; and an application was made for the extension of the receivership over such additional defendants. From an order granting such application, the defendants have appealed.

Geo. P. Miller and B. K. Miller, Jr., for appellants.

Lyman Barnes, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. It is deemed unnecessary to add anything to the following statement of the case and opinion of the court below:

"On motion to reappoint a receiver, and extend receivership to cover the property and parties as set forth in amended and supplemental bill of complaint. The original bill was filed in this court July 16, 1898, against the defendant Appleton Waterworks Company, for the foreclosure of a mortgage made by that company to secure bonds for the principal sum of \$200,000; and on the same day the subpoena issued, with an injunctive clause, and an order of this court was entered to show cause why a receiver should not be appointed. On July 18, 1898, service of the subpoena and order was attempted by serving upon one J. A. Hawes, who was in charge of the waterworks office and plant, but who asserted, and now states in an affidavit, that he was not at such date an officer of the Appleton Waterworks Company, or holding any relation there-

¹ For jurisdiction, as affected by possession of subject-matter of controversy, see note to *Adams v. Trust Co.*, 15 C. C. A. 6, and note to *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 356.

to, having ceased such relation some time theretofore; and the service was not in fact perfected until July 28, 1898, when the proper officer of the defendant was discovered and served. An order was entered by this court, on return of the attempted service, on July 25, 1898, appointing Herman Erb receiver; and he qualified as such, but, for reasons subsequently appearing has taken no possession of the property in question. An amended and supplemental bill was filed by leave of court August 15, 1898, from which it appears, among other matters, that between July 18th, when the first service was attempted, but not perfected, and July 28th, when legal service was completed, namely, on July 25, 1898, an order was entered in the circuit court for Outagamie county in accordance with section 3216, Rev. St. Wis., upon a judgment at law entered the same day by consent against Appleton Waterworks Company, and execution returned unsatisfied, sequestrating 'the stock, property, things in action, and effects of such corporation,' and appointing as receiver thereupon the defendant John M. Baer. Collusion is alleged on the part of the defendants in the institution of said proceedings to interfere with the proceedings in this court; and the said receiver is made a party defendant by leave of the circuit court of Outagamie county. The bill further alleges that the mortgaged property, being the entire plant of the Waterworks Company, is now in the ostensible possession of the defendant New England Water-Works Company, through tax deeds and proceedings collusively obtained, through the defendant Venner, who was president of each company, and became the owner of the tax certificates when president of the mortgagor company.

"SEAMAN, District Judge. The argument in opposition to an order extending the receivership to reach the parties and possession, set up in the amended and supplemental bill, is mainly directed to the proposition that this court is without jurisdiction over the res, because the proceedings in the circuit court for Outagamie county were prior in fact to the time when legal service of the process of this court was completed, and by the order of sequestration and the appointment of a receiver that court acquired exclusive jurisdiction over the property in controversy. The action in this court for foreclosure of the mortgage is essentially one in rem; and it is undoubted that jurisdiction was invoked and duly exercised on July 16, 1898, at the filing of the bill, to the extent of issuing the injunction against transfers, and the order to show cause why a receiver should not be appointed. The injunction became so far operative that any violation by one having actual notice of the order would be punishable, although there had been no personal service of the order, and he was not even a party to the action. *Ex parte Lennon*, 166 U. S. 548, 554, 17 Sup. Ct. 658. Decisions at the circuit are cited upon one side and the other in which eminent judges appear at variance as to a test of priority applicable to all actions of this nature, or at what precise stage the equitable lien upon the res may be taken as established. Although the date of actual service of the subpoena was adopted as fixing the jurisdiction in *Bell v. Trust Co.*, 1 Biss. 260, Fed. Cas. No. 1,260, and in *Union Mut. Life Ins. Co. v. University of Chicago*, 6 Fed. 443, it is very clear that such test cannot be made of universal application, as many cases arise in which the res must be taken into the possession of the court before the parties can be reached by service, actual or constructive. Whilst the fact of such service, unless there is an appearance, is, of course, indispensable to any final action or decree, it is well settled that judicial cognizance may be taken, before the defendants are served, to enter any preliminary order which may appear necessary to preserve property or the rights of parties, including the appointment of a receiver in extreme cases. The filing of the bill alone, without any order by the court, which seems to have approval in some of the cases as the test, is equally open to objections as one of general rule; nor can it be said that the weight of authority establishes a test which may be applied to all cases. I am of opinion that the true inquiry is one of actual cognizance by the court, and that the entry of an order upon the filing of the bill for any purpose involved in the action, and especially one tending to possession by the court of the res, is sufficient for jurisdiction to attach without awaiting an actual service of parties, and that the orders entered on July 16, 1898, accomplished that purpose in this case, without regard to the effect of the attempted service of July 18th, which appears to have given actual notice of the proceedings and orders

to the interested parties, and probably induced the counter proceedings in the state court. This view is clearly sustained by the ruling of the presiding chief justice in *Shoemaker v. French*, Chase, 267, Fed. Cas. No. 12,800, and is within the general doctrine stated in *Wiswall v. Sampson*, 14 How. 52; *Adams v. Trust Co.*, 30 U. S. App. 204, 15 C. C. A. 1, and 66 Fed. 617; *Union Trust Co. v. Rockford*, R. I. & St. L. R. Co., 6 Biss. 197, Fed. Cas. No. 14,401; *President, etc., of Atlas Bank v. President, etc., of Nahant Bank*, 23 Pick. 489.

"This bill, as filed, states a case for receivership as a necessary incident to the foreclosure, that the franchises and property are imperiled in the hands of the mortgagee, and that it is essential to the complainant's relief to preserve the rents and profits as well as the mortgaged property; and to that end there must be possession by the court of the res. The injunction and order to show cause were issued for that object, and on the return day, July 25, 1898, the order was entered appointing the receiver, without any knowledge on the part either of the court or of counsel for complainant of the proceedings taken on the same day in the circuit court for Outagamie county. Whether the notice conveyed by the service of subpoena and order on Mr. Hawes July 18th may be regarded as sufficient notice is immaterial upon this hearing, if jurisdiction existed to make the appointment. Whether the circuit court of Outagamie county was imposed upon in making its appointment of a receiver on the same day, through collusive proceedings or otherwise, and what may be the standing of the parties before that court, is a question exclusively within its province. The two proceedings are independent in their nature and object, and may well be carried to final determination in each co-ordinate court without occasion for conflict in any regard. If, in any feature, seeming conflict should impend respecting custody of the res, either court will readily solve the difficulty, in accordance with the well-established rule applied in *Northwestern Iron Co. v. Land & River Imp. Co.*, 92 Wis. 487, 492, 66 N. W. 515, and clearly set forth in *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 305, 5 Sup. Ct. 135, and in *Bank v. Stevens*, 169 U. S. 432, 459, 18 Sup. Ct. 403, and the cases reviewed.

"There is, however, no question of actual conflict presented here, either in the causes of action, or as to possession of the res. The receiver of the state court is vested with, and presumably in possession of, all the stock, stock subscriptions, and other matters of the debtor corporation, aside from the mortgaged plant and franchises; and as to the latter it is conceded that such receiver is neither in possession, nor can have immediate possession, in virtue of the order of the court or otherwise, except through an action of ejectment, or other separate proceeding, against the third parties alleged by these defendants to be in adverse possession. On the other hand, if the amended and supplemental bill of the complainant in this court is maintained, the right of possession thereunder is direct, and immediately effective. In this view, the constructive possession which arises in certain cases out of the order appointing the receiver is not immediately operative, under the proceedings in the state court, but would clearly follow an order entered in the pending action. *Adams v. Trust Co.*, 30 U. S. App. 204, 15 C. C. A. 1, and 66 Fed. 617. Whatever may be the ultimate rights of the respective parties in the res is reserved for final adjudication by the order of the circuit court for Outagamie county, granting leave to the complainant here to make the receiver of that court party to this action,—a recognition of the status of the parties and an exercise of comity on the part of the court which place at rest any possible conflict arising out of the proceedings of parties.

"On behalf of the defendants brought in under the amended and supplemental bill, it is further insisted that there should be no extension of the receivership, for two reasons: (1) That the bill, as now presented, seeks the trial of an adverse title and possession in the foreclosure action, and is multifarious; and (2) that possession of the property is in the defendant New England Waterworks Company, under an adverse claim of title, and should not be disturbed or prejudiced before final hearing.

"1. It is well settled, both upon principle and authority, that paramount title adverse to the mortgagor cannot be tried in an action to foreclose the mortgage, although in *Hefner v. Insurance Co.*, 123 U. S. 747, 754, 8 Sup. Ct. 337, there is strong countenance for so adjudicating upon a tax title which 'was subsequent in time, although paramount in right, to the title acquired under

the mortgage' in suit. But here the allegations and undisputed showing of purported adverse title rest upon tax titles for defaults in the payment of taxes which arose when the defendant Venner was president and financial manager of the mortgagor company, or of the predecessor company, as to the earlier certificate, where the relations of the parties will be regarded of like import in equity, undisturbed by the reorganization; that the tax certificates were bought in by Mr. Venner, or came into his hands under such relation, and tax titles were taken to the New England Waterworks Company, of which Mr. Venner was the organizer, and was president during all the times referred to. As president of the mortgagor company, then apparently insolvent, he received and held the tax certificates as trustee for the mortgagee and creditors, or, if not as a technical trustee, at least in a fiduciary relation. *Manufacturing Co. v. Hutchinson*, 24 U. S. App. 145, 11 C. C. A. 320, and 63 Fed. 496. And no title adverse to the mortgagee can be created through such source, but the transaction must be regarded as a payment of the tax. *Avery v. Judd*, 21 Wis. 262; *Stears v. Hollenbeck*, 38 Iowa, 550, and cases cited. From such fiduciary relation alone inquiry would be open in this action to determine the character of the title, and surely the further allegations of collusion by which the newly-organized company obtained possession from the mortgagor company, as foundation for its tax titles, furnish ample support for the bill in this aspect. Whether inquiry is open as to invalidity of the tax titles in other respects, as alleged, may be left for determination at final hearing. If the allegations previously referred to are sustained, both possession and title are under the mortgagor, and subordinate to the mortgage lien, and therefore subject to adjudication in this action. *Mendenhall v. Hall*, 134 U. S. 559, 568, 10 Sup. Ct. 616; *Trust Co. v. McKenzie* (Minn.) 66 N. W. 976.

"2. With the second branch of the objection I have found the greatest difficulty; involving, as it does, the serious question of a just exercise of the discretion reposed in courts of equity. The answering affidavits, especially that of the defendant Venner, furnish strong corroboration for the material allegations of the amended and supplemental bill respecting the relationship of both title and possession. The New England Waterworks Company has entire possession of this valuable plant, with the issues and profits, for its purported and comparatively insignificant investment of the amount of the tax certificates. The mortgagee is entitled to protection against such schemes and schemers as appear disclosed in the transactions set forth in this record, and to secure the integrity of the property, as well as benefit of the rents and profits, I am satisfied that judicial custody is the sole assurance; thereby protecting all the interests involved, including those of the mortgagee, American Loan & Trust Co., holding under mortgage made by the New England Company, for means claimed to have entered into improvements made by it. The presumptive right of the mortgagee to rents and profits after default can be obtained only through possession, actual or constructive. *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887. This can be preserved by the receivership, but not otherwise. I am therefore of opinion that a case is clearly made for the appointment of a receiver to take such property into the custody of the court; and an order will be entered accordingly, with the amount of bond to be fixed therein."

The order of the circuit court is affirmed.

BUMP v. BUTLER COUNTY et al.

(Circuit Court, E. D. Missouri, E. D. March 15, 1899.)

No. 3,844.

1. JUDGMENT—COLLATERAL ATTACK—DEFECT OF PARTIES.

A railroad company executed a mortgage by which it conveyed certain lands it had received from a county in payment of a stock subscription to three trustees, and "to the survivor and survivors, successor and successors, of them," as joint tenants, to secure the payment of bonds. The

mortgage further provided for the filling of vacancies in the office of trustee. The county subsequently brought a suit to cancel its conveyance of the lands to the company and the mortgage thereon, making the company and the original trustees defendants; service on the trustees being made by publication as nonresidents. Prior to the commencement of the action one of the trustees had died, and another died before the order for publication was returnable. Action was taken purporting to fill the vacancies so caused, but no record thereof was made in the county where the mortgage was recorded; nor did the pleadings, which were filed on behalf of all the defendants, suggest either the deaths of the original trustees or the new appointments, although one of the appointees appeared of record as counsel, and such facts were not known to the county or its counsel until after final decree, which was rendered three years after the suit was commenced, and which set aside and canceled the conveyance from the county and the mortgage, as to the lands in suit. *Held* that, conceding the regularity and validity of the appointment of the new trustees, it must be presumed, in support of the jurisdiction of the court, when collaterally attacked, that such appointments had not become effective by the acceptance of the appointees, and that the title under the mortgage remained in the survivor of the original trustees, and the decree was therefore a conclusive adjudication of the invalidity of the title of the company and its trustees.

2. CORPORATIONS—DISSOLUTION BY SALE OF PROPERTY—VALIDITY OF SERVICE.

Where a legislative act directing the sale of a railroad to satisfy a lien of the state especially provided that it should not be construed to authorize the conveyance to the purchaser of any lands which had been conveyed to the railroad by counties, of which the company held a large amount, the sale cannot be held to have worked a dissolution of the railroad corporation, so that a service upon its officers did not give a court jurisdiction over the company in a subsequent suit relating to such lands, especially where it appeared and contested the suit, and continued to exercise the powers of a corporation for years thereafter.

3. LACHES—ATTACKING VALIDITY OF DECREE.

A delay of nearly 30 years by a claimant of land out of possession, before bringing suit, constitutes such laches as will preclude him from attacking the validity of a decree which adjudged the title to be in the defendant county, and under which it and its grantees have claimed ever since.

4. ESTOPPEL—COLLECTION OF TAXES BY COUNTY.

Where a claimant of lands adversely to a county and its grantees, pending litigation as to his rights, and with knowledge that he did not have the legal title, voluntarily procured the land to be assessed in his name, and paid the taxes thereon for a number of years, the acceptance of such taxes will not estop the county, nor its grantee having knowledge of such facts, from asserting title to the lands.

5. ADVERSE POSSESSION—REQUISITES—WILD LANDS.

Acts of ownership exercised over wild and unoccupied lands, to constitute adverse possession as against the owner of the superior title, must be of a character so open, notorious, and unequivocal that they cannot fail to be known to the true owner, and to advise him of the claim made; and loose testimony as to occasional acts by a claimant, such as the making of surveys or driving off trespassers, while at the same time the owner of the legal title of record was exercising similar acts, and was offering for sale and selling portions of the lands, is insufficient to establish such adverse possession as will ripen into title, and in such case the rule must be applied that possession follows him who has the better title.

M. W. Huff and John F. Shepley, for complainant.

M. L. Clardy and Wood & Douglas, for defendants.

ADAMS, District Judge. This is a suit in equity to annul certain conveyances of swamp lands in Butler county, as clouds upon com-

plainant's title. The complainant claims title through the following legislative acts and conveyances: That is to say, the act of congress of September 28, 1850, authorizing the conveyance of certain lands, known as "swamp or overflowed lands," to the state of Missouri; the acts of the general assembly of the state of Missouri approved March 3, 1851, and February 23, 1853, donating to Butler county such of said swamp lands as were located within its confines; the act of the general assembly of Missouri of February 24, 1853, authorizing the formation of railroad associations, and subscriptions to the capital stock of such associations by counties; the orders of the county court of Butler county of dates October 24, 1854, and December 6, 1855, making two subscriptions, each for \$50,000, to the capital stock of the Cairo & Fulton Railroad Company, and providing for the payment of such subscriptions by the conveyance to said railroad company of swamp lands at \$1 per acre; the selection of such lands; the conveyance thereof to the railroad company by a patent executed by the governor of the state of Missouri, of date April 20, 1857; the mortgage executed by the railroad company, of date May 23, 1857, conveying said lands to Moore, Wilson, and Waterman, trustees, to secure the payment of an issue of 1,600 bonds of the railroad company, each for the sum of \$1,000; the foreclosure of said mortgage by a decree of the supreme court of Missouri rendered on the ——— day of ———, 1879, in the proceedings instituted by Charles P. Chouteau against the Cairo & Fulton Railroad Company et al.; the sale of the lands on October 30, 1882, by a deed executed by the special commissioner appointed by the supreme court of Missouri, to Charles P. Chouteau, from whom the complainant, by mesne conveyance, claims to have acquired title. The defendants admit complainant's chain of title as already set forth, but assail some of the proceedings involved in it, and especially the validity of the subscriptions made by the county court of Butler county to the stock of the railroad company. They contend that these subscriptions were without authority of law, in that there was no vote of the taxpayers of the county, as required by section 29 of the act of February 24, 1853, authorizing such subscriptions, and that the subsequent selection of lands, and conveyances thereof to the railroad company, and its mortgage thereof to secure its issue of bonds, were each and all illegal and void acts. The proof shows that a suit was instituted in the circuit court of Butler county on the 12th day of June, 1866, by Butler county against the Cairo & Fulton Railroad Company and Moore, Wilson, and Waterman, trustees named in the mortgage, to cancel and set aside the patent to the railroad company, and its mortgage of May 23, 1857, to Moore, Wilson, and Waterman, trustees, because of fraud and illegality in the proceedings involved in securing the same, and that such proceedings were had as resulted on the 2d day of July, 1869, in a final decree annulling said patent and mortgage, and vesting the title to the lands described in the mortgage in Butler county. The proof further shows that the county thereafter, by three separate conveyances called "patents," dated, respectively, January 31, 1871, and December 10 and December 21, 1874, conveyed a part of the lands included in said mortgage so annulled by the decree of 1869 to the defendant the St. Louis, Iron Mountain & Southern Rail-

way Company. (I do not now, and will not hereafter, undertake to distinguish between the two names of this corporation,—the railroad company and its successor, the railway company.) It is these conveyances, and others of like character, which the complainant seeks to have set aside as clouds upon his title.

As already stated, complainant claims a title of record from Butler county, by and through its subscriptions to the capital stock of the Cairo & Fulton Railroad Company, its conveyance of the lands in question to the last-named railroad company in payment of such subscriptions, the mortgage by the last-named railroad company to secure its bonds, the foreclosure of the mortgage, and purchase thereunder by his grantor, Mr. Chouteau.

The foundation of complainant's title is assailed at the outset by the defendants. It is conceded in the argument of this case that the subscriptions to the capital stock of the Cairo & Fulton Railroad Company were made by the county court of Butler county without the assent of the taxpayers of the county, secured at an election held for that purpose. It is contended that under the provisions of section 29 of the act of February 24, 1853, such a vote was a condition precedent to the right to make the subscriptions in question. On the other hand, the complainant contends that such is not the true construction of said section 29, and claims further that by the provisions of the act of December 10, 1855, entitled "An act to secure the completion of certain railroads in the state," the county court of Butler county had the right to subscribe its overflowed or swamp lands as stock to any railroad passing through the county, upon such terms, and to be valued at such prices, as may be agreed upon by the county court and the directors of the railroad company in which stock was taken, and that this act was in force at the time the patents were made to the railroad company, and was ample authority for the conveyance, without the consent of the taxpayers.

The able arguments of counsel, the several decisions of the supreme court of Missouri, and divers acts of the general assembly bearing upon the necessity for a preliminary election, would command critical consideration, if the question involved were an open one to this court; but, in my opinion, the decree of July 2, 1869, in the case of Butler county et al. against the Cairo & Fulton Railroad Company et al., concludes the complainant on this question. That suit was instituted by Butler county against the railroad company and the trustees of the bondholders for the purpose of annulling the county's subscriptions to the capital stock of the railroad company, and for the purpose of setting aside the patent of April 20, 1857, from the governor of Missouri to the railroad company, and the mortgage, of date May 23, 1857, from the railroad company to the trustees for the bondholders,—Moore, Wilson, and Waterman. The ground of complaint was that the title to the lands involved was procured from the county fraudulently and without warrant of law, and that, among other things, there was no consent of the taxpayers thereto. The suit, after pending three years or more, came on for a hearing upon the merits; and a final decree was rendered as prayed for by the county, setting aside and annulling the title of the railroad company and the trustees for the

bondholders. This decree, if valid, is binding upon the parties to that case, and all others in privity with them,—including, of course, any subsequent purchasers under the annulled mortgage.

I am unable to agree with counsel for complainant that said decree was void for want of necessary parties. The suit was instituted in June, 1866. John Moore, John Wilson, and Albert G. Waterman, the trustees named in the mortgage of 1857, which was duly recorded in the recorder's office of Butler county, were named as defendants in the case; and being nonresidents at the time of the execution of the mortgage to them on May 23, 1857, and supposed to be so in 1866, an order of publication was secured and duly executed against them as such nonresidents, requiring them to appear at the September term of said court and answer the petition of the plaintiff. But it now appears that Waterman died in February, 1862, and that Moore died on September 23, 1866, before the order of publication was returnable. Wilson alone survived. Notwithstanding the death of Waterman and Moore, counsel entered appearance and filed pleadings for all the defendants. The case took the usual course, and was tried, and the decree was entered in July, 1869, with no knowledge on the part of Butler county of the death of the two trustees, or of any irregularity in the proceedings. By the provisions of the mortgage of 1857, the land therein described was conveyed to John Moore, John Wilson, and Albert G. Waterman, and "to the survivor and survivors, successor and successors, of them, forever, as joint tenants, and not tenants in common, for the uses and purposes set forth." The mortgage also provided:

"That, for the purpose of continuing and securing the due execution of the trusts hereby created, it is declared that all vacancies that may occur in the office of trustee, by death, resignation, or otherwise, shall be filled thus: The first vacancy shall be filled by a majority of the members of the board of trustees as constituted, being in office at the time such vacancy shall take place; the next vacancy shall be filled by the said party of the first part [which is the Cairo & Fulton Railroad Company]; and so on alternately, until the end. And trustees so appointed shall fill the terms and succeed to and perform all the duties, and have all the powers, hereby conferred upon the members of the board of trustees herein named or provided for."

It appears that an attempt was made, pursuant to the provisions of the mortgage, to appoint a successor to Waterman, who died in 1862. One Mason Brayman had, before then, pursuant to the provisions of the original mortgage, been chosen by the three original trustees as president of the board of directors. On March 22, 1866, he and John Wilson signed a paper at Springfield, Ill., the home of the trustees, and where they seemed to have had an office, purporting, by its terms, to appoint the said Brayman a trustee to fill the vacancy caused by the death of Albert G. Waterman. It also appears that after the death of John Moore, to wit, on April 11, 1867, the board of directors of the Cairo & Fulton Railroad Company, purporting to act under the power conferred by the original mortgage, passed a resolution appointing Henry H. Bedford as trustee to fill the vacancy occasioned by the death of John Moore; and a writing embodying this resolution and this appointment was signed by Green L. Poplin, president, and T. W. Johnson, secretary, of the railroad company. These appointments, it ap-

pears, were recorded on what purport to be the minutes of proceedings of the board of trustees, at Springfield, Ill., and of the railroad company, at Bloomfield, Mo. They were not sealed or acknowledged by the persons signing them, and were never recorded in the recorder's office of Butler county, wherein the lands affected by them were situate. It appears that Butler county, or its attorneys, had no actual knowledge, either of the death of these two trustees, or of any appointment of their successors, until long after the final decree in question. By the public records, Moore, Wilson, and Waterman appeared to be the trustees holding the legal title, and therefore the proper parties to be made defendants. By the public records, also, as shown in the original mortgage, duly recorded, it appeared that, in case of the death of one or more of such trustees, the survivor or survivors took the sole title. The county might reasonably suppose, in the absence of knowledge to the contrary, that the three trustees named in the mortgage, who were nonresidents of this state, were living at the date of the institution of the suit; and the county might confidently rely, by reason of the legal situation created by the mortgage, that if, perchance, one or more of such original trustees were then dead, the survivor or survivors were fully vested with the title; and as it appears that one of them (Wilson) was living at the time of the institution of the suit, and at the time of the return of process, and at the time of the trial of the cause and entry of the decree, service upon him was effective to subject the trust estate represented by the mortgage to the jurisdiction of the court in that case, unless such appointments of successors of the deceased trustees had been so made as vested them with title as joint tenants with Wilson. This necessitates an inquiry into the sufficiency of the appointments of Brayman and Bedford. It is claimed by counsel for complainant that the appointment of a substituted trustee, under the provisions of the mortgage in question, was but the exercise of a power, was not required to be made by deed, did not amount to a conveyance of real estate, and therefore was not within the requirements of our registry acts, and that their validity is in no manner affected by the fact that the public records of Butler county failed to show them. This contention has much force, but does not appear to have met with favor by the supreme court of Missouri in the case of *F. G. Oxley Stave Co. v. Butler Co.*, 121 Mo. 614, 26 S. W. 367, in which the view is expressed to the effect that Butler county was not chargeable with notice of the substitution of trustees, in the absence of actual notice, or constructive notice resulting from recording the instruments making such substitution. There are, moreover, additional reasons why the decree of 1869 is not invalidated for the reason that Brayman and Bedford were not made parties. There was no evidence before the circuit court of Butler county that Brayman or Bedford ever accepted the trust or acted as such trustees, even if they were lawfully appointed as such. The facts that Bedford acted as counsel for the defendants of record, was possessed of knowledge of the facts, and did not disclose that he himself was a substituted trustee, impel me to the conclusion that if he knew of the transactions conducted at Springfield, Ill., and Bloomfield, Mo., to make Brayman and himself trustees, he at least had concluded not to accept the honor.

This is the only conclusion consistent with common honesty. If, therefore, notwithstanding the fact that the appointments of Brayman and Bedford were unacknowledged and unrecorded, they could be held effective as tenders of appointment, it may be that a nonacceptance of the trust was found by the circuit court of Butler county. At least, such a presumption may well be indulged in favor of the jurisdiction of that court, possessed as it was of general jurisdiction, in order to support its decree.

It is next contended that the Cairo & Fulton Railroad Company had been dissolved by the sale made on October 1, 1866, to enforce the state's lien for money loaned to it, pursuant to the provisions of the act of February 19, 1866, commonly known as the "Sell-Out Act," and that, such being the case, the last board of directors became thereafter trustees for the railroad company, and that they, instead of the president of the railroad, Mr. Poplin, should have been served with process in the case of Butler county against the railroad. It seems to me that a complete answer to this contention is found in the provisions of the last-mentioned act, as follows:

"Nothing in this act shall be construed as to convey or authorize to be conveyed, to the purchasers of said railroad, any of the lands subscribed by the counties to the stock of said railroad company."

In other words, the act in question did not authorize the sale, and no sale was made, of a large quantity of lands belonging to the railroad company. Butler county alone had, as then supposed, conveyed over 100,000 acres of swamp lands to this railroad company; and other counties had in like manner conveyed to it, as I understand, over 300,000 acres more of such lands. Although the railroad company had mortgaged its lands, the equity of redemption still remained in it. Considering the fact that the railroad itself was never completed, it seems to me that there was probably less in fact conveyed to the state under the sell-out act than was allowed to remain unsold under its provisions. Be this, however, as it may, the mere insolvency of the corporation, or the sale of the larger portion of its assets, does not necessarily work a dissolution. *Hill v. Fogg*, 41 Mo. 563; *Bank v. Robidoux*, 57 Mo. 446; *Hotel Co. v. Sauer*, 65 Mo. 279; *F. G. Oxley Stave Co. v. Butler Co.*, 121 Mo. 614, 26 S. W. 367. The cases relied upon by counsel for the complainant, namely, *Opinion of the Judges*, 37 Mo. 129, *Moore v. Whitcomb*, 48 Mo. 543, and *Chouteau v. Allen*, 70 Mo. 290, in which some expressions are found substantiating their views, deal with cases in which there had been a sale of all the property of the corporation, or in which a dissolution was admitted by the pleadings. These last-mentioned cases are considered by the supreme court of Missouri in the *F. G. Oxley Stave Co. Case*, supra, and their authority is gravely doubted; and, notwithstanding them, the court holds that service upon the president of the railroad company, instead of upon the members of the last board of directors, was, at the worst, an irregularity which might have been corrected if seasonably suggested, and affords no ground for vacating the judgment rendered, at the suit of Mr. Chouteau or his grantees. To the same effect is the case of *Hotel Co. v. Sauer*, supra. Taking all these cases together, and giving them due consideration, I cannot hold that the

Cairo & Fulton Railroad Company was so dissolved as to render service of summons upon its president ineffectual to bind the railroad company. Not only is it true that the railroad company was the owner of the unsold lands, but the proof shows a continuous and necessary exercise of the functions of a corporation long after the sale of 1866. Stockholders' meetings and meetings of its board of directors were held at the call of Mr. Poplin, the president of the company. The appointment of Bedford as a successor to John Moore, trustee, which the complainant invokes in aid of his rights, and upon which he must rely as a valid act of the railroad company, was made by authority of the board of directors, and executed by the president of the company, after the sale under the sell-out act had been made. As late as 1870 the railroad company brought suit in the Butler county circuit court against the trustees and Chouteau and Poplin to set aside deeds of trust on the ground that the same had been obtained from the company by fraud. Later, in 1871, the railroad company brought suit in the same court to vacate the decree of July 2, 1869, upon the ground that it had been obtained by collusion and fraud. This last-mentioned suit, it may be proper here to say, was never pressed to a final hearing, but dismissed by the railroad company. All of these acts were corporate acts exercised by the company, and necessary to the preservation and disposition of corporate assets and the assertion of corporate rights. It cannot be held, on this state of facts, and on applicatory authority already cited, that the railroad company was so dissolved by the sale to the state in 1866 as rendered its last board of directors trustees, and thus necessary parties to the suit of Butler county against the railroad in question. Service was made upon the president of the corporation according to law, and the corporation duly appeared and contested the suit. The court therefore acquired full jurisdiction over the owner of the equitable title to the lands in controversy. I have already shown that it had full jurisdiction over the holders of the legal title. No question is made but that it had jurisdiction over the subject-matter. In my opinion, therefore, it had full jurisdiction over the case, and all parties are concluded by its decree.

The supreme court of Missouri has carefully considered all these questions in the case of *F. G. Oxley Stave Co. v. Butler Co.*, supra. That suit was instituted by the plaintiff, who claimed title, as the complainant in this case does, by conveyances from Chouteau, and was instituted for the express purpose of setting aside the decree of 1869. All of the grounds of objection to that decree which are now made before this court were fully presented to the supreme court in that case. The last-named court took substantially the same views as I have taken, and in addition thereto announced a salutary, and, in my opinion, correct, doctrine, applicable to this case, and which effectually disposes of all the questions already considered, namely, that the delay of nearly 30 years by persons claiming these lands adverse to Butler county constitutes such laches as deprives them of any standing in a court of equity to aid their own title by destroying the county's muniment of title afforded by the decree of 1869. This principle is also distinctly announced in the case of *Boone Co. v. Burlington &*

M. R. R. Co., 139 U. S. 684; 11 Sup. Ct. 687. The supreme court of the United States, to which the case of F. G. Oxley Stave Co. v. Butler Co. was taken by writ of error (17 Sup. Ct. 710), says as follows:

"The supreme court of Missouri properly said that only two questions were presented by the record for its determination: First. Were the subscriptions by the county courts [county and district] of Butler county to the stock of the Cairo & Fulton Railroad Company, and the conveyance of the swamp lands of that county to said railroad in satisfaction of said subscriptions, authorized by law? Second. Ought the decree of the circuit court of Butler county annulling the conveyances of said lands to be set aside for the reasons urged by the plaintiffs, to wit—First, because procured by fraud; and, second, because two of the defendants named in it were dead at the time of its rendition, and the railroad company a dissolved corporation?"

After stating the foregoing propositions as having been presented, the supreme court of the United States says:

"Whether the subscriptions by the county court of Butler county to the stock of the railroad company, and the conveyances to that company, were valid, and whether the decree which the plaintiffs sought to have declared void was obtained by fraud, were questions of local law or practice, in respect of which the judgment of the state court was final."

This expression of opinion of the supreme court would have concluded any and all consideration of the questions already discussed, had not counsel for complainant invoked the fourteenth amendment to the constitution of the United States, and claimed that he, or his grantees in title, had been deprived of their property without due process of law. This contention, which, for the reasons stated by Mr. Justice Harlan in pronouncing the opinion of the supreme court, could not be considered by the supreme court, necessitated my ruling upon the questions already considered, namely, whether Brayman and Bedford, and the directors of the Cairo & Fulton Railroad Company in office immediately prior to the sale of that road under the sell-out act, were necessary parties to the suit of Butler county against the Cairo & Fulton Railroad Company. In view of what has already been said in discussing these questions, it is my opinion that they were not necessary parties, but that all necessary parties were before the court in that case, and therefore that the complainants, who claim under the parties defendant in that case, were not, by the decree in that case, deprived of their property without due process of law.

The foregoing considerations result in the conclusion that complainant has no legal title to the lands in question by virtue of the sale under the decree of foreclosure rendered in 1879 in the suit of Chouteau against the Cairo & Fulton Railroad Company et al. But counsel contend that Butler county, and its grantees under its patents to the St. Louis, Iron Mountain & Southern Railway Company (hereafter called the "Railway Company") of 1874, and others, are estopped from asserting aught against complainant's title; and this by reason of the fact that the county assessed taxes against Chouteau upon the lands in question, and collected the same from him and his grantees, for several years after the date of his purchase, in 1882, and that the Railway Company knew of such assessment and payments, and allowed the same to be done. It is the settled law of this state that the assessment against, and collection of taxes from, a person, by a county of

this state, do not estop the county from afterwards asserting its own title to the lands against which such taxes were assessed. *City of St. Louis v. Gorman*, 29 Mo. 593; *City of Hannibal v. Draper's Heirs*, 36 Mo. 332; *Sturgeon v. Hampton*, 88 Mo. 203; *Hooke v. Chitwood*, 127 Mo. 372, 30 S. W. 167. In addition to this, the facts of the case do not, in my opinion, justify the application of the doctrine of equitable estoppel. From 1882 to 1893, during which time taxes were being paid by Chouteau and his grantees, there was unquestionably a spirited contention between Chouteau and his grantees, claiming title, notwithstanding the decree of 1869, under the foreclosure proceeding, and Butler county and its grantees, claiming title under patents made after the decree of 1869, as to which title should prevail. Chouteau must be presumed to have known that his legal title was cut out by the decree of 1869, and that notwithstanding his purchase, in 1882, there was a serious infirmity in his claim to equitable title. He assumed to believe that the decree of 1869 would be held nugatory and void as to him, and instituted, or caused to be instituted, the suit of *F. G. Oxley Stave Co. v. Butler Co.*, supra, for that purpose. Pending a hearing and determination of that suit, Chouteau manifestly desired to bolster up his title, if possible. Accordingly, soon after his purchase, in 1882, he voluntarily paid delinquent taxes assessed against the lands in controversy,—induced the county court to assess the same in his name for the year 1883. This assessment was afterwards set aside and annulled by the county court, presumably because the title stood, apparently, in the Railway Company, under the grant of the county made in 1874. This action of the county court was so unwelcome to Mr. Chouteau that he employed an attorney to appear before the court to reinstate the assessment against him. This was accomplished in 1885, after several appearances; and he finally succeeded, on March 4, 1885, in getting a special tax book made, assessing these lands to him; and he paid taxes, and continued to do so for eight or ten years thereafter. The question is whether the payment of taxes under such circumstances, and the receipt of them by the county, with the knowledge of the Railway Company, amount to an estoppel on the part of the county or the Railway Company against claiming any title to such lands adverse to the Chouteau title. In my opinion, there are two satisfactory reasons why no estoppel arises out of such facts: First, Chouteau, and those claiming under him, knew that, according to the court and land records of Butler county, a perfect legal title to the lands in question was vested in Butler county and the Railway Company; and, second, no deceit, fraud, or concealment of any kind was practiced either by Butler county or the Railway Company to induce Chouteau to pay the taxes. On the contrary, the county protested against his paying them, to the extent, at least, of once striking the lands off the assessment, as against Mr. Chouteau's name. The Railway Company made no representations, concealed no facts, or took no steps whatsoever to induce Chouteau to take up or carry his self-imposed burden. Conveyances evidencing its title to the lands stood recorded in the public records of the county. Its name appeared on the assessment books as the owner of the lands until Chouteau made his purchase, and Chouteau voluntarily paid all

delinquent taxes. The facts, in my opinion, all show that Mr. Chouteau, with his eyes wide open to all the facts, and with full knowledge of the real title, with no deception, fraud, or misrepresentation on the part of the real owner, set about creating a title by adverse possession, against the real owner, if possible. This, in my opinion, is not such a laudable and praiseworthy project as to particularly inspire a court of conscience to lend its aid in its accomplishment. How well he succeeded in this will be presently shown. It is sufficient to say that, in my opinion, the facts in this case do not permit the application of the doctrine of estoppel in aid of complainant's title, as against either the county or the Railway Company. *Brant v. Iron Co.*, 93 U. S. 326; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Merrill v. Tobin*, 30 Fed. 738.

Complainant next claims that he has acquired title to the lands in controversy by adverse possession by himself and his grantor. In considering this question, it is well to start out with the undisputed fact that the lands are what is known as "swamp or overflowed lands." Neither Mr. Chouteau nor his grantee, the complainant in this case, have ever had the actual possession, in the sense in which these terms are employed in speaking of cultivated lands, but it is claimed that they have had all the possession which wild lands are susceptible of. This is claimed to consist in certain surveys, blazing trees, running off of squatters, prosecuting trespassers, and generally keeping an eye on the lands. The evidence in relation to all these acts is extremely general, and, indeed, the cross-examination of the witnesses produced to prove them shows that the "interest lands," as they are called, which are not involved in this case, were the subject of many of the alleged proprietary acts of Mr. Chouteau. All these acts, whether applicable to the lands in question or to the "interest lands," appear by the proof to be unsubstantial in character, and entirely insufficient to establish that open, notorious, adverse possession, under a claim of right, which alone is held sufficient to destroy the title of the real owner. They signally fail to comply with the requirements laid down by the supreme court of Missouri for such purpose. In *Musick v. Barney*, 49 Mo. 458, it is said:

"It would endanger property rights to permit a loose claim to land, with such acts of ownership only as might be exercised without attracting the attention of the real owner, and without occupancy, to ripen into title. The indications of the claim of possession should be so patent that the real owner could not be deceived."

The following authorities are, in my opinion, conclusive against the claim of the complainant in this case: *Leeper v. Baker*, 68 Mo. 400; *Pharis v. Jones*, 122 Mo. 125, 26 S. W. 1032; *Nye v. Alfter*, 127 Mo. 529, 30 S. W. 186; *Carter v. Hornback*, 139 Mo. 238, 40 S. W. 893. In addition to this, the proof shows that the Railway Company was during all these years exercising acts of ownership, in offering to sell, and selling, parts and parcels of the lands in question, and that these lands were quite generally known throughout the community as "railroad lands,"—probably better known as "railroad lands" than as "Chouteau lands."

After giving a patient and impartial consideration to all the evidence in the case, guided by the true rules of interpretation as laid down by the supreme court, I am unable to find that Mr. Chouteau's possession was so open, notorious, and visible as to deprive the true owners of their title. In my opinion, the loose and uncertain generalization of the witnesses with respect to Chouteau's possession, taken in connection with the evidence of acts of ownership of the Railway Company, whatever they may be worth, leave this case a very proper one for the application of the general rule that possession follows him who has the better title. Complainant's bill must be dismissed.

AMERICAN STAVE & COOPERAGE CO. v. BUTLER COUNTY.

(Circuit Court, E. D. Missouri, E. D. March 15, 1899.)

No. 4,037.

1. COUNTY—POWER TO MAKE CONTRACT—SALE OF SWAMP LANDS.

A Missouri county, having power, under the statute, to sell its swamp lands, the proceeds to be devoted to their reclamation, and any surplus to be paid into the school fund, entered into contracts with a railroad company by which the latter, in consideration of the conveyance to it of certain swamp lands, agreed to construct levees for the drainage of swamps. No right in such levees, or to their use when completed, was reserved to the railroad company. As constructed, they were continuous embankments, without culverts, bridges, or trestles, were fairly well constructed for the purpose of drainage, and were accepted by the county officers, and a conveyance of the lands made. *Held*, that the transaction was not ultra vires on the part of the county, though its real purpose may have been to secure the construction of a railroad along such embankment.

2. SAME—LACHES—ACQUIESCENCE IN CONVEYANCE.

A county acquiesced in a conveyance of certain swamp lands made by its officers, for 20 years or more, without objection, recognizing the grantee as the owner, and collecting taxes from the lands. *Held* that, though the transaction by which the lands were disposed of may have been voidable, such acquiescence amounted to a ratification, and the county was barred by its laches from asserting title, as against its grantee.

3. ESTOPPEL—GRANTOR IN DEFECTIVE DEED.

A vendor who undertook to deliver a sufficient conveyance cannot take advantage of a defect in his own deed.

4. QUIETING TITLE—EQUITABLE JURISDICTION OF FEDERAL COURT—POSSESSION OF COMPLAINANT.

A circuit court of the United States may entertain a suit in equity to quiet title to lands, where the complainant is in possession.

In Equity.

E. S. Robert, for complainant.

Wood & Douglas, for defendant.

ADAMS, District Judge. This is a proceeding to quiet the title to certain lands, known as "swamp lands," which the complainant's grantor, the St. Louis, Iron Mountain & Southern Railroad Company, claims to have acquired from the defendant county by three certain deeds, dated, respectively, January 31, 1871, December 10, 1874, and December 21, 1874. The considerations for these conveyances are found in two certain contracts entered into by and between Butler county

and the railroad company, of dates, respectively, July 15, 1870, and December 28, 1872. These contracts, when read together, obligated the railroad company to construct certain levees on the Little Black river through the Neely swamp, along the St. Francois river and along Black river, all in Butler county; and also to construct one or more railways within said county, in such way that the roadbed should be raised above high-water mark. It appears that this work was so done as to meet the approval of the duly-constituted officials of Butler county, and the deeds of 1871 and 1874, above referred to, were executed and delivered, as performance, on the part of Butler county, of the aforesaid contracts. It is now contended by the defendant county that the intent and purpose of the contracts referred to were not to construct levees for drainage purposes, but to secure the building of railways through the county, by donating the swamp lands in question to the railroad company; and that the contracts referred to, in so far as they contemplated the construction of levees for drainage purposes, were a subterfuge resorted to by the parties to give color to their unlawful project. The record contains much evidence, pro and con, upon this issue. The Neely swamp levee was fairly well constructed to serve the purpose of drainage of that swamp. It was a continuous embankment, without culverts, trestles, or bridges, and with no right reserved to the railroad company to ever employ the same as its road way or bed. This particular levee is therefore not within the condemnation of the rule announced in the cases of *Railway Co. v. Hatton*, 102 Mo. 45, 14 S. W. 763, and *St. Louis, C. G. & Ft. S. Ry. Co. v. Wayne Co.*, 125 Mo. 351, 28 S. W. 494. The fact, however, that, soon after the construction of this levee was finished, the county gave the railroad company the right to use it as a roadbed, on condition that it would at all times maintain it as an effective levee, casts some discredit upon the real intent of the original transaction. The proof also shows that the levee work done by the railroad company along the Black river, Little Black river, and St. Francois river, under said contracts, was done to the expressed satisfaction of the county officials in authority at the time. If this does not appear clearly by the proof, it is presumed from the execution of the deeds, which was only to be done after the work was completed. Although the doing of this work is not mentioned specifically in the order of the county court directing the execution of the last two conveyances of 1874 to the railroad company, as a consideration for the conveyances, it is fairly comprehended within the general language employed. Not only so, but the proof shows that this work was either paid for by the conveyance of 1874, or not at all. I have no difficulty in finding, from the proofs, that the doing of this last-mentioned work was the substantial consideration for the conveyances of 1874. Whether Butler county secured the construction of any railroads throughout the county, as an additional consideration moving it to the execution of these conveyances, or not, I do not need now to consider. There is, as already stated, a valuable consideration expressed in the contracts of 1870 and 1872, and for the conveyances made in pursuance thereof, of dates 1871 and 1874; and these contracts were clearly within the power of the county court to make. Its first trust and duty, with respect to all its swamp lands,

were to use the same for the purpose of securing the drainage of the swamps. This purpose was the ostensible object of the contracts in question, and, on the authority of the cases already cited (*Railway Co. v. Hatton and St. Louis, C. G. & Ft. S. Ry. Co. v. Wayne Co.*, *supra*), these contracts were not *ultra vires*.

In expressing the foregoing views, I am not oblivious to the historical facts connected with the swamp land in question in this state; neither do I underestimate the force of the evidence to the effect that, through the instrumentality of a friendly land commissioner, and within the latitude afforded by the general language of the contracts, an opportunity for the exercise of partiality to the railroad company was afforded; and I do not doubt but that, in the desire for securing railroads through the county, which generally prevailed 25 years ago, its officers lent a willing ear to any plausible scheme to that end; and, if the county had seasonably instituted some proceedings for rescinding the contracts and conveyances in question, it may be that relief could have been afforded. But a different question is raised at the present time. The railroad company, upon securing title to the lands in question, in 1871 and 1874, proceeded to exercise such acts of ownership and control over them as their locality and condition permitted. It, and its rival claimant to title, Mr. Chouteau, paid the taxes duly assessed by Butler county for a period of 20 years or more. During this period, and until the year 1894, the county at no time suggested, by act, word, or deed, that it claimed any interest in the lands involved in this case, but apparently fully acquiesced in the title of the complainant's grantor, the St. Louis, Iron Mountain & Southern Railroad Company. In 1894, the county, for the first time, pretended to own the lands. By an order of its county court, made of record on the 2d day of October, 1894, it first asserted a claim to ownership. By this and other successive orders, of dates, respectively, December 31, 1894, and April 9, 1895, it asserted an ownership of the same, and undertook to make, and did make, a contract looking to the disposition thereof. These several orders, and the contracts involved in them, standing of record in the public records of the county court, are a serious menace to the complainant's title, and clearly indicate a purpose on the part of the county to repudiate its conveyances to the railroad company of 1871 and 1874, and to resell the lands so conveyed, to others. Not only does this appear from an inspection of such records, but the defendant's answer in this case presents a clear statement of its present attitude of resistance to complainant's title, and its determination to add additional embarrassments to the secure enjoyment and free alienation of the same. It is altogether too late for the county to take any such position. Its acquiescence for 20 years or more effectually bars it from any attempt at rescission at this late day. Applying the principle announced by the supreme court of the United States in the case of *Boone Co. v. Burlington & M. R. R. Co.*, 139 U. S. 684, 11 Sup. Ct. 687, the county, by its delay or laches, has effectually ratified what was, at the worst, but a voidable transaction between it and the railroad company. To the same effect, also, are the cases of *Dunklin Co. v. Chouteau*, 120 Mo. 577, 25 S. W. 553, and *F. G. Oxley Stave Co. v. Butler Co.*, 121 Mo. 614, 26 S. W. 367.

The objection made to the deed of January 31, 1871, that the commissioner who executed it failed to affix his scrawl or seal, is unavailing in this action against Butler county. The deed, if not valid to pass the legal title, clearly passes the equitable title, as against Butler county, which received the consideration, and undertook to deliver a sufficient deed of conveyance therefor. *Wilcoxon v. Osborn*, 77 Mo. 621. The complainant, being in possession of the lands in controversy, is, by authority of *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, and *Sanders v. Devereux*, 19 U. S. App. 630, 8 C. C. A. 629, and 60 Fed. 311, entitled to the equitable relief prayed for. Counsel may prepare a decree.

RUMMEL v. BUTLER COUNTY et al.

(Circuit Court, E. D. Missouri, E. D. March 15, 1899.)

No. 4,034.

1. UNITED STATES COURTS—FOLLOWING STATE DECISIONS.

Decisions of a state court of last resort, which have become rules of property as to land titles within its limits, will be followed by the United States courts sitting therein.

2. SAME.

Decisions of a state court of last resort construing a state statute will be followed by United States courts.

3. MORTGAGES—VALIDITY—ESTOPPEL—LACHES.

Where the validity of a mortgage of land by a county to secure payment of a railroad stock subscription was not questioned for more than 30 years after its issuance, and until after the property had been sold under foreclosure and passed to bona fide purchasers, the county is estopped by such laches from thereafter claiming that the mortgage was invalid.

4. QUIETING TITLE—PURCHASER WITH NOTICE.

Where the holder of the legal title to swamp lands had such actual possession as the lands were susceptible of, he is entitled to a decree quieting his title, as against a subsequent purchaser from the common grantor, with notice of the record title.

In Equity.

John F. Shepley, for complainant.

M. L. Clardy, E. S. Robert, and Wood & Douglas, for defendants.

ADAMS, District Judge. This is a suit to cancel certain alleged conveyances affecting a large quantity of swamp lands situate in Butler county, Mo., as clouds upon complainant's title. The larger portion of these lands is embraced in the mortgage, of date May 23, 1857, executed by the Cairo & Fulton Railroad Company to Moore, Wilson, and Waterman, trustees, to secure the payment of an issue of \$1,600,000 in bonds of said railroad company, and is subject to the considerations which constrained this court, in the case of *Bump v. Butler Co.* (decided at this term) 93 Fed. 290, to hold that the decree of 1869, rendered in the suit of Butler county against the Cairo & Fulton Railroad Company et al., is conclusive against Bump's legal title. It is unnecessary to restate the reasons which resulted in that holding. The same result is necessarily reached in this case with respect to all of the lands in controversy which are in the same

situation with respect to title as those involved in the Bump Case. As to any lands, therefore, described in complainant's bill in this case which are embraced in the mortgage of 1857, foreclosed by the decree of the supreme court of Missouri in 1879, and purchased by Charles P. Chouteau, the complainant in this case is entitled, for the reasons stated in the Bump Case, to no relief. But different questions are presented in this case with respect to 3,040 acres of land, described in complainant's bill as situate in township 23, range 3 E. These lands are known, and will hereafter be referred to, as "interest lands."

By reason of the claim of certain settlers to some parcels of land patented to the railroad company by the county in satisfaction of the two subscriptions of that county to the capital stock of the Cairo & Fulton Railroad Company, of date, respectively, October 24, 1854, and December 6, 1855, the county of Butler on September 23, 1858, conveyed, in exchange therefor, to the railroad company, the above-mentioned interest lands. The railroad company afterwards, on October 6, 1858, conveyed said interest lands, by a supplemental deed in the nature of a mortgage, to Moore, Wilson, and Waterman, under and subject to the same trusts as were expressed in the mortgage of May 23, 1857, executed by the railroad company to secure the payment of its bonds. Mr. Chouteau, as holder of said bonds, on June 6, 1886, instituted a suit to foreclose the supplemental mortgage of 1858. This suit resulted in a decree of foreclosure, and a sale of the mortgaged lands, by a commissioner appointed for that purpose, to the grantor of Charles P. Chouteau, who, after having acquired the title, in 1893 sold and conveyed the lands so by him acquired to the complainant in this case. The validity of this supplemental mortgage was not involved in, or affected by, the decree of 1869; but the defendants assail this title on the ground that said subscriptions of Butler county to the capital stock of the railroad company were made without first having secured the consent of the taxpayers of the county at an election held for that purpose, and claim that for this reason the title to the said interest lands in fact never passed out of Butler county by the deed of September 23, 1858, to the railroad company, and, as a necessary consequence, never passed by the supplemental mortgage of 1858, or the sale under the foreclosure proceedings in 1886. Several persons, who, according to the averments of the bill, claim different portions of these lands, were originally made defendants. Some of them answer, disclaiming any right in and to the lands in question; and the complainant, prior to the submission of this cause, dismissed his bill as to all others who were alleged to have some claim to these interest lands, except Butler county and one John Mangold. So far as the interest lands are concerned, therefore, the controversy stands between the complainant, holding title under Mr. Chouteau, and the defendant Butler county, with respect to all of said interest lands except the S. W. $\frac{1}{4}$ of section 27, township 23, range 5, which, it appears, was sold nine years ago by Butler county to John Mangold.

The defendants not being aided by the estoppel of the decree of 1869 with respect to their title to these lands, the question whether or

not the above-mentioned subscriptions of Butler county to the stock of the Cairo & Fulton Railroad Company were valid, notwithstanding the fact that there was no antecedent election to secure the assent thereto of the taxpayers of the county, must be disposed of. I do not regard this as an open question in this state at the present time. The cases of *Dunklin Co. v. Dunklin Co.* Court, 23 Mo. 449; *Barrett v. Court*, 44 Mo. 197; *Chouteau v. Allen*, 70 Mo. 290; and *Dunklin Co. v. Chouteau*, 120 Mo. 577, 25 S. W. 553,—hold, in effect, that the want of such an election did not, in the light of contemporaneous legislation, invalidate the subscriptions. Whether this conclusion is reached by giving force and effect to the act of December 10, 1855, as curing the defects arising from want of such election, provided the deeds were made after the act of December 10, 1855, went into effect, or whether the conclusion is reached for other considerations, is immaterial. These decisions, as Judge Black remarks in *Dunklin Co. v. Chouteau*, supra, have become rules of property. They are also, under well-recognized authority, binding upon this court, as a construction of local laws by the court of last resort in this state.

There is also another ground which, in my opinion, precludes the county of Butler from setting up the invalidity, if there be any, of the subscriptions. The supplemental mortgage of 1858 stood unchallenged by Butler county, or any other person holding under it, from its date,—certainly up to nine years ago, when, according to the proof, Butler county sold one-quarter of a section of the land described in said mortgage to John Mangold,—and, except for that single sale, unchallenged until Butler county entered into the contract with George B. Wheeler recorded in the records of the county court of Butler county on the 2d day of October, 1894. By this and other orders of the county court of Butler county, found recorded upon its records under the dates of December 31, 1894, and April 9, 1895, it is clear that that county asserted an ownership over the lands in dispute, and undertook to make contracts looking to their disposition. As remarked in the case of *American Stave & Cooperage Co. v. Butler Co.* (just decided) 93 Fed. 301, these several orders, and the contracts involved in them, constitute a menace to complainant's title, and clearly indicate a purpose on the part of Butler county to repudiate its conveyance to the Cairo & Fulton Railroad Company, of date 1857, and to resell the lands, so conveyed, to others. During all this period, then,—from 1855 up to 1894,—Butler county was silent, when it ought to have spoken, and declared its subscriptions to the stock of the railroad company invalid and void. During this period, bonds secured by the mortgage executed by the railroad company were issued and sold, a foreclosure under the mortgage followed, the lands were successively purchased and sold, and finally the title has been lodged in the complainant in this case, who, so far as the record shows, is a purchaser without any knowledge, of record or otherwise, of any claim of Butler county to the lands in question. In the midst of litigation assailing nearly all, if not all, other titles in the several counties possessing swamp lands, the title of record of these so-called interest lands has never been questioned until, as already stated, in 1894, with the single exception of a sale to John Mangold already

referred to. With the general disposition of Butler county, as shown by historic litigation, to assert all manner of claims to these lands, it is reasonable to believe that the failure to do so with respect to these so-called interest lands for 30 or 40 years persuaded purchasers that Butler county made no claim thereto. At any rate, I am clearly of the opinion that it cannot now, at this late day, be permitted to say aught against the legal title as it stands in the complainant. Its acquiescence for 30 or 40 years bars it from any attempt at rescission of its subscriptions. The county must be held to have effectually ratified its subscriptions, if, indeed, they were not strictly valid, by its long delay and laches in asserting any claim to the contrary. *Boone Co. v. Burlington & M. R. R. Co.*, 139 U. S. 684, 11 Sup. Ct. 687.

The quarter section of land purchased nine years ago by defendant John Mangold stands in no different situation than the balance of these lands. He purchased with his eyes wide open. The record title was clear against him, and his title was taken from Butler county with constructive knowledge, at least, thereof. The complainant, having that constructive possession which follows the legal title, and having also all such actual possession of these interest lands as they are susceptible of, is entitled, under the authority of *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, and *Sanders v. Devereux*, 19 U. S. App. 630, 8 C. C. A. 629, and 60 Fed. 311, to the relief prayed for as to such interest lands. It results that the bill must be dismissed as to all the lands except those involved in the supplemental mortgage, and hereinbefore designated as "interest lands"; and as to these lands there will be a decree as prayed for, and counsel may prepare the same.

CONSOLIDATED STORE-SERVICE CO. v. DETTENTHALER.

(Circuit Court, W. D. Michigan, S. D. April 6, 1899.)

EQUITY PRACTICE—FINAL RECORD IN FEDERAL COURTS—WHEN REQUIRED.

The final record in equity and admiralty causes, provided for by Rev. St. U. S. § 750, is intended to answer the purpose of the enrollment of the decree under the former chancery practice, which was primarily to provide a permanent memorial of the rights of the parties as adjudicated; and no final record is required where there has been no adjudication inter partes, except in cases where there has been an adjudication of costs to officers when the record should be made. When a bill has been dismissed voluntarily or by stipulation of the parties, and the costs are paid, no final record is required. The special enrollment provided for by rule 15 of the United States courts for the district of Michigan, to be made on request of the solicitor of either party, is in addition to the final record directed by the statute.

In Equity. On application for direction of the court in a matter of costs.

Charles W. Nichols, for complainant.

SEVERENS, District Judge. In this case, which has been dismissed by stipulation of the parties, a question is made by counsel for the complainant as to whether the case is one in which a final record should be made by the clerk, and paid for by the complainant. The

question involved is one upon which, so far as I know, no reported judicial determination has hitherto been made in this district, although it has been informally discussed and considered on several occasions. The practice has proceeded, without critical examination of the subject, upon a rather liberal interpretation of the provisions of section 750, Rev. St. U. S., and of rule 15 of the rules of the United States courts for the district of Michigan, in equity, made under the authority of general equity rule 89 and Rev. St. U. S. § 918. It will be noticed that neither section 750 of the Revised Statutes nor rule 15 extends to cases at the common law, and applies only to cases in equity and in the admiralty. Section 750 provides that "in equity and admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record"; but rule 15, above mentioned, further provides that upon the request of the solicitor of either party the special enrollment therein mentioned shall be made and filed by the clerk, and is in addition to the final record directed by the statute. Apparently section 750 makes a provision which is generally applicable to equity and admiralty causes for the making of a final record which shall serve the purposes of the former practice of enrolling the decree in courts of chancery, and its proper construction should be made upon due regard to the former practice in respect to the matter therein provided for. The general equity rules contain no provision for enrollment of decrees, and I take it those rules are to be regarded as supplemented in this respect by the provisions of the statute. By the former practice there was not, customarily, any enrollment if nothing was determined in the case; that is to say, if no decree or order had been entered which adjudicated any right or advantage to one party or the other upon the matter of the pleadings. The essential purpose of the practice of enrollment was to provide a permanent memorial upon which the rights of the parties as adjudicated could be thereafter more safely preserved and certainly shown. It was held by Judge Speer in *Blain v. Insurance Co.*, 30 Fed. 667, that this enrollment should include all orders made in cases where there had been such an adjudication of costs to officers. I am not sure but this extends the bounds of the statute somewhat, my impression being that in strictness the practice, supplemented by the statute, did not go beyond cases of decrees or orders inter partes; but as the decision above mentioned was in a court of co-equal power and jurisdiction, and the reasons for construing the statute thus broadly given by the learned judge seem reasonable, I am content to follow his ruling. Such, then, is my construction of the general provisions of the statute. The special enrollment provided for by our rule 15 is to be made upon the special request of either party, and accords a privilege which is not given by the statute. At the common law, after final judgment a judgment record or roll was made up from the entries and minutes of the clerk, and this was the final and permanent evidence of the rights of the parties as secured by the judgment. This practice for a long time prevailed in some of the states in the Union, and perhaps still continues in some of them. In others—as in Michigan,

where the proceedings of the court are required to be spread upon the journal as the business proceeds—no final record or roll is required to be made up, statutory provisions in that regard having been held to supersede the old practice. *Norvell v. McHenry*, 1 Mich. 227; *Prentiss v. Holbrook*, 2 Mich. 372. As the practice in the federal courts in the district is the same as that of the state court, and the manner of keeping the journals of the law court is the same, it has been a question whether any final entry corresponding to the judgment or roll of the former practice is now required in common-law cases; but the present inquiry does not involve that question, and no final opinion is given upon it. But, as the purpose of the judgment record in a court of common law was the same as that of the enrollment of the decree in the chancery court, there is an inference to be drawn from the practice in regard to making up the judgment record. From the fact that no judgment record was made up in the absence of a judgment, or something having equivalent effect as a determination of rights was made in the case, the inference from the analogy would be that there was no such requirement in the substance of things in the common-law practice. Of course, it results from what has been said that when the bill is dismissed voluntarily or by stipulation of the parties without any adjudication, and the costs are paid, no final record is required. The clerks of the circuit and district courts will follow the foregoing construction of the statute and rule in making up final records and enrollments in equity and admiralty cases, respectively. No provision is made by rule for any enrollment in admiralty cases. But the statute directs a final record to be made in such cases; that is, such cases as have reached a determination of the kind above mentioned.

SIMPSON V. FIRST NAT. BANK OF DENVER.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1899.)

No. 1,007.

SALE OR MORTGAGE—TRANSFER OF PROPERTY BY DEBTOR TO CREDITOR—PRESUMPTION.

When a mortgagor transfers to his mortgagee by the same transaction large portions of his real and personal property, by a deed of the real estate and by a bill of sale of a part and a pledge as collateral security of another portion of his personal property, and the considerations recited in the deed and the bill of sale are less than one-half of the value of the property described in them, the presumption is that the relation of mortgagor and mortgagee continued, and that the conveyances were made by way of security; and the burden rests upon a creditor, who claims that the deed and the bill of sale evidence absolute sales, to overcome this presumption, and establish that fact by substantial and persuasive evidence.

Appeal from the Circuit Court of the United States for the District of Colorado.

T. J. O'Donnell (Milton Smith, on the brief), for appellant.
Charles J. Hughes, Jr., for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which dismissed a bill exhibited by the appellant, Simon M. Simpson, against the First National Bank of Denver, the appellee, for an account of the proceeds of certain personal property, which the appellant alleged that he had transferred and delivered to the bank as collateral security for the payment of his indebtedness to it. On March 2, 1887, Simpson owed the bank \$33,685.31. He owned three lots and a house, in which he lived, which were worth about \$12,500; a stock of cigars, pipes, and other articles used by smokers, and some fixtures in a store in Denver, which were worth about \$21,000; and a large stock of cigars and tobacco in the United States bonded warehouse in that city, on which the duties had not been paid, and which were represented by bills of lading, and were worth about \$25,000. For the sake of brevity, we shall call the house and lots the "residence," the stock of cigars, smokers' articles, and fixtures in the store the "store," and the stock of cigars and tobacco in the bonded warehouse the "bonded goods." David S. Moffat was the president, S. N. Wood was the cashier, and H. Z. Salomon was a brother of a former director, and a customer of the bank, who was engaged in the grocery business in Denver, and was familiar with all the facts relative to this transaction as they occurred. On March 2, 1887, Simpson told Wood that he was insolvent, and that he was willing to secure the payment of his indebtedness to the bank; and thereupon, under Wood's direction, he deeded the residence to him, conveyed the store by a bill of sale and delivered it to him, and assigned the bills of lading of the bonded goods to the bank as security for \$23,000 of his debt, for which amount he gave new notes on that day. The consideration recited in the deed was \$7,500, and the consideration recited in the bill of sale was the same amount. For this deed and bill of sale he was given a credit of \$15,000 on the books of the bank, and he was given a credit of \$23,000 for his new notes, making his credit, in all, \$38,000. This credit paid his overdraft and his old notes, and left a balance of \$4,314.69 to his credit still. For this balance, the bank issued its certificate of deposit, but made it payable to its president, Moffat, instead of to Simpson, and Moffat retained it in the bank. It was never delivered to Simpson, but in November, 1888, it was canceled, and credited to profit and loss on the books of the bank, as an offset to a note of \$5,000, which had been made long subsequent to March 2, 1887, by the Only Chance Mining Company, a corporation of which Simpson was treasurer and manager, and which had been indorsed by Simpson.

It is conceded by the bank that the bonded goods were assigned to it as collateral security for the new notes for the sum of \$23,000, which was a part of Simpson's old debt of \$33,685.31. The controversy was over the store. The appellant alleged in his bill that this was assigned and conveyed as security for his debt, and he now insists that the residence and the store, as well as the bonded goods, were transferred to secure his entire debt. On the other hand, the bank maintains that it bought the residence and the store outright, for \$7,500 each. The appellant did not charge, in his bill, that the residence was conveyed as security; so that the nature of the title to it

which the bank acquired arises incidentally. The real issue is whether the transfer and delivery of the store to Wood was a purchase thereof by the bank for \$7,500, or an assignment of it to the bank in trust, to sell and to apply the proceeds to the payment of Simpson's debt, and to return the surplus to him. Upon this issue only two witnesses testified, Simpson and Wood, and their testimony is irreconcilable. We are therefore remitted to the surrounding circumstances, and to the acts of the parties while they were disposing of this property, for convincing evidence of the truth. The written instruments made by the parties at the time generally constitute persuasive, if not controlling, proof on such an issue; but they are of slight significance here, because it is conceded on all hands that they do not evidence the truth. The deed and bill of sale, and the entries in the account books of the bank, show that Wood bought the residence for \$7,500, that he bought the store for \$7,500, that he paid Simpson \$15,000 for them, and that Simpson paid this money to the bank; but Wood testified that he had no idea of taking the store or of assuming the payment of \$7,500 to the bank on account of it, that in all his transactions with Simpson he was really acting for the bank, and that \$10,685.31 of the \$15,000 was a credit to Simpson on his debt to the bank, while the balance, of \$4,314.69, was not paid to Simpson at all at the time, but was put into the form of the certificate of deposit we have mentioned, payable to the order of the president of the bank, and was left in his hands to cover any contingencies that might arise. Courts of equity look through the form into the actual character of a transaction (*Marshall v. Thompson*, 39 Minn. 137-142, 39 N. W. 309, and cases there cited), and it clearly appears from the testimony of the witnesses for the bank that this transaction was in fact between a debtor and his creditor, between Simpson and the bank, and that the deed and the bill of sale were not, as they appeared to be, conveyances to a purchaser who was a stranger, but to the creditor, the bank. It is not claimed that the bank was forbidden to become a purchaser because it was a creditor; but where the relation of debtor and creditor, or of mortgagor and mortgagee exists, and conveyances are made, or property is delivered by the debtor to the creditor, the legal presumption is that the relation continues, and that the transfers were made as further security for the debt. *Marshall v. Thompson*, 39 Minn. 137, 140, 39 N. W. 309; *Holridge v. Gillespie*, 2 Johns. Ch. 33; *Holmes v. Grant*, 8 Paige, 243, 251; *Clark v. Henry*, 2 Cow. 324; *Hone v. Fisher*, 2 Barb. Ch. 559.

When the arrangement for these conveyances was made, the relation of debtor and creditor, and the relation of mortgagor and mortgagee, existed between Simpson and the bank. He owed it \$33,685.31, and Wood held his deed of the residence as security for this debt. Before entering upon a discussion of the disposal of the store, we will briefly indicate the facts proved with reference to the residence. The old deed, which Wood held to secure the bank, had never been recorded. It was destroyed, and a new deed, dated March 2, 1887, reciting the consideration of \$7,500, was made to Wood, and recorded. The familiar rule, "Once a mortgage, always a mortgage," left the presumption that this second deed was a mere security for the debt

so strong that convincing evidence was required to overcome it. But the only evidence produced was that of Wood, and this was contradicted by that of Simpson. The subsequent treatment of this real estate by the bank does not strengthen Wood's testimony. On its account books, real estate was charged with \$7,500 on account of the residence, in accordance with the theory of a purchase; but on November 19, 1888, real estate was charged with \$5,000 more on account of this property, and on the same day a note of Simpson's corporation, the Only Chance Mining Company, was paid. It is difficult to resist the conclusion that this note was paid by this residence property, and this inference seems to be strengthened by the fact that on January 16, 1889, the residence was sold for \$9,000 cash, or its equivalent, and for other lots worth \$3,500, and real estate was credited with \$12,500, the sum of \$7,500 and \$5,000, on account of it. This account strongly indicates that the bank considered the interest of Simpson in the residence sufficient, in November, 1888, more than 20 months after it claims to have purchased it, to pay a debt of \$5,000 due to it from his corporation. We will not pursue the discussion of the title to this property further. The fact that it was already mortgaged to the bank when the deed of March 2, 1887, was made, the fact that the consideration recited in that deed was \$5,000 less than the value of the property, and the fact that 20 months later the bank appears to have used Simpson's interest in it to pay an obligation of his corporation for \$5,000, militate strongly against the testimony of Wood that the bank bought the property outright.

We turn to the consideration of the main question,—whether the store was bought by the bank for \$7,500 or transferred to it as security for Simpson's debt. When the agreement of March 2, 1887, pursuant to which the bill of sale, the deed, and the transfer of the bonded goods were made, was discussed, H. Z. Salomon was present. Wood took possession of the store on the same day that the bill of sale was made. He immediately proceeded to pay the duties on the bonded goods, and turned them over to Salomon, who, with the aid of Simpson, sold them and accounted to the bank for the proceeds. On March 5, 1887, three days after he received his bill of sale, Wood transferred and delivered the store to Salomon, and took his promissory note for \$7,500, signed "H. Z. Salomon C. S." "C. S." indicated "cigar store." The bank claims, and Wood testified, that this was an absolute sale of the store to Salomon for \$7,500. At this time, Salomon was in active business as a grocer in the city of Denver, was in good credit, and had an individual account with the bank. He opened another account with this bank, in the name of "H. Z. Salomon Cigar Store." In this account he deposited indiscriminately the proceeds which he realized from the store and those which he received from the bonded goods. On March 25, 1887, Salomon, Simpson, and Wood sold the store to one Hyman for about \$21,000, and deposited the proceeds of this sale in Salomon's cigar-store account. Simpson showed the goods and assisted to negotiate the sale; Wood fixed the amount of cash required of the purchaser, Hyman, and the time and terms of his deferred payments; and Salomon or Wood re-

ceived the notes and cash from the purchaser, and deposited them in Salomon's cigar-store account. Just before the deposit of the proceeds of this sale was made, the cigar-store account was overdrawn more than \$5,000. Immediately after this deposit was made, there was a balance of more than \$15,000 to its credit. Thereupon, and on the same day, Salomon checked out of this account, and paid over to Wood, for the bank, \$12,660.35. Of this amount, \$7,543.05 was applied to the payment of Salomon's cigar-store note of \$7,500, which he made when he took the store, and \$5,117.30 of it was indorsed on Simpson's notes for \$23,000, which he made on March 2, 1887. More than \$3,500, and probably all of this \$5,117.30 so indorsed on Simpson's note, was a part of the proceeds of Salomon's sale of the store to Hyman; and Wood knew it. It is certain that it could have come from no other source, because up to that day Salomon had not received from the bonded goods as much as he had expended on their account, and, while he deposited \$21,700.64 on that day, only \$1,314.88 of it appears to have come from the bonded goods. At this time, Wood had paid out, for duties and for freight on the bonded goods, much more than he had received from them; so that the proof is conclusive that the larger part of the \$5,117.30 paid over to the bank on Salomon's cigar-store check, 20 days after it claims that it had sold this store to Salomon, was the proceeds of the sale of that store to Hyman, and was received, and applied by its cashier, as Simpson's money, in part payment of Simpson's notes. After the sale of the cigar store Salomon continued to sell the bonded goods, to deposit their proceeds in his cigar-store account, and to pay over to the bank from time to time the amounts which he realized. Out of the funds deposited in this account, he paid over to Wood, for the bank, \$10,000 on May 13, 1887, \$5,000 on August 4, 1887, and \$4,649.10 on October 5, 1887. The payments of \$10,000 and \$5,000 were credited on Simpson's notes, and Wood used \$4,246.68 of the payment of October 5, 1887, to make the final payment on the last of them. This was done on October 5, 1887. After Simpson's notes were paid, according to the indorsements upon them, and according to the entries in the books of the bank, Salomon and Wood agreed that Salomon was entitled to \$2,000 for his services in this matter; and on October 14, 1887, he checked \$2,000 out of his cigar-store account, and deposited it in his individual account, in payment of his services. There are many minor facts and circumstances which we cannot stay to recite, and many subordinate issues upon which the testimony is conflicting and its effect doubtful; but the salient facts to which we have adverted are either admitted by the parties or established by the evidence beyond doubt or cavil.

The court below presumably found that the store was sold to the bank for \$7,500, for it dismissed the bill; and we have examined this record in view of the rule that where the court below has considered conflicting evidence, and made its finding and decree, they are presumably correct, and should be permitted to stand unless an obvious error has intervened in the application of the law, or

some serious or important mistake has been made in the consideration of the evidence. *Warren v. Burt*, 12 U. S. App. 591, 600, 7 C. C. A. 105, 110, 58 Fed. 101, 106. But the more carefully we have read this record, and the more critically we have analyzed the evidence it contains, the more forcibly has the conclusion been borne in upon our minds that there never was any sale of this store to the bank. To constitute a sale of this property to the bank, something more than a mere bill of sale to its cashier was required. A bill of sale, without more, would necessarily have the effect to charge the bank with the fair value of the property. To make a sale, there must be an agreement of sale, a meeting of the minds of the parties on its terms, and a performance of the agreement. Now, the burden of establishing this agreement, of proving this meeting of the minds of the parties, was upon the bank. Not only this, but the relation of debtor and creditor, and the relation of mortgagor and mortgagee, existed between Simpson and the bank before and at the time of the transaction of March 2, 1887; so that there was a legal presumption that these relations continued, and that any transfers or conveyances of property from the debtor to the creditor were made, not in payment of, but as further security for, the debt. It necessarily follows that a bare preponderance of evidence of an agreement of sale was insufficient to discharge the burden which rested upon the bank. Substantial and persuasive evidence of the meeting of the minds of the parties upon the terms of the sale was required to overcome the legal presumption, and to establish the fact. This requirement was not met by the testimony for the bank. It produced but one witness to the contract, and he was contradicted by the appellant. Thus, the sale was left upon the oral testimony, with the legal presumption against it, and no preponderance of testimony in its favor. When we look beyond the oral testimony, when we read and analyze the entire evidence, we find the acts of the parties, which generally speak louder and more truthfully than their words, inconsistent with the theory of a sale, and explicable only on the supposition that the residence and the store were transferred to secure, and not to pay, the debt. If the residence and the store were sold, the consideration paid would naturally have been nearly the fair value of the property. If they were transferred as security, the consideration would be immaterial, and would, perhaps naturally, bear little relation to the actual value of the property. The theory of the bank is that Simpson sold to it, in payment of his debt, the residence, worth \$12,500, for \$7,500, and the goods in his store, worth \$21,000, for \$3,185.31. We do not overlook the fact that the bank contends that the nominal consideration for the store was \$7,500, but we also remember that it concedes that it put all but \$3,185.31 of this consideration in the certificate of deposit, to which we have repeatedly referred, which was payable to the order of its president, and was kept in the bank, as Wood says, "to cover any contingencies that might arise." Frequent and repeated efforts have done much to strengthen our faith, but it is too tense a strain on our credulity to believe that this debtor sold property worth \$33,-

500 to his creditor for \$15,000, and then turned over \$4,314.69 of this consideration, which was due him in cash, to secure his purchaser against any contingencies that might arise.

It was a wise and reasonable precaution for Salomon to open a separate account with the bank under the name of "H. Z. Salomon Cigar Store," and to place in that account the proceeds of the bonded goods which the bank held as collateral security to Simpson's debt, and which Salomon was selling for it. He held these goods and their proceeds in trust for the bank, and duty and wisdom alike required that they should be kept separate from his individual property and money. If the bank sold the store to Salomon outright on March 7, 1887, when Wood delivered it to him, the consideration would naturally have been about the value of the goods in the store. It would naturally have been paid by Salomon out of his own money, and not out of the funds he held in trust for the bank, and the proceeds which he subsequently derived from the sale of it would in the usual course of business have been deposited to the credit of his individual account, and would not have been mixed with the trust funds in his cigar-store account. On the other hand, if the store was held, like the bonded goods, as security for Simpson's debt, and Salomon was acting as the agent of the bank to sell it, the amount of the consideration of its transfer to him was immaterial, and might well bear little relation to the actual value of the property. That consideration would naturally have been paid out of the trust funds held by Salomon for the bank, or would not have been paid at all, and all the proceeds of the store, after it had been transferred to Salomon, would rightfully and in the usual course of business have been kept among the trust funds in the cigar-store account, and not in the individual account of Salomon, because they would have been the property of the bank and of Simpson, and not the property of Salomon. Now, what was actually done? The value of the store was \$21,000. The consideration of its transfer to Salomon was \$7,500, a little over one-third of its value. This consideration was not paid by Salomon from his individual account, or out of any property or money of his own. He gave a note for it, signed "H. Z. Salomon C. S.," and he paid that note out of his cigar-store or trust-fund account on March 25, 1887, when he sold the store to Hyman for about \$21,000. He did not deposit the proceeds of the sale of the store to Hyman in his individual account with his own moneys, but he deposited it in his cigar-store or trust-fund account, and he checked out of this trust-fund account largely, and probably entirely, from the proceeds of the sale of this store on that day, and paid over to the bank \$5,117.30, which Wood received and indorsed on the notes of Simpson for \$23,000, with full knowledge of the source from which it was derived. Could demonstration be more perfect, or proof more conclusive, that through all its transfers, until Hyman bought it, this store remained a part of the security for Simpson's debt, exactly as did the bonded goods? It was managed and sold by the same agent of the bank. The proceeds derived from its final sale to Hyman were placed in the same

trust-fund account, and were applied to the payment of the same debt of Simpson. The amount of the alleged consideration for the pretended sale from Simpson to the bank, and from the bank to Salomon, was less than two-fifths of the actual value of the property. Salomon never paid any part of the pretended consideration for the transfer of the store to him, but merely gave a note for it to the bank, which he subsequently paid with the bank's money out of the proceeds of the store which he held in trust for it. We will not further extend the discussion of the evidence presented in this case. We think we have sufficiently stated the reasons why we are unable to resist the conclusion that this store never was sold to the bank or to Salomon, but was transferred to and held by them in trust to secure the debt of Simpson to the bank until they finally sold it to Hyman. The result is that the appellant is entitled to an accounting of the moneys received and the expenses incurred by the bank in the management and disposition of the store, as well as in the management and disposal of the bonded goods, and, as this was denied him in the court below, the decree which dismissed his bill must be reversed.

In the briefs of counsel there is some discussion regarding the basis of the accounting, but as the account has not been stated, and as it is probable that the evidence upon which it will rest is not all before us, we deem it unwise to enter upon any extended consideration of the suggestions presented. It is sufficient to say that the objection of the appellee to the maintenance of this suit, because the appellant assigned his interest to third parties in the balance due him on the accounting to the amount of \$5,000, is untenable, because it does not appear that the surplus due him does not exceed \$5,000, and that the objection of the appellant to the allowance to the bank of such amounts as in the exercise of sound judgment and reasonable prudence it expended to defend its title to the trust property against the attacks of third parties, or to compromise actions brought against it on account of this property, is equally baseless. We defer the discussion of the items of the account until all the evidence shall have been taken, presented to, and considered by the court below. The decree below is reversed, and the case is remanded to the circuit court, with directions to enter a decree that the appellant is entitled to an accounting of the proceeds received and expenditures made by the bank and its agents, Wood and Salomon, in the management and disposition of the store and the bonded goods.

CRAPO v. HAZELGREEN, Drainage Commissioner.

(Circuit Court of Appeals, Seventh Circuit. April 8, 1899.)

No. 528.

1. JUDGMENT—EQUITABLE RELIEF AGAINST—SUFFICIENCY OF BILL.

A bill to enjoin the construction of a drainage ditch established by a judgment of a circuit court of Indiana in proceedings for that purpose, on the ground that such proceedings were void for want of notice to com-

plainant, is insufficient, unless it sets out the facts shown by the record in regard to such notice.

2. DRAINAGE—PROCEEDINGS UNDER INDIANA STATUTE—JURISDICTION.

In proceedings under the Indiana statute for the establishment of a drainage ditch, the statute (2 Burns' Rev. St. 1894, §§ 5623, 5624) requires the filing of a petition, which shall describe the lands which it is believed will be affected, and give the name of the owner of each tract, if known, and, if unknown, shall so state, but shall be sufficient to give jurisdiction if the land is described as belonging to the person who appears to be the owner on the last tax duplicate or transfer of record. It further provides, after prescribing the notice to be given the owners named in the petition, for a reference to the drainage commissioners, who shall locate the ditch, assess benefits and damages, and report the same, and that as respects lands embraced in the report, but not in the petition, notice of the report and hearing thereon shall be given in the same manner as required on the filing of the petition. *Held*, that the requirements of the petition as to the description of lands and the naming of the owners, as well as to the notice required, apply equally to the report of the commissioners as to lands mentioned therein for the first time, and that where such a report for the first time described lands over which the ditch was located, naming as the owner one who was not the owner, and was not shown to be by the last tax duplicate or records, and no notice to the real owner was given as required, and he had no actual notice of the proceedings, such proceedings, as to his lands, were void for want of jurisdiction.

3. SAME—NOTICE—CONSTRUCTION OF RECORD ENTRY.

A court record, in drainage proceedings, which sets out the evidence on which a finding as to service on the parties was made, may properly be construed as excluding any other or different notice than that shown by such evidence.

Appeal from the Circuit Court of the United States for the District of Indiana.

This appeal is from an order dissolving a preliminary or temporary restraining order of injunction granted upon the bill, which was brought by William W. Crapo, as sole executor and trustee under the will of Edward D. Mandell, against the appellee, Henry S. Hazelgreen, who had been appointed commissioner for the construction of a drainage ditch in Lake county, Ind., known as the "Jarneck Ditch," to obtain an injunction against proceeding with the proposed work. The injunction was asked on the ground that the proceedings in which the construction of the drain had been ordered, in so far as they affect the rights of the appellant, or of his testator, were void for want of notice, and because Mandell was not made a party to the proceedings. The averments of the bill which need be considered are the following: "* * * That said defendant claims the right to contract for the construction of and to construct said canal and ditch by virtue of proceedings in the circuit court of Indiana, originally commenced in the Lake circuit court of Lake county, Indiana, in September, 1892, and afterwards the venue thereof changed to Porter circuit court, and final judgment therein rendered in 1896, establishing a ditch to be constructed * * * as hereinbefore alleged; that neither the plaintiff herein nor the said Edward D. Mandell were parties to said proceedings for the establishment and construction of said canal or ditch, nor was any notice given to any of them as required by the statute of the state of Indiana under which such proceedings were had, nor any notice given under the statute of the said state of Indiana under which such proceedings were had which authorized the condemnation or taking of such lands of said Mandell, deceased, or the plaintiff herein, or any part thereof, for the purpose of said ditch, and that as to the said Mandell, deceased, and this plaintiff, said proceedings establishing said ditch were absolutely void, and that the said lands are not now, nor ever have been, in the possession of the said defendant, either in his individual capacity or as drainage commissioner; * * * that at the time

of the filing of said original petition, and for seven months prior thereto, the said lands of the plaintiff had been duly transferred upon the records of said Lake county to, and stood in the name of, said Edward D. Mandell, and during all of the said time, and up to the death of the said Mandell, in December, 1897, and ever since, the said lands have stood in the name of the said Mandell on the records of said Lake county, and were, in accordance with the laws of said state, duly entered upon, and stood in the name of the said Mandell upon, the tax duplicates, as well as all other records of said county, and the lands of the plaintiff were not described, nor was the name of the plaintiff, or Mandell, in whose name the said lands stood upon the tax duplicates and all the records of said county of Lake, mentioned or described, in said petition; that notice was given of the filing of the said petition, but neither the lands of the said plaintiffs described herein, nor the name of the said Mandell or of this plaintiff, were mentioned or referred to either in the petition or the notice given in pursuance thereof, nor were such lands described in any manner in such petition, nor was it stated that the name of the owner thereof was unknown, nor were the same referred to or described as belonging to the person who appeared to be the owner of the same according to the last tax duplicates or record of transfer kept by the section of the county where the same is situated; that an order was made referring the same to the drainage commissioners, and afterwards, in the year 1892, the drainage commissioners made a report locating and establishing said drain petitioned for upon the line and route petitioned for and described in the original petition in said cause; that afterwards said report so made by said drainage commissioners was set aside, and the same again referred back to the drainage commissioners; and thereafter, on the 22d day of April, 1895, the drainage commissioners filed a second report in the circuit court of Lake county, establishing the route of said canal or ditch as hereinbefore alleged; * * * that in said second report neither the name of said Edward D. Mandell nor of this plaintiff was mentioned therein; * * * that in said second report of said drainage commissioners is the only time or place in any of the proceedings in relation to said ditch that even the land, or any portion of the same, owned by the said plaintiff, is mentioned or described or referred to, and neither the name of the said Mandell nor the said plaintiff is mentioned as owner thereof, nor was it alleged that the name of the owner of such lands was unknown, nor was it described as belonging to the person who appeared to be the owner according to the last tax duplicate or record of transfer kept by the section of the county where the same is situated; * * * that no written or printed notice, or notice of any kind whatsoever, was given the owner or occupant of the plaintiff's land hereinbefore described, setting forth the route of such drain as described in the petition or in either of said reports, or the fact of the filing and pendency of such petition, and when the same was docketed, nor was any notice of the filing, pendency, and time fixed for docketing, or for the hearing of said petition or either of said reports, given, by posting up written or printed notices thereof at three public places in each township where the lands described in said petition are situated, and near the line of the proposed work, and one at the door of the court house in the county of Lake, in which said lands are situated, setting forth the route of such drain as described in either the petition or the report, and the fact of the filing and pendency of the petition and report, or either of them, and when the same was docketed, or the time for the hearing of the same. And the plaintiff avers that no notice whatsoever was served, given, posted, or published in accordance with the statute of the state of Indiana, or any notice of any kind or character whatsoever, subsequent to the filing of the second report of the said commissioners, which is the first and only report that locates the said proposed ditch, and upon the lands of the said plaintiff."

In support of the motion to dissolve, the following proofs were heard: It was agreed by the parties that in the second report of the commissioners, made on April 22, 1895, three 40-acre tracts of land of Edward D. Mandell, on which the ditch was located, were stated to be owned by Josephus Collett, to whom, and to other persons named, over whose land the ditch, as located, would pass, the commissioners reported, "We assess no damages or benefits." Upon the filing of that report the following entry was made:

"Comes again the Honorable George W. Burson, special judge herein, and come also the drainage commissioners herein, and they now file their report, showing the proposed work to be of public utility, the route, commencement, and terminus thereof, also the assessments of benefits to the lands affected, which also brings in new parties who have not been served with process herein, but who own lands that will be affected by the construction of the proposed work, which report is in the following words: (Insert.) * * * And the petitioners herein are thereupon ordered to give the notice required by law to said new parties brought in by the report, and this cause is continued until May 13, 1895."

On May 4, 1895, the following entry was made:

"Come again the parties, by counsel, * * * and thereupon come the petitioners, and show to the court that all new parties who were brought in by the report of the commissioners filed herein on April 22, 1895, have been duly and legally served with notice of the filing of said report, and that the same was set for hearing on May 13, 1895, and, in proof of such service, file herein the said notice, and return of the sheriff thereon indorsed, and also a copy of said notice, with the affidavits of Henry Bachman and T. S. Fancher thereon indorsed, which notice and said sheriff's return and said affidavits so thereon indorsed, respectively, are in these words: (Insert.)"

The following is the notice referred to:

"To Josephus Collett, Edward B. Mandell, Joe R. Lane, Lucy S. Osborn, John B. Luther, Henry F. Pennington, Martha R. Hart, Frank Mathis, John Seeberger Estate, Ludwig Busse, and Frank Busse: You, and each of you, are hereby notified that we, the undersigned, and others, have filed in the Lake circuit court of the state of Indiana their petition for the drainage of the valley of the Little Calumet, in Lake county, Indiana, and that upon the same the drainage commissioners of said county have made their report, which is now on file in said court, in which you are named as persons whose lands will be affected by said proposed drainage, and that said report will be heard by said court upon the 13th day of May, 1895.

"John F. Jarnecke, by T. S. Fancher and J. Kopelke, His Attorneys."

The return of the sheriff showed service on parties not concerned in this litigation. The affidavits mentioned, of Bachman and Fancher, or copies thereof, were not produced; but Fancher's affidavit, made for use at the hearing, was read, showing that he posted at the door of the court house at Crown Point, Ind., on or about April 29, 1895, and more than 10 days before May 13, 1895, a notice like that on which the sheriff's return appears, and made a verified return, on a copy thereof, and filed the same in the clerk's office, with the papers in the case; that the notice so posted contained the name of Edward B. Mandell, the then owner of the property; that he found the notice served by the sheriff upon resident landowners, but that he had made diligent search for the notice, by himself and by Bachman, but could not find the same among the papers, nor any place where the same was on file. This was a very restricted search. Bachman's affidavit was also read, showing that he received the notice from the hands of Fancher on or about April 27, 1895; that he served the same upon three parties named, and posted "three copies of said notice in three separate places near the line of the ditch in the townships of North, Calumet, and Hobart, in Lake county, Indiana, being all the townships in which the lands are located that are reported benefited." The statute required three notices in each township where the lands described in the petition are situated, and the lands of Mandell were not reported as either benefited or injured.

Proof was made by the appellant that the lands had been transferred, and had stood in the name of Edward D. Mandell, as alleged in the bill; that neither Mandell, who lived in Massachusetts, nor his agent at Chicago in charge of the lands, ever in fact had notice or knowledge of the proceedings in question, and that at the time of the proceedings a part of the lands of Mandell, upon which the ditch is located, was occupied by Fredericka Fulgraf, and another part by John Scherevlin, as tenants of Mandell; and that no notice was served

upon either of them in relation to the ditch, or of the filing of either report by the drainage commissioners in relation thereto.

The statute under which the proceedings were had (2 Burns' Rev. St. 1894) contains the following provisions:

"Sec. 5623. * * * The petition shall describe in tracts of forty acres according to fractions of government surveys, or less tracts when they exist, and in Clark's grant and the French grant and all pre-emptions of Indian reservation in such tracts as are owned, the lands of others which it is believed will be affected by the proposed drainage, and give the names of the owners thereof, if known, and if unknown shall so state. * * * Such petition shall be sufficient to give the court jurisdiction over all lands described therein and power to fix a lien thereon, if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer kept by the section of the county where the same is situated.

"Sec. 5624. Whenever the petitioner or petitioners shall file their petition in the clerk's office of the circuit court, he or they shall fix and note thereon the day set for the docketing thereof, and shall give the owner or occupant of each tract of land described in said petition, who is a resident of the county or counties in which said land is situated, notice thereof by serving upon such owner or occupant a written or printed notice setting forth the route of such drain as described in the petition, the fact of the filing and pendency of such petition, and when the same shall be docketed, which notice may be served by the petitioner or petitioners, or either of them, or by any person for them, in the same manner as summons are served in civil cases; * * * and as to all owners of lands to be affected by such proposed drainage who at the time of filing the petition are non residents of the county or counties in which the lands to be affected are situated, notice of the filing, pendency, and time fixed for docketing of said petition shall be given by posting up written or printed notices thereof at three public places in each township where the lands described in said petition are situated, and near the line of the proposed work, and one at the door of the court-house of each of the counties in which said lands are situated, which notices shall be similar in form to those required to be served on resident land owners; and if it appears to the court that notice has been given of the filing of said petition by service of notice upon resident land owners, and by posting of notices as above provided not less than twenty days before the day set as the day for docketing the same, the court shall order the same placed on the docket of said court as an action pending therein. Any person named in such petition as the owner of land shall have ten days, exclusive of Sunday and the day of docketing such action, after such docketing to file with said court any demurrer, remonstrance or objection he may have to the form of said petition, or as to why said drainage commissioners or either of them, on account of their interest in said work, or kinship to any person whose lands are affected thereby, should not act in the matter. * * * If no such remonstrance shall be filed, and the court deems said petition sufficient, such court shall make an order referring the same to the drainage commissioners. * * * They shall make personal inspection of the lands described in the petition, and of all other lands likely to be affected by the proposed work * * * [and if they find certain facts as required] they shall proceed and definitely determine the best and cheapest method of drainage, the termini and route, location and character of the proposed work, and fix the same by metes and bounds, courses and distances and description, * * * assess the benefits or injury as the case may be to each separate tract of land to be affected thereby, * * * and make report to the court as directed under oath. * * * And provided, further, that in all cases where lands are named in said report as affected by such proposed work, which are not named in the petition, the court shall fix a time for hearing the report, and it shall be the duty of the petitioners, at their own cost, to give ten days' notice to the owners of such lands of the filing of such report in the same manner as is herein required to be given of the filing and docketing of the petition, which notice shall state the time for hearing such report, and such case the court shall continue the hearing of said entire report until such notice has been given as last above provided. The same proceedings shall

be had in regard to such report as if all the lands mentioned therein and the owners thereof had been named in the original notice of the filing of the petition."

Walter Olds, for appellant.

J. Kopelke, for appellee.

Before WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It is well settled by the decisions of the supreme court of Indiana that the averments of the bill to the effect that notice was not given according to law, or that no notice whatever was given, are insufficient and unavailing as ground for the relief sought. The circuit court in which the proceedings were had being a court of general powers, the presumption in favor of its jurisdiction in the particular case, notwithstanding it was a special statutory proceeding, will be conclusive against a collateral attack upon its judgment. When, therefore, it was sought to annul or to restrain proceedings to enforce the judgment in question on the ground that it is void for want of notice, it was not enough to allege that notice was not given according to law, or that no notice whatever was given. The bill should have stated what the record of the judgment assailed shows in respect to notice, so that it could be determined whether, upon the face of the record, the proceedings were valid; every fact, where the contrary did not appear, being presumed in favor of the jurisdiction. As stated in *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156, "the circuit court being one of general jurisdiction, the presumption is that it had jurisdiction especially as to parties, until the contrary is made to appear." To the same effect, see *Kleyla v. Haskett*, 112 Ind. 506, 14 N. E. 387; *Bailey v. Rinker*, 146 Ind. 129, 45 N. E. 38. Containing as it does no averment of what the record of the proceedings in question shows on the subject, the bill before us does not present the question whether, for any reason, the notice actually given or attempted to be given, as shown by the record, was so far defective in respect to Mandell as to subject the proceedings to collateral attack by his executor. The bill does not aver that the lands of Mandell were occupied by tenants, nor that the occupants were not served with notice, nor does it state what the record shows concerning notice to occupants. For all that is alleged, the record may show a finding that the lands were unoccupied, or that there were occupants on whom proper notice had been served. In all these respects, in the absence of proper averment to the contrary, the presumption is in favor of the jurisdiction. If the bill had set out just what the record shows on the subject, whether evidence that there were tenants upon the land who were not given notice would have been admissible, and what the effect of the proof offered, would have been important questions; but, on the bill as framed, they do not arise. It remains, therefore, to consider only whether, as contended, no valid notice could have been given to Mandell, because he

was not a party to the proceedings, and no action was pending against him, upon which notice could be based.

Mandell had no land within four miles of the drain proposed in the petition. He was not named, nor any of his land described, in the petition. He was named nowhere in the proceedings, except in the notice served by the sheriff on persons not here concerned, and in a like notice, copies of which were posted at the court-house door in Lake county, and at three places along the line of the ditch; and while the ditch as relocated is shown by the report of the commissioners to pass over three tracts of his land, without benefit or injury thereto, each tract is described as owned by Josephus Collett, a former owner, though the proper transfers had been made, and the title of record and the entries on the tax duplicates had long been in Mandell's name. The first section quoted of the statute requires that the petition shall describe the lands to be affected, by forty-acre tracts, or other subdivision specified, "and give the names of the owners thereof, if known, and if unknown shall so state"; but "such petition," it is further provided, "shall be sufficient to give the court jurisdiction over all lands described therein and power to fix a lien thereon, if they are described as belonging to the person who appears to be the owner according to the last tax duplicate." The next section, after prescribing the notice to be served or posted, authorizes a reference to the drainage commissioners, who are empowered to determine the method of drainage, the termini, route, and location of the work, to assess the benefits or injury to each separate tract of land to be affected, and to make report to the court. In respect to lands embraced in the report, but not named in the petition, it is added that the court shall fix the time for hearing the report; that the petitioners, at their own cost, shall give 10 days' notice to the owners of such lands of the filing (and of the time of hearing) of such report, in the same manner as is therein required to be given of the filing and docketing of the petition; that the court shall continue the hearing of the entire report until such notice has been given; and finally that "the same proceedings shall be had in regard to such report as if all the lands mentioned therein and the owners thereof had been named in the original notice of the filing of the petition." It is to be observed that many requirements of the statute in respect to lands described in the petition are not expressly repeated in respect to lands first mentioned in the report of the commissioners. In the petition, for instance, the description must be by forty-acre tracts, while in respect to lands of the other class the only requirement is that the commissioners shall "assess the benefits or injury as the case may be to each separate tract of land to be affected." In the petition, too, the name of the owner, if known, must be given, and if, not being known, it is given according to the last tax duplicate, it will be enough to confer jurisdiction; but there is no express requirement that the commissioners shall report the names of the owners, if known, or according to the tax duplicate, if unknown, of lands included in the report which were

not included in the petition. So, too, written notice is required to be given to resident owners or occupants of lands described in the petition, and to nonresident owners by posting written or printed notice; but, in respect to lands first mentioned in the report, nothing is said of occupants or of tax duplicates, the provision being simply that notice shall be given to the owners of such lands of the filing of the report in the same manner as is therein required to be given of the filing and docketing of the petition. Other differences might be pointed out.

The argument of the appellant, in substance, is that the whole statute must be construed together; that, by fair construction, the report of commissioners is the foundation of the action, as regards new parties, constituting the declaration or complaint against them, as the petition is the complaint and declaration, and the foundation of the action against those named in it, and hence the report must show the same facts concerning new parties as the petition must show against original parties,—that is to say, “it must describe their lands by forty-acre tracts or less and must name the owner of each tract, or if the name be unknown it must be so stated and [each tract] must be alleged to be the land of the person in whose name it stands upon the last tax duplicate or transfer book of the county.” In fortification of this argument, it is urged that but one mode is recognized in Indiana for the commencement of an action by one person against another; that section 316, 1 Burns’ Rev. St. 1894, provides that a civil action shall be commenced by filing a complaint, and causing the summons to be issued, or publication to be made in proper cases; that the statute by which these proceedings were authorized was intended to be, and is, in harmony with the general provision, the petition being required to name the parties concerned, and it being permitted to bring in new parties, when found necessary, by the report of the commissioners, operating for that purpose as an amendment of the petition, and therefore required, by fair implication, to show the facts essential to jurisdiction over the new parties, which the petition was required to show in order to establish jurisdiction over the original parties. In the opinion of the supreme court of Indiana in *Young v. Wells*, 97 Ind. 410, expressions were used which lend support to this construction; but the question was not directly involved in the case, and the opinion can be said to contain no more than an intimation on the subject. Counsel for appellee, on the contrary, after emphasizing the differences between the provisions of the statute touching lands described in the petition and those first brought in by the report of the commissioners, insist that the commissioners “do not deal with the parties, but with the lands to be affected; that, when they undertake to name the owners of the tracts of land reported by them as affected, they go beyond what the statute contemplates, and that portion of their report may be rejected as surplusage”; that when, in this instance, they made the mistake of naming Collett, instead of Mandell, as owner, it was an unauthorized act, for which the petitioners car-

rying on the proceedings were not responsible, and should not suffer; that it is not the business of the commissioners to examine tax duplicates and transfer books for the names of owners, but simply to determine and describe the lands to be affected, and that only when the report is made does it become the business of the petitioners to find out, by an examination of the records, as in the first instance, who are the owners of the new lands brought into the proceedings by the commissioners' report, and give them notice, and that a notice which names an owner whose land has been so described, when given as required by the statute, makes the owner a party to the proceedings, though he be not otherwise named; and that the finding of the court that such notice had been given is conclusive against collateral attack, even though the notice was in fact defective. An argument in support of this construction of the statute is drawn from the phrase, "the lands mentioned therein and the owners thereof," found in the last clause of the section. That expression, it is said, assumes that the lands are mentioned, as before they are required to be named, in the report, but puts the owners in a different category, since they need not be mentioned in the report, but must, of course, be named in the notice. It is urged further, and *Dukes v. Working*, 93 Ind. 502, is cited in support of the proposition, that a drainage proceeding is not a civil action, but a special statutory proceeding, which is not so much in personam as in rem, and that a petitioner does not have to search for the owner of lands affected, outside of the tax duplicate and record of transfers. This argument does not seem to us to be convincing. While, in a general sense, it is doubtless true that a petitioner, who has no knowledge or notice of the actual ownership, need not look beyond the tax duplicate, he is required by the terms of the statute to take cognizance of an owner in possession; and we are of opinion that the word "occupant," as used, includes a tenant or licensee occupying in subordination to the owner, and that notice is required to be given to an occupant, not simply that he may have an opportunity to defend his own right, but also for the benefit of the owner, to whom it was assumed by the lawmaker that the occupant, if in possession under the owner, would communicate the notice served upon himself. The better construction of the statute in respect to jurisdictional requirements seems to us to be that the name of the owner—actual, if known, or as shown by the tax duplicate if not known—shall be set out in the report of the commissioners in connection with each tract of land included which had not been described in the petition. The report in this case was prepared upon that theory, under the supervision, presumably, of the petitioners or their counsel. If it was not the business of the commissioners to search the duplicates or other sources of information for the names of owners, as it certainly was their duty to find out the proper description of lands to be affected, it was the right and duty of the petitioners, who instituted and had control of the proceedings, to see that the names were furnished; and, if a mistake in that respect was made, the responsibility for the error was theirs, and they should not escape the consequences at

the expense of an adversary, who confessedly had no actual notice of what it was proposed to do, and had the right to rest in the assurance that his property could be taken or affected by such a proceeding only by due process of law. To say that there was due process of law in this case, it seems to us, would be little less than a mockery.

If regard be had to the evidence beyond the averments of the bill, the record of the proceedings in the drainage case, and the other proofs offered, which in no sense contradicted anything stated in that record, show that the notice required by the statute was not given. There was no finding by the court that notice in any form was served upon or given to Mandell. When the report of the commissioners was filed, a finding was entered to the effect that the report brought in new parties, and it was ordered that notice should be given to them as required by the statute. But Mandell was not one of the parties referred to. His name was not in the report, and was not mentioned in the finding; and the further finding, entered some days later on proof of service, was "that all new parties who were brought in by the report of the commissioners * * * have been duly and legally served with notice of the filing of said report and that the same was set for hearing," etc. That finding does not include Mandell, because he was not brought in or made a party by the report. The entry proceeds to set out the evidence on which the finding was made, consisting of the sheriff's return, which does not mention Mandell, and the affidavits of Bachman and Fancher; showing that copies of a notice, addressed to Josephus Collett, Edward B. Mandell, and nine others named, were posted at the door of the court house in Lake county, and at three places in three townships named, near the line of the proposed ditch. It is the evident meaning of this entry that there was no other proof of notice than that stated, and, as that does not show compliance with the statute, it might be said that the record itself shows that the requisite notice was not given, even if it were conceded that a mere description of land in the report of commissioners, coupled with the name of another as owner, is sufficient to justify judgment against the true owner upon proof of posting the notices required by the statute, and that, too, when there were tenants upon the land to whom no notice was given. The order appealed from is reversed, with direction to reinstate and continue in force pending the suit the restraining order which was dissolved.

Judge SHOWALTER participated in the hearing, but not in the decision, of this case.

BROWN v. TILLINGHAST.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 457.

1. NATIONAL BANKS—RESOLUTION TO INCREASE CAPITAL STOCK—VALIDITY AND EFFECT.

The effect of a resolution of the shareholders of a national banking association, proposing to increase the capital stock from \$200,000 to \$500,000, and authorizing the president and cashier, whenever \$50,000 of the increase was subscribed and paid, to certify the same to the comptroller, was to render valid and binding on the subscribers, when paid and approved by the comptroller, any increase amounting to \$50,000, or any multiple thereof, not exceeding \$300,000 in all.

2. SAME—COMPTROLLER'S CERTIFICATE APPROVING INCREASE OF STOCK—COLLATERAL ATTACK.

The action of the comptroller of the currency in issuing a certificate approving an increase of the capital stock of a national bank is that of a special tribunal, which is not subject to collateral attack; and a suit by a subscriber to such stock against a receiver of the bank after its insolvency, for the recovery of his subscription, on the ground that the increase was illegal, and the comptroller's certificate void, is such an attack.

3. SAME—RIGHTS OF SUBSCRIBER TO INCREASE OF STOCK.

Where a subscription to a part of the increased stock of a national bank has become complete and binding, under the terms of the original resolution of increase, its validity is not affected by any subsequent action looking to a limitation of the amount of increase authorized.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

The appellant filed in the circuit court a bill in equity, the substantial averments of which are as follows:

That on September 2, 1891, the Columbia National Bank of Tacoma, Wash., was incorporated as a banking association, with a capital stock of \$200,000, all of which was subscribed before January 12, 1892. That on January 12, 1892, a meeting of the shareholders was held, at which a resolution was adopted proposing to increase the capital of the association from \$200,000 to \$500,000, and authorizing the president or cashier, as soon as money should be paid in on said increased stock to the amount of \$50,000, to certify the same to the comptroller of the currency. That on July 17, 1892, the complainant subscribed 50 shares of said proposed increase of capital, and paid to the association \$5,000 on account, and received from the association an ordinary stock certificate, reciting that he was the owner of 50 shares. That on or about January 2, 1894, the complainant received from the association \$200 dividend on his stock. That on July 25, 1895, the board of directors adopted a resolution, reciting that whereas \$150,000 of the increase of capital authorized by the resolution of January 12, 1892, had been paid in, and the remaining \$150,000 of said proposed increase had not been paid, it was resolved that the unpaid portion be canceled and rescinded, and the paid-up capital of the association be fixed at \$350,000, and that the comptroller of the currency be notified of the increase of \$150,000, and that the same had been paid, and he be required to approve and issue a certificate of such increase, according to law. That thereupon the officers and directors of said association applied to the comptroller of the currency to approve an increase of the capital of the association in the sum of \$150,000. That on August 9, 1895, the comptroller of the currency wrote to the cashier of the banking association a letter, as follows: "Sir: You are respectfully informed, after a careful investigation into the question of the increase of the capital stock of your bank, that I have determined to approve an increase in the sum of \$150,000, upon the following condition: A meeting of the shareholders must be called for the purpose of considering the question of increasing the capital stock, and the notice of said meeting must be given to the shareholders, by mail or pub-

lication, thirty days prior to the date of holding the same, and must specifically state that the matter of increasing the capital stock in the sum of \$150,000, making the capital, after increase, \$350,000, will be considered at such meeting, and such other business as may properly come before it. If, at such meeting, a two-third's stock vote is obtained in favor of said increase, and the legal requirements are fully met, the increase will receive my approval; it being my understanding that there is at present \$150,000 which has been paid into the bank for the purpose of increasing the capital stock, and which has hitherto been reported as uncertified capital stock. The present assessment of 25 per cent. upon the present shareholders of the bank must stand and be collected. If necessary, after the increase of capital has been approved, a further assessment may be ordered, but this is a matter that will be determined later. All necessary blanks and instructions in the matter of the increase of capital stock are herewith inclosed." That the articles of the banking association provided that meetings of its stockholders should be called by its board of directors, or by three of its shareholders, by publishing notice for 30 days in a newspaper published in the city of Tacoma, or by mailing to each shareholder notice in writing 30 days before the time fixed for the meeting. That on August 9, 1895, the president and cashier of the association caused a notice, signed by them only, to be published in a daily newspaper at the city of Tacoma, of which the following is a copy: "A special meeting of the stockholders of the Columbia National Bank of Tacoma, Washington, is hereby called for Monday, the 9th day of September, A. D. 1895, at 10 o'clock a. m., at the office of said bank, to take action in regard to the increase of the capital stock in the sum of \$150,000, making the capital, after increase, \$350,000, which will be considered at said meeting, and to attend to any other business that may properly come before the meeting." That the notice was not published for 30 days continuously prior to the time fixed for the said meeting, or for any more than 20 of the days intervening between August 9, 1895, and September 9, 1895, and no other notice of the proposed meeting was given to the stockholders, and that the complainant had no knowledge of said meeting, or of any intention to hold the same, until some time in August, 1897. That 58 shareholders of said association, owning in the aggregate 1,472 shares of the original capital of the association, purported to be represented by proxies to vote their stock at said meeting. That on September 9, 1895, T. W. Bean, who held said proxies, and 9 stockholders of the association, who held 106 shares of the stock, held a meeting, and assumed to cast the vote of such shareholders in favor of the resolution to increase the capital stock as proposed. That thereafter, at the request of the directors and officers, but without the assent of the shareholders, one Charles P. Corbit applied to the comptroller of the currency for his approval of the increase; and on October 21, 1895, said Corbit, who was one of the board of directors, delivered to the comptroller of the currency a letter in which he reviewed the financial condition of the association, stating that its original capital was greatly impaired, and that it was absolutely necessary, if the business of the association were to be continued, not only that its capital be increased as proposed by him, but that an assessment of from 30 to 50 per centum be levied upon all the capital of the association, including the increase of capital. That on October 23, 1895, the comptroller of the currency signed a certificate, reciting that the capital stock had been increased in the sum of \$150,000, and that said increase had been paid into the association as part of its capital, and that said increase was approved by him. That at the time when said instrument was so signed the comptroller had fully determined and then intended to appoint a receiver for said association, and to wind up its affairs as an insolvent national banking association, and that he signed said certificate solely for the purpose of making the subscribers to said increased capital liable to assessment by him to pay the debts of the association. That, after signing said certificate, the comptroller caused the same to be deposited in the post office at Washington, addressed to the association at Tacoma, but the certificate never reached its destination, never came into the possession of the association nor any of its officers, but was intercepted and retained by a bank examiner acting under instructions of the comptroller, and was afterwards turned over to the defendant, the receiver of the banking

association. That the complainant never assented to transfer his subscription to the increase of capital voted at the meeting of January 12, 1892, to that proposed or voted at the meeting of September 9, 1895, and that the increase of capital so proposed at the meeting of January 12, 1892, was never submitted to the comptroller for his approval or considered by him. That on October 24, 1895, Charles Cleary, a bank examiner, acting under instruction of the comptroller of the currency, took possession of the bank of said association, and all its books, records, and assets, and was, on October 30, 1895, appointed receiver by said comptroller, to wind up its affairs as an insolvent national bank, until he was succeeded by the defendant as such receiver. That until August 25, 1895, the complainant erroneously believed he was the owner of 50 shares of stock of said association, and that proper proceedings had been taken to render valid the increased capital to which he had subscribed as aforesaid, and that while under such erroneous belief, in August, 1895, he paid to said association, at the request of its officers, \$1,250, as an assessment upon the 50 shares of the capital. That on June 22, 1896, the comptroller of the currency made an assessment of \$61 upon each of the shares of said stock, and the defendant, under the same erroneous belief and mistake, paid, on September 2, 1896, to the defendant, \$3,050 in compliance with said demand. That on or about August 1, 1896, the comptroller declared and paid to the creditors of said association whose claims had been allowed a dividend of 20 per centum upon the amount of their several claims. That no debt of any kind was incurred by said association subsequent to the time of signing the certificate approving an increase of the capital. On October 23, 1895, the complainant in his bill offered to return to the association the money received by him as dividend, or to credit the same upon his claim, as the court should direct. The prayer of the bill was that the increase of capital to which the complainant subscribed be adjudged to have been abandoned by the association, and that the certificate issued by the comptroller be decreed null, and that the complainant be decreed to be a creditor of the bank to the amounts he had paid on assessments.

T. W. Hammond, for appellant.

Philip Tillinghast, in pro. per.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the facts, delivered the opinion of the court.

The question presented on the appeal in this case is whether the circuit court erred in sustaining a demurrer to the bill for want of equity. The facts stated in the bill are substantially the same as those which were involved in the case of *Bank v. Mathews*, 29 C. C. A. 491, 85 Fed. 934, recently decided by this court. In that case the court said:

"When a man subscribes to a proposed increase of stock in a national bank, with knowledge that the stockholders had, by a resolution duly passed, authorized the officers of the association, with the approval of the comptroller of the currency, to increase the capital stock in any multiple of \$50,000, up to \$300,000, as the subscriptions shall be paid in, he is bound by his act of subscription in any amount of the increased stock which may at any time thereafter be voted and authorized, not exceeding the amount of \$300,000, and not exceeding the amount of money actually paid in, and is estopped from questioning the regularity of the proceedings of the bank, its directors, officers, or shareholders, provided the certificate and consent of the comptroller of the currency to such increase has been obtained. * * * His [the comptroller's] judgment as to the sufficiency of the facts and regularity of the proceedings, like that of other special tribunals, upon matters coming within his exclusive jurisdiction, is unassailable, except by a direct proceeding for correction or amendment."

It is attempted to distinguish the present case from that, on the ground that in the case at bar the action of the comptroller of the

currency in issuing the certificate is directly attacked, whereas in *Bank v. Mathews* its validity was assailed collaterally. In the *Mathews* Case the action was brought by a shareholder against the receiver to establish a claim against the bank for the amount paid by the shareholder on his subscription for a portion of the increased stock. In the present case a shareholder sues the receiver in equity, and seeks to recover the amount which he has paid on his subscription to the increased capital, and he asks the court to decree that the increase was illegal, and the comptroller's certificate void. There is no substantial difference in the causes of action. They are both actions against the receiver, and the object and purpose of both is the same. In neither is the proceeding directly against the comptroller, or for the purpose of correcting or revising his decision. In the view which this court and other courts have taken of the nature of the comptroller's function in certifying to an increase of capital stock, the present suit is a collateral attack upon a judicial or a quasi judicial decision,—a decision which is conclusive except as against direct attack. *Tillinghast v. Bailey*, 86 Fed. 46; *Rand v. Bank*, 87 Fed. 520. But, if this were a direct attack upon the decision of the comptroller and the validity of his certificate, we are still of opinion that no case of equitable cognizance is presented by the bill. The appellant had notice of the meeting of January 12, 1892, and of the terms of the resolution under which his subscription was made. He subscribed to the stock under the conditions which were imposed by that resolution. The resolution expressly provided for an increase of capital by installments of \$50,000 each, or whenever a subscription to the amount of \$50,000 or a multiple thereof should be paid in and certified to the comptroller. Under such a resolution, it was not necessary that the full amount of the \$300,000 increased capital should be subscribed before any portion of such subscription should be certified to the comptroller. At any time after \$50,000 was subscribed and paid in, that fact might have been properly made known to the comptroller, and his certificate might have been obtained, certifying to that amount of increased capital; and when the sum of \$150,000 was subscribed and paid, and the proof thereof was in due form presented to the comptroller, he could lawfully have certified that the capital was increased to that amount. The only effect of the action of the shareholders on September 9, 1895, was to limit the amount of the total capital of the association to \$350,000. We are unable to perceive how any of the proceedings of the directors or of the shareholders so limiting the increase of the capital have affected the substantial rights of the appellant. His rights and his liabilities were fixed by the resolution of January 12, 1892, by his subscription to the increased capital, and by the fact that \$150,000 of such increased and paid-in capital was certified to the comptroller, and his certificate obtained therefor. It is immaterial, therefore, whether the notice of August 9, 1895, was duly issued or published, or whether the special meeting of the shareholders, held in pursuance thereof, was legal or not. The law was complied with, irrespective of that meeting and those proceedings. We find no error in the decree of the circuit court sustaining the demurrer to the bill. The decree will be affirmed.

NATIONAL UNION BANK v. EARLE.

(Circuit Court, E. D. Pennsylvania. April 3, 1899.)

BANKS—APPROPRIATION OF FUND—PAYMENT OF CHECK BEFORE SUSPENSION OF DRAWER.

Where a Philadelphia bank, being indebted to a New York bank for collections made, remitted by its cashier's check on another New York bank, with which it had a sufficient deposit, which check was duly presented and paid through the clearing house, the transaction constituted a complete appropriation of the fund to the creditor bank, and its ownership is not affected by its restoring the money to the bank paying the check on the same day, on the demand of the latter, made on learning of the suspension of the drawer, which return was required under such circumstances by the rules of the clearing house, of which both banks were members, but only for the purpose of protecting the paying bank, in case the payment should prove to have been unauthorized; nor will the fact that such bank, without right, paid the money to the receiver of the insolvent bank, prevent its recovery from the receiver by the payee of the check.

On Demurrer to Bill.

Stern & Rushmore and A. H. Wintersteen, for complainant.

Asa W. Waters and W. H. Addicks, for respondent.

DALLAS, Circuit Judge. This is a general demurrer to a bill which prays a decree for \$21,145.43. The facts properly pleaded, and therefore admitted, are well summarized in the complainant's brief as follows:

"The Chestnut Street National Bank, a Philadelphia institution, was a collecting agent of the complainant, the National Union Bank, of the city of New York. The arrangement between the parties required that the Chestnut Street National Bank should remit to the National Union Bank on Wednesday of each week for the balance as shown by its books to be due to the latter at the close of business on the preceding day, and this custom was invariably followed. On December 22, 1897, the Chestnut Street National Bank held, as such collecting agent, the proceeds of collections made by it for the National Union Bank in the amount of \$21,103.43. The Chestnut Street National Bank, having at that time funds on deposit with the National Bank of the Republic, in the city of New York, more than sufficient to satisfy its liability to the complainant, as aforesaid, and desiring to apply said funds and appropriate the same to the satisfaction of said liability, drew its cashier's check for that purpose on the National Bank of the Republic against said funds, in the amount of \$21,103.43, and forwarded the same to the National Union Bank, and immediately upon forwarding debited itself and credited the National Bank of the Republic, and credited itself and debited the National Union Bank with the amount of said draft. The said cashier's check was received by the complainant early on the morning of the 23d day of December, 1897, and was presented by it at 10 o'clock on that morning to the National Bank of the Republic, at the clearing house in the city of New York, of which both the said National Bank of the Republic and the said National Union Bank were members, and the said check was duly paid by the said National Bank of the Republic through said clearing house at that time. It appears that on that day (December 23, 1897) the comptroller of the currency required the Chestnut Street National Bank to close its doors and suspend business because of its insolvency. This fact, however, was not known either to the complainant or to the National Bank of the Republic at the time the cashier's check in question was received by the former and presented to the latter. Shortly before 11 o'clock on that day the National Bank of the Republic, having received unofficial information that the Chestnut Street National Bank had suspended business, returned the said cashier's check to the National Union Bank, indorsed 'Bank suspended,' and requested the repayment thereof, whereupon the Na-

tional Union Bank (acting, however, solely in pursuance of a custom prevailing among the clearing-house banks in New York in cases of such reclamation, 'to pay the amount reclaimed at once, and to adjust the merits of the claim afterwards'), repaid to the National Bank of the Republic the amount of the check. Thereafter the complainant demanded from the National Bank of the Republic the return of the money so restored to that bank, which refused, however, to repay the same, or any part thereof, and thereafter remitted the said funds to the respondent, who had been appointed the receiver of the Chestnut Street National Bank. Thereupon the complainant duly demanded the return of said money from the respondent, but without avail."

That the delivery of a check will not, of itself, operate as an assignment, must, for this court at least, be regarded as settled. But where the delivery of the check was accompanied by, or has been connected with, circumstances from which it may be reasonably inferred that an appropriation of the fund, to the extent of the amount of the check, was intended or, if such an appropriation has been actually effected, it is equally well settled that the transaction, as a whole, constitutes an equitable assignment pro tanto. From "the conduct of the parties, the nature of their dealings, and the attendant circumstances" in this case, I think that, under the authorities, a purpose by the Chestnut Street Bank to appropriate the fund in question must be implied, and also that, when "the said check was duly paid," that purpose became fully executed and the appropriation was consummated. *Bank v. Yardley*, 165 U. S. 644, 17 Sup. Ct. 439; *Clark v. Iron Co.*, 39 U. S. App. 754, 26 C. C. A. 423, and 81 Fed. 310.

The Bank of the Republic paid the check by an adjustment of balances effected in accordance with the rules of the clearing house, of which it and the Union Bank were members; but in legal contemplation the transaction was the same as if the payment had been specifically made. The Union Bank received a fund which was absolutely its own. It returned this fund to the National Bank of the Republic, upon reclamation made by the latter, in pursuance of the contractual obligation, which the Union Bank had assumed, to comply with the requirement of the clearing house that such reclamations should be honored. The Chestnut Street Bank, not being a member of that organization, could not have invoked this requirement, and in point of fact had nothing whatever to do with the return of the money. The situation and motives of the two New York banks are obvious. The Bank of the Republic had, without knowledge or notice of the insolvency of the drawer, paid a check of a national bank. At a later hour it learned of the failure of that bank. It then apprehended that some question might arise respecting the legality of the payment which it had made, and, in consequence, it exercised its right to demand that the money should be restored to its keeping "at once, and to adjust the merits of the claim afterwards." This demand was, of necessity, complied with; but by this compliance the Union Bank did not disclaim or affect its title to the fund. The Bank of the Republic clearly did not acquire, and did not claim to have, any beneficial interest in it. It took it as trustee for the actual owner, and held it to await a proper determination of any doubt which might have been supposed to exist respecting its ownership. There never was any such determination, yet the Bank of the Republic transferred

the money to the receiver of the Chestnut Street National Bank, who was not entitled to it, and, apparently, in total disregard of the rights of the Union Bank, whose money it really was. If it were still in the custody of the Bank of the Republic, its duty to pay it over to the Union Bank would, I think, be unquestionable; and, in my opinion, a court of equity, avoiding unnecessary circuitry, should now require the defendant, into whose possession the fund has been traced, to execute the trust which adheres to its possession by relinquishing that fund to the plaintiff.

The demurrer is overruled, and the defendant is assigned to answer sec. reg.

BLAIR v. SILVER PEAK MINES et al.

(Circuit Court, D. Nevada. March 27, 1899.)

No. 642.

1. EQUITY PLEADING—EFFECT OF DENIAL FOR WANT OF KNOWLEDGE OR INFORMATION.

Equity rule 41 does not require the testimony of two witnesses, or its equivalent, to support an allegation in a bill, though denied by a sworn answer, where such denial is made for want of sufficient knowledge, information, or belief on the part of defendant as to the fact alleged; the only effect of such denial being to require some proof on the point.

2. JURISDICTION OF FEDERAL COURT—PROOF OF CITIZENSHIP.

An allegation of the citizenship of complainant, made for jurisdictional purposes, and denied by defendant only for want of sufficient knowledge, information, or belief as to the fact, is sufficiently established prima facie by proof that complainant is, and has been for 70 years, a resident of a certain town in the state of which he is alleged to be a citizen, and that he owns a house in such town, in which he resides and has his business office.

3. MORTGAGE—ESTOPPEL TO FORECLOSE—SUBSEQUENT PURCHASE OF PROPERTY.

Complainant owned certain mining property, which he conveyed to a corporation, in which he became the largest stockholder, taking back a mortgage for purchase money. Subsequently the corporation entered into a contract with a third person for the sale of the property, by which it agreed, on the making of the stipulated payments, to convey the property to him free of incumbrance. *Held*, that such facts did not estop complainant, as against the purchaser, from foreclosing the mortgage, it further appearing that the purchaser had failed to make the payments agreed upon, which would have enabled the corporation to discharge the mortgage.

4. REHEARING IN EQUITY—REHEARING IN ABSENCE OF DEFENDANT—REQUISITES OF SHOWING.

To justify a court of equity in granting a rehearing after decree on the ground that through inadvertence or excusable neglect the defendant was not present or represented by counsel on the hearing, in addition to a sufficient legal excuse for such absence, it must be shown that defendant had a good and meritorious defense, or at least that from the evidence the court might, upon argument, reach a different conclusion on the merits.

On Petition for Rehearing. Denied.

For former opinion, see 84 Fed. 737.

Rush Taggart (M. A. Murphy, of counsel), for complainant.

Reddy, Campbell & Metson, for defendant L. J. Hanchett.

HAWLEY, District Judge (orally). On the 21st of July, 1897, complainant commenced this suit to foreclose a mortgage given by the

defendant corporation to complainant to secure the payment of seven bonds, each bearing date October 1, 1879, and becoming due and payable at different times, the last becoming due October 1, 1883, the whole amount aggregating the sum of \$204,205.73. Upon these bonds and mortgage, payments and credits amounting to \$21,000, or thereabouts, have been at different times made, the last credit being on the 21st day of April, 1896. L. J. Hanchett was made a party to the suit by the following averment in the complaint:

"That the defendant L. J. Hanchett has, or claims to have, some interest in or claim upon the said premises, or some part thereof, which claim or interest is unknown to this complainant, and which interest or claim is subsequent to and subject to the lien of this complainant's mortgage."

Thereafter, on the 2d day of October, 1897, the said L. J. Hanchett appeared, and interposed a demurrer to plaintiff's complaint on several grounds, which was overruled by the court. Blair v. Silver Peak Mines, 84 Fed. 737. On the 6th day of June, 1898, defendant Hanchett appeared and filed an answer to plaintiff's bill of complaint, to which a replication was in due time filed by the complainant. Thereafter the cause, being at issue, was set for trial on the 21st of November, 1898. The Silver Peak Mines confessed judgment on the original bill September 13, 1897, and on the amended bill February 17, 1898. On the day set for trial, counsel for Hanchett failed to appear, and the case was heard upon the testimony previously taken by deposition. Judgment and decree of foreclosure were entered in favor of complainant for the sum of \$573,978.71, that being the amount of principal and interest then due upon said bonds and mortgage. On December 5, 1898, defendant Hanchett filed a petition for rehearing, upon the following grounds:

"(1) That the proofs fail to establish that the complainant in this suit was, at the time of the commencement of this action, a citizen of the state of New Jersey, although the allegation of the bill to that effect was denied in the answer of this defendant, and for that reason this court was without jurisdiction to enter any decree herein other than a decree dismissing said amended bill. (2) That the diverse citizenship of the parties to this suit was not proved, although put in issue by said answer, and for that reason this court was without jurisdiction to enter the decree herein in complainant's favor. (3) That said decree is erroneous because the alleged cause of action upon which this suit is founded was at the time of the commencement of this suit, as against this defendant, barred by limitation. (4) That said decree is erroneous because the alleged cause of action upon which this suit is founded was at the time of the commencement of this suit, as against this defendant, barred by time and laches, and by the rules of equity and equity practice, and because the same was and is stale, and not enforceable in equity. (5) That said decree is erroneous because the proofs herein show that the complainant is estopped by his ownership of said property, his actions, conduct, and representations, from enforcing said alleged mortgage against the said L. J. Hanchett. (6) That the said decree is erroneous because the evidence shows that said alleged mortgage is extinguished by lapse of time, as well under the laws of the state of New York, where the same was made, as under the laws of this state, and under the general rules of equity. (7) That said decree is erroneous because the proofs are insufficient to prove the execution, delivery, and nonpayment of the alleged bonds and mortgages upon which said suit is founded. (8) That said decree is erroneous because upon the pleadings and proofs a decree should, in equity and good conscience, be entered herein in defendant's favor, dismissing the said amended bill of complaint. And this defendant further respectfully petitions your honors to set aside and vacate

said decree and grant a rehearing upon the ground and for the reason that by reason of inadvertence, and surprise which ordinary prudence could not have guarded against, the hearing in this suit was had in his absence, and in the absence of all his solicitors and counsel; and because he was, for the reasons above stated, unrepresented at said hearing, and the case was not argued and presented on his behalf; and for the reason that the failure of his counsel to be present at said hearing resulted from their misapprehension, surprise, inadvertence, and excusable neglect, which, in equity and good conscience, should be relieved against upon this petition."

Upon the oral argument the attention of counsel was called to the fact that if the court should be of opinion that a sufficient legal excuse was made to justify the court, on that ground alone, in granting a rehearing, it ought not to prevail unless defendant Hanchett could show that he had a good and meritorious defense to the suit, or, at least, that from the testimony filed herein it should appear upon argument that the court might reach a different result upon the merits of the case. With this general statement we proceed to an examination of the points discussed by counsel.

1. In so far as the grounds urged by defendant are based upon the statute of limitations, it will not again be argued, it having been fully discussed and decided in *Blair v. Silver Peak Mines*, supra.

2. It is claimed by the defendant that this court has no jurisdiction of this suit. Without stopping to examine whether the defendant has waived or abandoned his right to raise this question because he did not interpose a plea in abatement to the jurisdiction before filing his answer to the bill, as claimed by the complainant, the question of jurisdiction will be considered on its merits. In the bill of complaint it is alleged:

"That the complainant, John I. Blair, is now, and during all the time and times hereinafter mentioned was, and is, a resident and citizen of Blairstown, in the state of New Jersey, and is not a citizen or resident of the state of Nevada; * * * that L. J. Hanchett is a citizen and resident of the city of Sacramento, county of Sacramento, state of California; * * * that this suit is of a civil nature, and that the matter or amount in dispute exceeds the sum or value of \$10,000, exclusive of interest and costs; that the controversy herein is between citizens and residents of different states, to wit, between John I. Blair, a citizen and resident of Blairstown, state of New Jersey, and the Silver Peak Mines, a corporation duly organized and existing under and by virtue of the laws of the state of New York, * * * being a resident and citizen of said state of New York; that the property mentioned and referred to in the mortgage * * * is situated in and near the town of Silver Peak, county of Esmeralda, state of Nevada."

The answer of L. J. Hanchett upon this point alleges:

"That he has no knowledge, information, or belief sufficient to enable him to answer the allegation of said amended bill, * * * and, placing his denial upon that ground, denies that the complainant at any of said times was, or now is, a resident or citizen of Blairstown, N. J., or a citizen or resident of New Jersey at all."

The contention of the defendant Hanchett that, inasmuch as the complainant did not waive an answer under oath, and that, he having answered under oath that complainant is not a citizen of the state of New Jersey, the complainant must, under equity rule 41, produce two witnesses, or one witness and very strong circumstances corroborating him, in order to overthrow the allegation in defendant's

answer, is wholly devoid of merit. The equity rule relied upon can only be invoked where there is a direct, positive, and unequivocal denial, in the answer, of the allegations in the bill, which the defendant is called upon to answer. It has no application to a denial in the answer which is made without any knowledge, information, or belief as to the facts. This is too clear for argument, or citation of authorities. The only effect of the denial is to compel the complainant to make some proof upon the point. It is argued that the evidence in this case is silent upon the question of the citizenship of the complainant. It is admitted that the testimony shows that at the time of the bringing of this suit he was, and for a period of about 70 years prior thereto had continuously been, and is now, a resident of Blairstown, in the state of New Jersey. But the contention of defendant Hanchett is that mere residence does not constitute citizenship. It has been universally held in removal and other cases that an averment as to the residence of the parties is not the equivalent of an averment of citizenship for the purpose of giving the national courts jurisdiction. *Tinsley v. Hoot*, 3 C. C. A. 612, 53 Fed. 682; *Craswell v. Belanger*, 6 C. C. A. 1, 56 Fed. 529; *Robertson v. Cease*, 97 U. S. 646; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207; *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. 555; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 873; *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154; *Anderson v. Watt*, 138 U. S. 694, 702, 11 Sup. Ct. 449; *Wolfe v. Insurance Co.*, 148 U. S. 389, 13 Sup. Ct. 602. But the citizenship of complainant is properly alleged in the bill of complaint. This allegation in the bill could, if assailed, be proven by any facts which, in legal intendment, constitute citizenship. In addition to the admitted fact that complainant has been a resident of Blairstown for 70 years, it affirmatively appears from the testimony that he owned a house and transacted his business there; that he used the house as a business office and as a dwelling. It was, therefore, his home,—his domicile. Do not these undisputed facts establish *prima facie* that complainant is a citizen as well as a resident of New Jersey? Is not such a statement, as to the facts, equivalent to a direct and positive declaration that Blair was a citizen of the state of New Jersey? Of what state is Blair a citizen? From the pleadings and evidence in this suit there can be but one answer, viz. New Jersey. Does it not clearly and satisfactorily appear that he intended to remain there permanently? From the fact of his long residence, and from the name of the town where he lives, it might be fairly presumed that he was the father that gave his name to the child. The general rule is well settled that a citizen is one who owes the government allegiance, service, and money by way of taxation, and to whom the government in turn grants and guaranties liberty of person and of conscience, the right of acquiring and possessing property, of suit and of defense, and security in person, estate, and reputation. *Knox v. Greenleaf*, 4 Dall. 360; *Gassies v. Ballon*, 6 Pet. 761; *Shelton v. Tiffin*, 6 How. 163, 185; *Sheppard v. Graves*, 14 How. 512, 513; *Minor v. Happersett*, 21 Wall. 162, 166; *U. S. v. Cruikshank*, 92 U. S. 542; *Anderson v. Watt*, 138 U. S. 695, 706, 11 Sup. Ct. 449; *Boyd v. Nebraska*, 143 U. S. 135, 159, 12 Sup. Ct. 375; *Gordon v. Bank*, 144 U. S.

97, 103, 12 Sup. Ct. 657; *Marks v. Marks*, 75 Fed. 321. It is also well settled that a state may deny all her political rights to an individual, and he yet be a citizen. The right of office and suffrage are political purely. A citizen enjoys civil rights. *Id.* 328; *Burnham v. Rangeley*, 1 Woodb. & M. 7, Fed. Cas. No. 2,176; *Catlett v. Insurance Co.*, 1 Paine, 594, Fed. Cas. No. 2,517; *Minor v. Happersett*, 21 Wall. 162; *Blanck v. Pausch*, 113 Ill. 60, 64; *State v. Fairlamb*, 121 Mo. 138, 150, 25 S. W. 895. I am of opinion that the facts and circumstances testified to by the witnesses in this case sufficiently establish the fact that the complainant, John I. Blair, was, at the time of the commencement of this suit, a citizen of the state of New Jersey, and are therefore sufficient to invest this court with jurisdiction.

In *Shelton v. Tiffin*, *supra*, it was held that an allegation of the citizenship of the parties must be made, but the proof of the citizenship, when denied, might be satisfactorily established, although the privileges and rights of a citizen may not be shown to have been claimed or exercised by the individual. The facts were that Shelton and wife became residents of Louisiana in 1840, more than two years before the commencement of the suit; that, since their residence commenced, they had been absent from the state only once, a short time, on a visit to a watering place in Mississippi; that they resided the greater part of the time on the plantation which was in controversy, cultivating and improving it. Upon these facts the court said:

"Where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such state, unless the contrary appear. And this presumption is strengthened where the individual lives on a plantation, and cultivates it with a large force, as in the case of Shelton, claiming and improving the property as his own. On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject, but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient. The facts proved in this case authorize the conclusion that Shelton was a citizen of Louisiana, within the act of congress, so as to give jurisdiction to the circuit court."

In *Anderson v. Watt*, *supra*, cited and relied upon by the defendant, the court, in referring to the facts constituting citizenship, said:

"The place where a person lives is taken to be his domicile until facts adduced establish the contrary; and a domicile, when acquired, is presumed to continue until it is shown to have been changed."

In *Marks v. Marks*, *supra*, there is an elaborate discussion, and a copious citation of authorities, concerning citizenship in many different phases. In the course of the opinion, Clark, J., said:

"Citizenship, in relation to the federal judiciary, must be of that kind which identifies the party with some particular state of which he is a member. *Butler v. Farnsworth* (1821) 4 Wash. C. C. 101, Fed. Cas. No. 2,240; *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289; *Mitchell v. U. S.*, 21 Wall. 350. To constitute citizenship of a state in relation to the judiciary act requires: First, residence within such state; and, second, an intention that such residence shall be permanent. In this sense state citizenship means the same thing as domicile in its general acceptation. The act of residence does not alone constitute the domicile of a party, but it is the fact of residence, accompanied by an intention of remaining, which constitutes domicile. The distinction between

domicile and mere residence may be shortly put as that between residence *animo manendi* and residence *animo revertendi* [citing cases]. Mere residence may be for a transient purpose,—as for business,—for a fixed period, or limited by an expected future event, upon the happening of which there is a purpose to return or remove. The two elements of residence, and the intention that such residence shall be permanent, must concur to make citizenship.”

In *Morris v. Gilmer*, 129 U. S. 315, 328, 9 Sup. Ct. 293, the court held, upon the facts disclosed, that Gilmer was not a citizen of the state of Tennessee, as claimed in his complaint, but had transferred his residence from Alabama for the sole purpose of bringing the suit in the national court, thereby committing a fraud upon the law. But in the course of the opinion the court said:

“It is true, as contended by the defendant, that a citizen of the United States can instantly transfer his citizenship from one state to another (*Cooper v. Galbraith*, 3 Wash. C. C. 546, 554, Fed. Cas. No. 3,193), and that his right to sue in the courts of the United States is none the less because his change of domicile was induced by the purpose, whether avowed or not, of invoking, for the protection of his rights, the jurisdiction of a federal court. As said by Mr. Justice Story, in *Briggs v. French*, 2 Sumn. 251, 256, Fed. Cas. No. 1,871, ‘if the new citizenship is really and truly acquired, his right to sue is a legitimate, constitutional, and legal consequence, not to be impeached by the motive of his removal.’ *Insurance Co. v. Broughton*, 109 U. S. 121, 125, 3 Sup. Ct. 99; *Jones v. League*, 18 How. 76, 81. There must be an actual, not pretended, change of domicile; in other words, the removal must be ‘a real one, *animo manendi*, and not merely ostensible.’ *Case v. Clarke*, 5 Mason, 70, Fed. Cas. No. 2,490. The intention and the act must concur in order to effect such a change of domicile as constitutes a change of citizenship. In *Ennis v. Smith*, 14 How. 400, 423, it was said that ‘a removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it,’ and that, while it was difficult to lay down any rule under which every instance of residence could be brought which may make a domicile of choice, ‘there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence.’”

3. Numerous other points have been discussed by counsel, and will be grouped together. It is deemed sufficient to state that it devolves upon Hanchett to establish the affirmative allegations in his answer by a preponderance of evidence. This, in my opinion, he has failed to do. He relies solely upon his answer, and the testimony offered by the complainant, and claims that the cross-examination of complainant's witnesses proves his case, but he has failed to convince the mind of the court that his contention is correct. On the other hand, the court is of opinion that there are no facts proven in this case sufficient to establish any fraud or collusion between Blair and the Silver Peak Mines with reference to the Blair mortgage, sought to be foreclosed herein. There was no fraud in the execution of the mortgage. It was duly executed in New York, and properly recorded in Esmeralda county, state of Nevada, long prior to the execution of any agreement between Hanchett and the Silver Peak Mines, and existed of record at that date. It is not shown that the mortgage debt has ever been paid, or any part thereof, save and except the amounts credited in the judgment and decree of foreclosure herein. Blair is not shown to have been a party to the execution of any agreements that existed, or now exist, if any, between the corporation and Hanchett. It is not shown that Blair ever committed any act, by word or by deed, which would estop him from foreclosing the mort-

gage. The fact that Blair was the original owner of the mines at Silver Peak, and that he conveyed the property and premises to the Silver Peak Mines for the more convenient working and managing of the same, certainly does not estop him from foreclosing his mortgage upon the property. This is a matter of daily occurrence. The fact that Blair is a large stockholder, owning nearly all the stock of the Silver Peak Mines, and that the other stockholders are his relatives or near friends, who would naturally conform to his wishes in the management and control of the corporation, does not estop him from the foreclosure of his mortgage. Blair is not either a director or officer of the corporation. He has not been guilty of any laches of which Hanchett can complain. It may fairly be presumed that, if Hanchett had kept his agreements with the corporation, and paid the money that he agreed to pay by the terms and conditions thereof, within the time specified, the corporation could and would have paid the mortgage debt due to Blair, and would thus have been placed in a position where it could and would have been able to execute and deliver to Hanchett a good and sufficient deed of the property "free and clear of all incumbrances," as it agreed to do. But if it should be conceded that the corporation has not kept or performed all the covenants on its part agreed to be performed with Hanchett, it would not by any means follow, from any evidence in this case, that Blair could not foreclose his mortgage against Hanchett. Hanchett's remedy, if any he has, would be by bringing an action against the corporation for damages for its failure to comply with its agreements, and in such an action he would have to prove that he had fully complied with all the covenants and agreements on his part to be performed; or that he had been prevented from so doing by the acts and conduct of the corporation. Moreover, the testimony in this case is to the effect that Hanchett's right to purchase the property from the corporation under the agreements which he claims gave him an equitable title to the property expired August 15, 1896, without any compliance upon his part therewith, and that there never has been any extension of time given by the corporation, although often asked for by Hanchett; and that he was allowed to remain in possession of the property by the mere sufferance of the corporation defendant herein. The testimony, in its entirety and weight, clearly shows that Hanchett, whatever rights, claims, demands, or interest, if any, he may have against the defendant Silver Peak Mines, has no such interest in the Silver Peak property as entitles him to make any defense against the foreclosure of Blair's mortgage. In other words, whatever interest or claim he may have in the property is—as alleged in the bill of complaint herein—"subsequent to and subject to the lien of this complainant's mortgage." Entertaining these views, it would serve no useful purpose to discuss, consider, or decide the question whether the counsel for Hanchett were misled by any conversations had with complainant's counsel, or have offered a good and reasonable excuse for their failure to appear and argue this case at the time and place it was regularly set down for trial. They have had the opportunity on this hearing to as fully discuss the testimony as they would have had if they had been present at the time

the case was tried. It would be idle and useless to grant a rehearing when it is not affirmatively shown that if the rehearing was had any other judgment or decree could be entered, upon the pleadings and testimony of record herein, than was entered by this court on the trial hereof. The petition for rehearing is denied.

SAVINGS & TRUST CO. OF CLEVELAND, OHIO, v. BEAR VALLEY IRR.
CO. et al. (SPRECKELS BROS. COMMERCIAL CO., Intervener).

(Circuit Court, S. D. California. March 20, 1899.)

1. JUDGMENT—LIEN ON PROPERTY IN HANDS OF RECEIVERS.

The filing of a transcript of a judgment against a corporation in a county, as required by the statute of California to make the judgment a lien on real estate therein, does not create a lien on property which had been previously conveyed by the defendant to receivers under an order of court, nor entitle the judgment to any preference, in the distribution of assets, over other personal judgments.

2. INSOLVENT CORPORATIONS—PREFERENTIAL CLAIMS.

The principal on which claims for labor or materials furnished to a corporation of a public nature, like a railroad, to keep its business going, are given priority in equity over a prior mortgage, does not apply to materials furnished to an irrigation company for use in the original construction of its works.

3. SAME—FORECLOSURE SUIT—RIGHT OF GENERAL CREDITOR TO INTERVENE.

A general creditor of an insolvent corporation, whose property is in the hands of a receiver, in a foreclosure suit, has sufficient interest in any surplus which may remain after payment of the liens to be entitled to become a party by intervention.

On Application for Leave to Intervene.

Wm. J. Hunsaker, for complainant.

H. L. Titus, for intervener.

ROSS, Circuit Judge. This is an application on the part of the Spreckels Bros. Commercial Company for leave to file a petition in intervention. The suit in which the intervention is thus sought was brought for the foreclosure of a certain mortgage executed by the Bear Valley Irrigation Company to the Savings & Trust Company of Cleveland, Ohio, and also for the foreclosure of certain receivers' certificates issued by the authority and direction of this court in a former suit brought herein by one James Gilbert Foster against the Bear Valley Irrigation Company and others, in which suit that company, under and pursuant to an order therein made by this court, conveyed all of its property to certain receivers therein appointed, including the property covered by the mortgage sought to be foreclosed in the present suit. From those receivers the title to the property passed, under the orders of this court, to, and is now held by, the receiver appointed in the present suit. The validity of neither the mortgage nor the receivers' certificates, to which title is asserted by the complainant, is questioned by the petition now sought to be filed. The latter is based upon certain indebtedness due from the Bear Valley Irrigation Company to the Spreckels Bros. Commercial Company, which arose and exists, according to the aver-

ments of the petition in intervention, in this wise: Subsequent to the execution of the mortgage mentioned, the Spreckels Bros. Commercial Company furnished to the Bear Valley Irrigation Company certain cement, to be, and which was, used by the irrigation company in the construction of a certain irrigating ditch. This was prior to the litigation in which the irrigation company afterwards became involved, and while it was carrying on its ordinary business. As collateral security for the amount due it for the cement, the Spreckels Bros. Commercial Company took from the Bear Valley Irrigation Company certain bonds of the Perris irrigation district, which bonds were afterwards sold by the pledgee, and the proceeds thereof applied on the indebtedness; leaving, however, much the larger part of the indebtedness still due. For this balance the Spreckels Bros. Commercial Company, subsequent to the institution of the present suit, brought an action against the Bear Valley Irrigation Company in the superior court of the county of San Diego, Cal., in which action it recovered a judgment, certified copies of which were recorded in the counties of Riverside and San Bernardino, where the property covered by the mortgage and receivers' certificates is situated. That judgment in favor of the Spreckels Bros. Commercial Company remains unpaid.

In respect to judgment liens, a statute of California provides:

"A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for two years unless the judgment be previously satisfied." Code Civ. Proc. Cal. § 674.

Assuming that the effect of the filing of a certified copy of the judgment is the same as the filing of "a transcript of the original docket, certified by the clerk," as prescribed by the statute, yet, at the time of the filing in San Bernardino and Riverside counties of certified copies of the judgment in favor of the Spreckels Bros. Commercial Company, the Bear Valley Irrigation Company owned none of the real property covered by the complainant's mortgage or the receivers' certificates sued upon, nor has it since acquired ownership thereof. The Spreckels Bros. Commercial Company, therefore, has not acquired any judgment lien upon any of the realty covered by the mortgage or receivers' certificates upon which the bill is based, and has only a personal judgment against the Bear Valley Irrigation Company. *Savings & Trust Co. v. Bear Valley Irr. Co.*, 89 Fed. 32. "And the same reasons, or reasons equally strong as those which have settled the question that a judgment subsequently acquired in another court, or in the same court in another suit, does not create a legal lien on any of the property being administered, exclude the holder from acquiring thereby an equitable lien or right of preference in the assets." *Mercantile Trust Co. v. Southern States Land & Timber Co.*, 30 C. C. A. 359, 86 Fed. 711, 721; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788.

Nor does the petition of Spreckels Bros. Commercial Company bring its claim within the rule which, within certain limitations, accords to claims for labor and supplies furnished a quasi public corporation, to keep it going, priority over mortgage liens; for here, according to the petition, the cement furnished the Bear Valley Irrigation Company was for the original construction of one of its ditches, and was so used. To allow a preference over a mortgage lien for supplies furnished for such a purpose, and so used, would be destructive of the mortgagee's rights, and would find no justification in the rule under which receivers of railroads, and other corporations of like nature, are, under proper conditions and limitations, allowed and directed by the courts to pay out of the proceeds, or even out of the corpus of the property, certain debts and obligations incurred, within a limited time prior to the receivership, in the ordinary operation and maintenance of the property. Such action is grounded in the principle that the corporation, having public duties to perform, must be kept a going concern while in the hands of the court, and that claims of the character indicated, which it is not usually practicable to pay in cash, should be paid as they would have been paid if the court had not taken the control of the property from the corporation. See *Miltenberger v. Railroad Co.*, 106 U. S. 286, 311, 1 Sup. Ct. 140; *Kneeland v. Trust Co.*, 136 U. S. 89, 97, 10 Sup. Ct. 950; *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824; *Wood v. Safe-Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131; *Railroad Co. v. Hamilton*, 134 U. S. 296, 306, 10 Sup. Ct. 546; *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 24 C. C. A. 487, 79 Fed. 202; *Atlantic Trust Co. v. Woodbridge Canal & Irr. Co.*, 79 Fed. 39.

The petitioner, therefore, occupies the position of a general creditor, only, of the defendant Bear Valley Irrigation Company, having no lien upon any of the real property which forms the subject of the foreclosure suit. It was not, therefore, a necessary party to the suit, and, if made such, could do nothing by way of defense to the complainant's suit. *Stout v. Lye*, 103 U. S. 66, 70. Nevertheless, as such general creditor the petitioner has an interest in any surplus that may remain after the complainant's liens are satisfied; and, since the possession and control of the property by the court through its receivers have prevented, and still prevent, the petitioner from proceeding against it under its judgment, the petitioner ought, I think, to be allowed to come into this suit, in order that it may be, in the language of the circuit court of appeals for the Seventh circuit in the case of *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 28 C. C. A. 205, 84 Fed. 539, 541, "in condition to keep an eye on the proceedings," and in condition to secure protection of its interest in any such surplus. The motion for leave to file the petition in intervention is granted.

CLARK et al. v. PATTON et al.

(Circuit Court, W. D. Tennessee, W. D. March 31, 1899.)

MORTGAGE FORECLOSURE — AMOUNT OF APPEAL BOND — INSURANCE PENDING APPEAL.

Where there has been a decree of sale in strict foreclosure proceedings, if the mortgagor has not complied with the stipulation in the mortgage that he will keep the property insured at a fixed value, for the benefit of the mortgagee, the appeal bond should be not less than the amount of the agreed insurance; and this although the naked land may be worth as much as the sum decreed, as the mortgagee has the right, under such a contract, to the protection which would have been afforded by the insurance pending the appeal.

On Application for Approval of Appeal Bond.**T. M. Scruggs, for plaintiffs.****Randolph & Randolph, for defendants.**

HAMMOND, J. Counsel are in disagreement as to the amount of the appeal bond in this case. On a bill to foreclose a mortgage, the plaintiff had a decree of sale for \$6,027.50. It seems to be understood, as one of the rulings in *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911, that in a foreclosure suit the statutory requirement of an appeal bond "that the appellant shall prosecute his appeal to effect, and if he fail to make his plea good shall answer all damages and costs," covers deterioration or waste of the property pending the appeal, caused by reason of fire, when the property is not insured. Counsel for plaintiff concedes that this property, as it stands, is worth about the sum of \$10,000; but he insists that the value of the house and improvements, subject to loss by fire, is as much as \$5,000, which he thinks should be the minimum amount of the appeal bond. It is urged that this is especially so in this case, because there is a stipulation in the mortgage that the mortgagees "will cause any buildings upon the said premises to be insured in such safe and responsible insurance company, for the sum of \$6,500, or such less sum as the legal holder of the notes secured hereby may elect, and keep the same insured, and will deliver all policies of insurance and all renewal certificates, from time to time, to the said party of the second part, or his successors in trust"; and another stipulation, that, in case of default or neglect to procure or renew insurance, the mortgagee may enter and sell, etc.; and another stipulation, that "in case of sale the proceeds shall be applied—First, to the costs of the sale, and, secondly, to all sums of money paid by the said secured party, or the holder of the note, for insurance, taxes, assessments, or charges, to protect the title or possession of said premises, together with interest," etc. It is insisted by the plaintiff that there is now existing no insurance whatever upon this property, while the defendant contends that he is informed and believes that the plaintiff holds a subsisting policy for the sum of \$500. The defendant has filed a petition, with which he brings into court a policy of insurance dated July 19, 1898, for one year, which insures T. M. Patton, the defendant in this case, in the sum of \$3,500, against loss by fire upon the premises foreclosed,—\$2,500 upon the two-story brick building, and

\$1,000 on the furniture therein contained,—which also contains his assignment in blank, indorsed on the back thereof, according to the usual forms for assignments. In the petition he further states that he is informed and believes that there is an outstanding policy in the hands of the plaintiff for the sum of \$500, upon the same premises; but the petition does not explain why the defendant does not know precisely how this fact is. He also agrees, by the petition, that he will renew this \$3,500 policy when it expires, on the 19th of next July, with the same form of an assignment. He states that he is willing that the assignment be filled out in such manner as the court may direct, in order to give the plaintiff in this suit the benefit of the entire \$3,500 of insurance, in case of the destruction of the premises and furniture by fire pending the appeal, and to any extent to which by law they may be entitled to the same. He further states that the two policies of \$1,000 and \$2,500 represent the fair insurable value of the house and that it is ample to secure against any probable loss by fire pending the appeal. He finally states that he believes the land itself, without the buildings, is worth more than the amount for which the sale is decreed. The petition then prays that the assignment shall stand as it is, in blank, to be filled according to the order of this court when occasion requires, and consents to such transfer of the insurance, and his rights thereunder, as the court may direct. Along with this petition an order is presented which directs that the policies of insurance be delivered to John B. Clough, the special commissioner named in the decree to make the sale of the mortgaged premises, to hold the same, and any renewal that may be made thereof, for indemnity of the plaintiff against loss by fire pending the appeal, to the extent to which he may be entitled; the court reserving the power to direct the filling up of the blank, and the collection of the money, and its application, if any loss occurs. Also, there is offered for approval an appeal bond, conditioned according to the statute, for the sum of \$1,500, which the court is asked to approve.

The plaintiff undoubtedly has the right to insure the property for any sum, to the extent of \$6,500, and to collect out of the proceeds of sale the cost of such insurance. That is their alternative, under the stipulation of the mortgage, where the mortgagor does not himself keep the property insured for that sum, or some less sum agreed upon, according to his obligation. The plaintiff is under injunction against enforcing the security through the powers given to the trustee, and therefore he could not enter for the default in the matter of keeping the property insured, which is the other alternative mentioned in the mortgage. It is manifest, then, that at this stage of the proceedings, after a decree of foreclosure, the plaintiff should not be compelled to rely upon this open alternative to pay for and take out that insurance which the defendant is under an obligation to take out and keep up for him. It would be adding that amount to the mortgage debt, when the value of the property without insurance was thought by the parties to be inadequate, or so near the amount of the debt that there would be no margin for such additional expense. Besides, it is by the contract optional with the mortgagee to take that means for his security, and he should not be

compelled to adopt it; nor should he be left without any security against fire, when the act of congress giving the appeal covers the risk, by its requirements as to the stipulations of the appeal bond. I am of the opinion, therefore, that the plaintiff has a right to demand that the amount of the appeal bond shall be adjusted to cover any loss by fire. Indeed, the defendants do not deny this, and they offer to meet that liability by the assignment of the policy which the defendant mortgagor has taken out for his own benefit, and not for the benefit of the mortgagee, as he agreed to do; and the controversy of counsel is over the amount of the insurance, or the amount of the appeal bond, and the best method of meeting this danger of the deterioration of the security by fire.

It is contended by the defendant that, inasmuch as the trustee has been enjoined from executing his powers of sale, the proposed policy should not be taken out in his name, or assigned to him. It is also urged that the stipulation in the policy as to the amount of the insurance, and the requirement that the policy shall be delivered to the trustee, have been arrested or abrogated by this injunction, and that the plaintiff is entitled only to such security by way of insurance as the general principles of equity would require after a decree of foreclosure, and pending an appeal. I do not concur in the soundness of this view. Because the trustee is enjoined from making a sale, and the plaintiff is therefore required to resort to a foreclosure by decree, it by no means results that the obligation of the defendant mortgagor to keep the property insured according to the stipulations of the mortgage has been at all affected by that injunction; nor can the court overlook that stipulation in determining the controversy which has arisen over the amount of the appeal bond. Neither do I think that the court can enforce the insurance by refusing this appeal until the stipulation of the mortgage that the defendant mortgagee shall keep the property insured for the benefit of the trustee to the extent of \$6,500 has been complied with. The failure to comply with that stipulation is among the grounds of the decree for foreclosure, and the measure of the penalty to be imposed upon the mortgagor for not insuring the property is the decree of foreclosure itself. But, when the defendant mortgagor comes to offer his appeal bond, the court has the opportunity and the duty to protect the security by adjusting the amount to cover the danger of loss by fire. Here the parties have agreed that, in the absence of a stipulation to the contrary, the insurable value of the improvements is \$6,500; and why, I ask, should not that value be taken as the agreed amount of protection to be given to the security by insurance? I think it is. It is true that in case of loss by fire insurance companies may be bound to pay the actual value of the premises insured, and it might be that they would not agree to place that much insurance upon the improvements; but that does not alter the obligation of the defendant mortgagor. Instead of offering a policy of insurance for the amount agreed upon, he offers pending this appeal a far less amount, complicates the insurance with insurance on furniture which he offers to assign, and tenders a policy which expires within 90 days from the time of its tender. It is true, he agrees to renew

the policy on the expiration of the existing insurance, and that the renewal may stand as the original policy. But what security has the plaintiff that this new agreement which the defendant would force on him will be complied with, and what protection would the plaintiff have if on the 1st of next July the defendant should be unable to renew the policy, or should decline to do so? Evidently, none at all. And it is not at all probable that this case can be reached in the court of appeals, and decided, within three months, according to the general course of business. Therefore the security against loss by fire which is tendered seems to be quite inadequate, measured by the agreement of the parties themselves for that security, and which the plaintiff has an equitable right to enforce. In the circumstances of the case, the strict, equitable right of the plaintiff is that the amount of the appeal bond should be \$6,500, at the very least, so that in the event of loss by fire he may recover whatever indemnity the insurance companies would be compelled to pay under an ordinary policy of insurance for that amount. The defendant has no equitable right to demand the mitigation of this stipulation in the policy; nor has he a right to any claim that any policy of insurance shall be accepted in the place of the security offered by the appeal bond, unless the policy tendered is according to the stipulations of the mortgage. The surety on the appeal bond would, on the principle of *Kountze v. Hotel Co.*, supra, become the insurer against loss by fire, under the stipulations of the mortgage contract. It may be suggested that he could protect himself by a policy of insurance for his own benefit, or that the assignment here offered might be made to him for his protection; and, if the plaintiff feels any doubt whether the rule upon this subject which is only suggested in *Kountze v. Hotel Co.* would be followed in a case actually presenting the point for decision, he might protect himself against that danger by taking out a policy of insurance for his own benefit, and it is not impossible that he might be able to reimburse the cost of that insurance under a final decree of sale.

On the whole, I have concluded that the better precedent to establish is that the court shall not concern itself about any extraneous security by insurance, after a decree of foreclosure has been made, and that it is best to hold, according to the strict rights of the parties, that if the mortgagor has not kept the property insured according to the stipulations of the mortgage, or does not offer before or at the time of the decree of sale a policy of insurance in conformity with the stipulations of the mortgage, the court should, in adjusting the appeal bond, fix the amount large enough to cover the probable loss by fire, as that amount has been agreed upon between the parties. Where the parties differ as to the insurable value of the premises, it might, in the absence of any agreement between them as to the insurable value, be proven and determined, upon a reference to a master, what that value is; but I think that course is wholly unnecessary where the parties have agreed that the mortgagor shall insure for a definite amount. The application of the defendant to substitute by assignment the policy he now holds must therefore be denied. Also, the court must decline to approve the

appeal bond as tendered, and the amount will be fixed at the sum of \$6,500. Strictly considered, it ought possibly to be somewhat increased, to cover costs and other damages that might be included in the bond; but I think, on the facts above stated, it is quite apparent that the sum of \$6,500 would cover, not only any loss that would probably be assured by the insurance companies, but also any other costs or damages that may occur pending the appeal.

Since the foregoing opinion was announced the parties have agreed to fix the appeal bond at \$3,000, which is approved.

BLACK v. BLACK.

(Circuit Court, E. D. Pennsylvania. April 3, 1899.)

RECEIVER—DISTRIBUTION OF FUND OF RECEIVERSHIP—CLAIM AGAINST RECEIVER FOR CONVERSION.

A claim by an unsuccessful defendant, in an action to recover the possession of land, that a receiver appointed to harvest and sell the crops from the land pending the action trespassed on other land, and took possession of and sold crops therefrom owned by defendant, cannot be heard and determined on distribution of the fund in the hands of the receiver.

On Exceptions to Auditor's Report.

Francis T. Tobin, for exceptions.

N. Dubois Miller, opposed.

MCPHERSON, District Judge. In aid of proceedings to recover possession of land, brought by Mary K. L. Black, the apparent owner of the legal title, against Mary M. Black, an adverse claimant in possession, the circuit court, sitting in equity, appointed a receiver to harvest and sell the growing crops, and retain the proceeds, for the benefit of whichever party should finally appear to be entitled thereto. The receiver's account was afterwards filed, and referred to an auditor, who awarded the balance to the successful plaintiff; and these exceptions are filed by the adverse claimant, whose claim to the possession has been adjudged to be unfounded. Her principal objection is that she had no notice of the audit, and no opportunity to be heard. If the exceptant were interested in the fund, she would have good reason to complain that she did not receive notice of the audit. From her counsel's statement at the argument, however, it appears clearly that she is not interested, and had, therefore, no right to a voice in the distribution. Her claim to be interested rests upon the averment that a part of the fund was produced by the sale of crops that were not grown upon the farm of which the receiver had charge, but upon other real estate, which the exceptant had leased from the United States. These crops, she declares, were wrongfully seized and sold by the receiver, and their proceeds brought into the fund now before the court. In other words, the exceptant's claim is hostile to a part of the fund. She does not admit the receiver's title to such part, but denies it; asserting that she herself, and not the receiver, is the true owner thereof, and is entitled to a decree therefor. Such an assertion of title cannot be heard upon distribution. The

exceptant's position is that the receiver trespassed upon land in her rightful possession, and wrongfully converted a part of her personal property to his own use. This may be true; but, even if the fact be assumed, we are of opinion that redress cannot be afforded in this proceeding. Williams' Appeal, 101 Pa. St. 474; Geist's Appeal, 104 Pa. St. 351.

The exceptions are dismissed, the auditor's report is confirmed, and distribution is decreed in accordance therewith.

MAFFET v. QUINE.

(Circuit Court, D. Oregon. March 15, 1899.)

No. 2,540.

1. PUBLIC LANDS—RESERVATIONS IN PATENT—RIGHT OF WAY FOR DITCHES OR CANALS.

To bring a right of way for a ditch or canal within a reservation in a patent for public lands in pursuance of Rev. St. § 2339, in favor of such rights, when they have accrued and vested under local customs, laws, and decisions, it is not necessary that a local custom in the immediate vicinity be shown, but it is sufficient if such custom is established with reference to the state as a whole.

2. SAME.

When land included in a railroad grant reverts to the government, a subsequent patentee under the homestead laws takes the title subject to the right of way for a ditch or canal over it which was acquired prior to his entry; and it is immaterial whether the appropriation was made prior or subsequent to the time the government was reinvested with title.

3. EMINENT DOMAIN—APPROPRIATION OF RIGHT OF WAY—SUBSEQUENT CONVEYANCE OF LAND.

When a company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, whether with or without the consent of the owner, a subsequent vendee of such owner takes the land subject to the burden placed upon it, and the right to payment or damages from the company belongs to the owner at the time it took possession.

4. SAME—PUBLIC USE—FLUME FOR CARRYING LUMBER.

The construction of a flume to convey lumber from mills to a city is a work of such a public character as will authorize the condemnation of right of way therefor under the statutes of Oregon.

5. INJUNCTION—INTERFERENCE WITH USE OF EASEMENT.

Defendant acquired the ownership of land over which a flume had previously been constructed by a mill company, and continued to reside upon it for a number of years, without making any objections to the maintenance of the flume, until he sought to collect a claim from the mill company for wages. It appeared that his damages from the existence of the flume were merely nominal. *Held*, that the company was entitled to a preliminary injunction to restrain him from committing a threatened injury to the flume.

E. B. Watson and Geo. W. Joseph, for plaintiff.

Ralph R. Duniway, for defendant.

BELLINGER, District Judge. During the years 1887 and 1888 the Latourell Falls Wagon Road & Lumber Company, a corporation, located and constructed a flume for a distance of some four miles, connecting their lumber mill with the town of Latourell. This

flume was constructed of lumber, and crossed the land owned by the defendant, Quine. The plaintiff has succeeded to the property and rights of the Latourell Company. There is a question as to whether this land, at the time the flume was constructed, was public land of the United States, or whether it belonged to the Northern Pacific Railroad Company under its land grant. In 1892, Quine, the defendant, settled on the land, and made homestead application therefor, and about 1896 obtained his patent. The plaintiff alleges that the defendant, on about the 21st day of last January, broke down and destroyed a portion of the flume where it passes across his land, and thereby prevented the use of the flume in the transportation of the manufactured product of plaintiff's mill to point of shipping. The suit is brought for an injunction to restrain the defendant in the commission of the acts complained of, and the questions arising between the parties are now presented upon an application for a preliminary restraining order.

It is alleged that the flume, water, and water rights affected are of the value of \$10,000. The patent of the defendant vests the title to the land in him, "subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes recognized and acknowledged by the local customs, laws, and decisions of courts." The reservation in the patent in favor of right of way for the construction of ditches and canals where rights thereto have accrued under the local laws is in pursuance of section 2339 of the Revised Statutes, which provides that:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

It is contended in behalf of the defendant that no local custom recognized by the local laws or decisions of courts exists in the vicinity where this flume has been constructed, and it is further contended that at the time of such construction the land in question belonged to the Northern Pacific Railroad Company under its grant from congress, and that, therefore, the right of way claimed could not vest in the plaintiff's grantor, such lands not being at the time public lands of the United States. I am of the opinion that the local custom need not be proved with reference to the specific locality where the right is claimed; that it is sufficient if such custom is established with reference to the state as a whole. And it is common knowledge that the right to appropriate water is recognized by the local laws and by the decisions of the courts for irrigation and for manufacturing and agricultural purposes. Moreover, it is established by the testimony in this case that such custom exists with reference to flumes and water rights along the Columbia river, and in the vicinity of the premises in controversy.

As to the second question, it is immaterial whether these lands were covered by the grant to the Northern Pacific Railroad Company or not. If they so were, there must have been an interval of time when their ownership was reinvested in the government of the United States, in order to enable them to be taken under the homestead laws, and at such time the pre-existing appropriation and use would be as effective as if subsequently made, and when the title had so reinvested in the government. Moreover, it is settled that where a company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such land, a subsequent vendee of the latter takes the land subject to the burden thus placed upon it; and the right to payment from the company, if it entered by virtue of an agreement to pay, or to damages if the entry was unauthorized, belongs to the owner at the time the company took possession. *Roberts v. Railroad Co.*, 158 U. S. 1, 15 Sup. Ct. 756; *Railroad Co. v. Murray*, 31 C. C. A. 183, 87 Fed. 648. This doctrine applies in a case of this character. It may be questioned whether the company taking the right of way must have the power of condemnation; but, where such power exists, the established rule is that the owner at the time the possession was taken is entitled to the resulting damages where the entry was unauthorized, and that such damages cannot be recovered by the subsequent grantee of the premises. That a company like this has the right of condemnation is held in the case of *Lumbering Co. v. Urquhart*, 16 Or. 67, 19 Pac. 78. Now, independently of these considerations, the facts that this defendant settled upon this land four or five years after this flume was constructed and in operation, and has continued to reside upon it until last January, without making objection to the existence of this flume, or complaint concerning it; that the damages suffered by him appear to be merely nominal; that the acts complained of were prompted on his part because of the nonpayment of a claim for wages due from the plaintiff company, or from its grantor,—show that his act is merely vexatious, and that he is not entitled to the favorable consideration of a court of equity; that he has taken this step as a means for the collection of his debt, and not to protect any rights he may have in the land which is the subject of the easement claimed by the plaintiff. The preliminary injunction will be allowed.

ANDERSON v. CONDUCT et al.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1899.)

No. 538.

1. RAILROAD FORECLOSURE—FILING CLAIMS—NOTICE.

Where a decree on foreclosure of a railroad mortgage provided for filing all claims within a time specified, but did not provide for publication or notice of its requirement, is the provision binding upon claimants without notice, *quære*?

2. SAME—DECREE—EFFECT ON PURCHASER.

A decree confirming a foreclosure sale of a railroad required notice to be published that all claims against the property superior to those decreed

to be paid from the proceeds of the sale, and all claims against the receiver, should be filed within 60 days from its publication. *Held*, that the purchasers were bound by such decree.

3. SAME—LACHES OF CLAIMANT.

Where a decree confirming a foreclosure sale of a railroad provides for filing of claims before the master, and a party having a claim files the same, he becomes so far a party to the suit that he is bound to diligence necessary to protect his claim; and, where he fails to bring such claim to the notice of the court, he is without remedy, after decree and distribution, unless his claim was one which by the decree was imposed upon, and subject to which the purchasers acquired title to, the property.

4. SAME—RECEIVER'S CERTIFICATES—COSTS OF ADMINISTRATION.

Certificates of a receiver of a railroad were made a first lien on the property and its proceeds, and on all net income derived from its operation, "after the payment of expenses and costs of administration." *Held*, that a claim for personal injuries happening during the operation of the road by the receiver was an expense incurred in, and by reason of, the operation of the road, and should be charged upon the corpus of the property, failing income sufficient to pay it.

Appeal from the Circuit Court of the United States for the North-east District of Illinois.

In January, 1897, Stephen D. Bayer filed his creditors' bill in the court below against the Englewood & Chicago Electric Street Railway Company to enforce payment of a certain judgment by him recovered against that company. Subsequently a suit was brought for the foreclosure of a mortgage given upon the railway to secure certain bonds. The two causes were consolidated, and G. H. Condict was appointed receiver, and empowered to continue the operation of the railroad, and to conduct its business in the usual manner. On February 25, 1897, the court authorized the issuance of two series of receiver's certificates,—one, designated "Series A," amounting to \$60,000, which certificates upon their face recited, as was provided by the order, that they "are made a first and prior lien upon all property, assets, effects, and franchises of said the Englewood & Chicago Electric Street Railway Company, and the proceeds thereof, which now or may hereafter come into the possession, custody, or control of said receiver, and upon all net income derived from the operation of said railway, after the payment of operating expenses and costs of administration, superior to the lien of the bonds and trust deed mentioned in said order; superior, also, to all of the claims or liens now existing, or which may be hereafter created, against said property, or any part thereof; and all of said property and said income is pledged for the payment of said certificates of this series A, according to the terms thereof." The other series of certificates was designated "Series B," and certificates were authorized to be issued to an amount not exceeding \$265,000. These certificates, as was provided by the order, contained the like recitals, excepting that they were subject to the superior lien of the certificates of series A. There was issued of these certificates the full amount of series A, and \$247,439.73 of series B. On July 27, 1897, a decree was entered in the consolidated cause determining the amount due upon the bonds and coupons to be \$1,265,502.97; adjudging that the lien of the bonds was subject to the costs of the suit, to the costs and charges of the administration of the estate in the hands of the receiver, and to the receiver's certificates, and subject to certain specified claims (which do not include the claim in controversy), the question of the priority of which was reserved; directing a sale by the master, and that the proceeds be first applied to the expenses of the sale and the costs of the suit, including all charges, compensation, allowances, and disbursements of the receiver and his solicitor and counsel, then to the payment of the receiver's certificates, next to the payment of the bonds, next to the payment of the judgment of Bayer, next to the claims against the company which had been allowed. The twenty-eighth paragraph of the decree provides as follows: "And the purchaser or purchasers, and his or their successors and assigns, shall be entitled to have and hold the premises and property so sold free and discharged from the lien or in-

cumbrance of the mortgage foreclosed in this cause, and from the claim of all other parties to this cause, and those claiming under them, save only as herein expressly reserved, and subject only to such claims and allowances as shall be adjudged by this court to be prior in lien or superior in equity to the receiver's certificates hereinabove mentioned, and the mortgage foreclosed in this cause, and which shall be adjudged to be paid out of the property so sold, or any part thereof, and which the purchaser or purchasers may be required to pay by the order of this court, and also subject to all current liabilities of the receiver incurred, or obligations assumed or imposed upon him by order of this court, which may hereafter be adjudged and decreed herein to be superior in equity to the mortgage foreclosed in this cause and said receiver's certificates." The thirty-first paragraph of the decree reads as follows: "It is further ordered, adjudged, and decreed that all persons or corporations having or claiming any right against said receiver or against said property superior to any of the liens or claims herein provided to be paid from proceeds of said sale as aforesaid shall, within ninety days from the entry of this decree, file with Henry W. Bishop, master in chancery, a statement of said claim or claims, * * * and that any person or persons having any such claim or claims who shall fail to file the same as aforesaid shall not be allowed payment or recourse against the property herein decreed to be sold, or against the estate in the hands of the receiver, or the proceeds of said sale, and that the purchaser or purchasers at such sale shall purchase such property subject to the payment only of the amount allowed upon such of said claims so filed within said ninety days as shall be found entitled to priority over the lien of the trust deed herein foreclosed, and which the court may further find should be paid by said purchaser or purchasers."

On October 12, 1897, the property was sold by the master, and purchased by the appellees Heidelberg, Shipley, Bach, and Rice, for the sum of \$260,000, \$25,000 of which was paid in cash, as required by the decree, and the balance in receiver's certificates, series A and series B, as permitted by the decree. On November 10, 1897, the report of the master was confirmed, and the sale made absolute, "subject, however, to all and singular the terms of purchase as recited in said decree of July 27, 1897, which terms and conditions are by reference thereto hereby incorporated in this decree, with the same force and effect as if they were herein set forth at length." The decree of confirmation contains, also, these provisions: "And the court expressly reserves and retains jurisdiction of this cause, and power to enforce all the provisions of said decree of July 27, 1897, and of this decree, including the right to retake and resell said railroad properties in case said purchasers shall fail to comply with any order of this court made in respect to the payment of any indebtedness, obligation, or liability required by them to be made, or in respect of any of the other terms or conditions of the said decree, or of this decree, within thirty days after the entry of such order." "It is further ordered that said master in chancery shall publish in one newspaper of general circulation published in Chicago, Illinois, once a week for four successive weeks, a notice that all claims against the said property mentioned in said decree of July 27, 1897, which are, or are alleged to be, superior to the liens or claims provided in and by said decree to be paid from the proceeds of the said sale, and all persons having or claiming to have any claims against said G. Herbert Conduct, as receiver herein, shall within sixty days from the date of first publication of such notice, to be therein stated, file with Henry W. Bishop, Esq., master in chancery, a statement of said claim or claims, wherein there shall be set out the nature of said claim or claims, and the priority or priorities which are asserted in respect thereto." The notice published limited the time for filing claims to sixty days from February 26, 1898, the date of the first publication. On January 17, 1898, the court directed the payment of the costs of the suit and the solicitor's and master's fees, consuming all of the \$25,000 paid in cash by the purchasers, which payments were made on or before January 20, 1898. On April 1, 1898, an order was made directing the issuance of a deed to the purchaser, and the delivery of possession thereunder by the receiver; and it appearing to the court that from the 21st day of January, 1898, the income of the property in the hands of the receiver was insufficient to pay the expenses incurred by him, and that there was a deficit of \$4,304.77 in the operation and

maintenance of the property, and that the receiver had no further funds or assets to pay such deficiency, it was ordered that the purchasers, as a condition of the delivery to them by the receiver of the possession of the property, should assume and agree to discharge such deficiency arising from the business as aforesaid, and the purchasers thereupon, in open court, assumed to pay such deficiency; and the court expressly reserved jurisdiction of all parties to the consolidated cause, and of all matters and things not thereby disposed of, until the final disposition of all matters and things not disposed of. On the 29th of December, 1897, the appellant, Johannes Anderson, the administrator of the estate of Axel Alrich Anderson, deceased, pursuant to the decrees of the 27th of July, 1897, and of November 19, 1897, filed with the master a claim against the receiver for the death of his intestate by reason of the alleged negligence of the receiver's servants in the operation of the railway. This claim appears to have remained with the master unnoticed, and without action thereon. Subsequently, on the 23d of April, 1898, and within the time allowed by the decree of November 19, 1897, he filed a further claim, to which, on June 6, 1898, objections were filed by the receiver and by the purchasers at the sale. On July 19, 1898, the petitioner, Anderson, moved the court for a reference to a master to hear the claim. The court overruled the application, and, on motion of the objectors (appellees here), dismissed the claim at the cost of the petitioner, and entered judgment thereon, which order or decree is brought here for review.

A. H. Gross, for appellant.

Charles L. Horton, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, upon this statement of the case, delivered the opinion of the court.

If, as was said at the bar, the decision under review proceeded upon the ground that the petition of the appellant was not timely filed, the holding was erroneous. The time limited by the decree of July 27, 1897, for the filing of claims had, indeed, expired before the filing of the appellant's claim. That decree, however, did not provide for publication or notice of its requirement, and the omission was manifestly inadvertent. It is not to be presumed that the court designed, if it had the power, to cut off remedy without notice. This omission is supplied in the decree confirming the sale, which required notice to be published that all claims against the property alleged to be superior to those decreed to be paid from the proceeds of sale, and all claims against the receiver, should be filed within 60 days from the date of the publication of such notice. By that decree the purchasers are bound. *Olcott v. Headrick*, 141 U. S. 543, 12 Sup. Ct. 81. The claims of the petitioner (appellant)—both the one filed December 27, 1897, and the one filed April 23, 1898—were so filed within the time limited; notice being first published February 26, 1898. It was therefore erroneous to dismiss this petition upon the ground stated.

The claim of the appellant, as first filed, would seem to have been overlooked; for on January 17, 1898, the court directed distribution of the proceeds of sale, without making provision with respect to that claim, and those proceeds were accordingly distributed among the parties adjudged entitled thereto. However improvident that decree, if there remains no fund or property within the control of the court out of which the claim of the appellant, if

and when established, could be satisfied, it would be useless to reinstate the claim or to determine its merits. The appellant is not without fault. By filing his claim, he became so far a party to the suit that he was bound to active vigilance with respect to all things necessary to protect his claim. It was his duty to see that the fund then in court was not diverted from its legitimate purpose or improperly distributed. Failing therein, whether through ignorance or negligence, he is bound by acts done under authority of the decree of the court. The appellant is therefore without remedy, unless his claim is one which by the decrees was imposed upon, and subject to which the purchasers acquired title to, the property.

It is urged that the receiver's certificates take priority over a claim for personal injury subsequently incurred under the receivership. The certificates, by the order authorizing their issue, and upon their face, are made a first and prior lien upon the property and its proceeds, and upon all net income derived from the operation of the railway, "after the payment of operating expenses and costs of administration." The holders of these certificates took them with the knowledge that the railway was in control of and under the operation of the court, through its receiver. It was contemplated that, until sale and delivery of possession thereunder, such operation should continue. Such operation might result in profit or in loss. The expense of operation should primarily be paid out of the income derived from the operation of the railway; but if, as here, there be no such income, that cost may properly be allowed priority out of the corpus of the property. *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809. This is the plain meaning of the language employed in the order authorizing the certificates. The expression in the order and the certificates, "after the payment of operating expenses and costs of administration," must be referred to, and limits, the lien declared upon the corpus of the property, and cannot be referred to income; for the term employed in the order is "net income," and the expression quoted, applied to net income, would be meaningless. It is not presumable that the court would divest itself of the power to pay the expense of operation which it had assumed. That would be an act of *felo de se*. It granted to the certificates a lien paramount to that of the trust deed, subject, however, to the payment of operating expenses and costs of administration; and this, we think, comprehends all liability incurred in the operation of the railway.

But it is said that claims for personal injuries happening during the operation of the road by a receiver cannot be allowed, as a cost of administration, in priority to the receiver's certificates; and this in analogy to the doctrine that claims for personal injuries accruing prior to foreclosure are denied priority to the lien of the trust deed, under the six-months rule. We cannot sustain this contention. The one rests upon an entirely different principle from the other. *Union Trust Co. v. Illinois Midland Ry. Co.*, *supra*. In the one case the arbitrary displacement of the lien of the mortgage or

trust deed by a certain character of expense of operation is allowed during a certain arbitrary period after default in payment of interest or principal of the mortgage, and before suit to foreclose, and while the mortgagor is in possession, because the railway must be kept a going concern, and damages for personal injury arising during such period of operation are not of the character of cost essential to the operation; but if the mortgagee were in possession, operating the railway, none would doubt liability for personal injuries. Here, at the request of the trustee, the court assumed, and, with the knowledge and acquiescence of the holders of the receiver's certificates, continued, the operation of the railway. They subjected their securities to the expense of operation,—the trustee, by its affirmative act in praying the court to take possession and operate the railway; the holders of the certificates, by the provision of the order authorizing the issuance of the certificates, and which was expressed upon their face, making them subject to the payment of operating expenses and the cost of administration. For that purpose, and to that extent, these parties were vicariously in the possession and operation of the railway through the court as their representative. All liabilities of the receiver were imposed upon the corpus of the property, failing income, as certainly as a mortgagee would be personally liable if he possessed and operated the railway. Technically, perhaps, payment for personal injury cannot correctly be denominated cost of operation; but it is an expense incurred in and by reason of the operation, and as such should be allowed in the accounts of the receiver. *Klein v. Jewett*, 26 N. J. Eq. 474. That such was the meaning of these decrees seems to us incontestable. Possibly, in the wording of the decrees, there is lacking that precision of statement desirable in documents of such importance. For example, in the twenty-eighth paragraph it is said that the purchaser should take over the property subject to claims superior in equity to the receiver's certificates and the mortgage, and also subject to all current liabilities of the receiver incurred, or obligations assumed or imposed by the order of the court, which should thereafter be adjudged to be superior in equity to the mortgage and said receiver's certificates. By the thirty-first paragraph the purchaser takes subject to claims which shall be found entitled to priority over the lien of the trust deed, omitting reference to the receiver's certificates. But, taken as a whole, we think these decrees are sufficiently explicit. The decree of sale provides that the proceeds of sale should be applied—First, to the payment of the costs and compensation of certain officers, and to the "costs and charges of the administration of the estate in the hands of the receiver herein, including all charges, compensation, allowances, and disbursements of the receiver and his solicitors and counsel"; second, to the payment of the principal and interest of the receiver's certificates, series A; and, third, to the payment of the principal and interest of the receiver's certificates, series B. Thus, by the very terms of the decree of sale, the expense of the receiver in the administration of the estate was to be paid in priority to the receiver's certifi-

cates; thereby adjudging that such expense was superior in equity. The decree of confirmation provided for the publication of the notice to file claims against the property which are alleged to be superior to the liens or claims provided by the decree to be paid from the proceeds of the sale, and also for all claims against the receiver, thus distinguishing the two classes; and that distinction is recognized in the notice which was approved by the court. It is doubtless true that it was supposed at the time of the decree that the \$25,000 required to be paid in cash upon the sale would be sufficient to discharge the liabilities having priority over the receiver's certificates. It is not, however, to be supposed, nor does the language of the decree imply, that the court limited the amount of claims which should be paid prior to the receiver's certificates to that sum. It was a mere deposit required by the court, that such claims might be presently discharged. The provision was in the interest and for the convenience of the holders of the receiver's certificates, who, it was supposed, might become the purchasers, and were allowed to pay their bid, except as to the sum stated, in the receiver's certificates; but this was subject to the power reserved to retake and resell the property, if the purchaser should fail to discharge the demands which the court should determine were entitled to priority. Otherwise, the action of the court in distributing this fund of \$25,000 prior to any publication of the notice to file claims would be wholly indefensible. It is clear that that fund was so distributed because the court still held control of the property to satisfy all lawful claims against the receiver; and this conclusion is fortified by the fact that in the distribution of that fund no provision is made for the payment of the receiver's compensation, or for any expense incurred in the management of the road; and, by a subsequent decree authorizing the issuing of the deed, it was made an express condition of delivery of possession of the property that the purchaser assumed, and agreed to discharge, the stated deficiency arising from the operation of the road to meet obligations incurred by the receiver. We are therefore of opinion that the appellee's claim, if established, should be charged upon the corpus of the property, and adjudged superior to the right of the purchasers. The decree is reversed, and the cause remanded, with directions to the circuit court to proceed to hear and determine the claim in question, and for further proceedings conformable to this opinion.

HARRIS V. YOUNGSTOWN BRIDGE CO. LOUISVILLE TRUST CO. v.
 SAME. COLUMBIA FINANCE & TRUST CO. v. SAME. GAULBERT
 et al. v. SAME. CENTRAL THOMSON-HOUSTON CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. March 31, 1899.)

Nos. 503-506, 519.

1. CORPORATIONS—FORECLOSURE OF LIENS—METHOD OF SELLING PROPERTY.

Where a first mortgage on the property of a corporation becomes a lien by virtue of an after-acquired property clause on property subsequently purchased by the mortgagor, but as to a part thereof subject to another

lien, the holder of such lien on its foreclosure is entitled to bring in the mortgagee, and to insist on a sale of the part of the property covered by his lien free from the mortgage incumbrance.

2. MECHANIC'S LIEN—IMPLIED WAIVER OF RIGHT.

Although the mere fact that the parties to a contract do not contemplate a mechanic's lien may not of itself defeat the right to a lien, yet such right may be impliedly waived by acts which show that such was the intention.

Appeals from the Circuit Court of the United States for the District of Kentucky.

Judson Harmon and Thomas W. Bullitt, for trustee.

St. John Boyle, for Louisville Trust Co.

W. O. Harris, for Kentucky Nat. Bank.

A. P. Humphrey, for Youngstown Bridge Co.

E. T. Trabue, for Columbia Finance & Trust Co.

William Marshall Bullitt, for Gaulbert and others.

Helm Bruce, for Central Trust Co.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. Two petitions for modification of the opinion of the court heretofore rendered herein (90 Fed. 322) have been filed, and a third, but informal, suggestion of a change has also been made. Theodore Harris, trustee, complains that the lengths of track on the different classes of terminal property have not been correctly stated in the opinion. It was not intended to make a finding of the exact lengths of the different tracks, or to foreclose a full examination of the facts, upon this issue by the circuit court. The distances stated in the opinion were given for the purpose of illustrating and making clear the principles which the court thought should be applied to the case. It is not, therefore, deemed necessary to examine the record to determine whether the measurements as set forth in the opinion are supported by the evidence or not.

Harris, trustee, further complains that the language of the opinion is likely to give the impression that he has not, under his mortgage, a lien for \$400,000 on the property described in the same. We do not think the opinion can be so construed. The fact that he had such a lien was not denied at the bar. The only issue in controversy was to what extent his lien was prior in right to that of the first mortgage bonds. We held, and still hold, that the whole issue of bonds is secured by a first lien prior in right to that of the first mortgage bonds upon a certain part of the property to the extent of the amount paid for said part and for the improvements thereon. Thus, if it turns out that the amount spent in the purchase and improvement of that part is \$150,000, then the mortgage bondholders whom Harris represents will have a lien to secure their \$400,000 upon that part, but they cannot realize therefrom more than \$150,000 and interest for application to their debt. To hold that there is a lien of \$400,000 in extent upon the part in question, prior in right to the first mortgage, would be to ignore the principles upon which our judgment in this case rests.

Harris, trustee, further complains that the mode of selling the bridge

and the main line as one parcel and the new terminals as another, and the offering of them as a unit, is not satisfactory. We considered this question at the original hearing, and find nothing in the brief at rehearing to change our views. The division was made to permit the terminal bondholders to protect their interests. We think we should be going too far in directing a sale of the bridge, without an approach on the Kentucky side, as one parcel, in accordance with the prayer of Harris, trustee.

In the opinion already handed down the following language was used:

"The sale decreed by the circuit court was a sale subject to the lien of that mortgage. It is not necessary to change this, except to declare that the prior lien of the first mortgage covers only an undivided part of the new terminals, and the purchaser will take the same subject to such a lien. The junior lien which the first mortgage trustees will have on the remainder of the new terminal will simply give to them the right to redeem that remainder from the purchaser." 33 C. C. A. 83, 90 Fed. 337.

It is suggested to the court by counsel for some of the parties in interest that to leave the junior lien of the trustees of the first mortgage unaffected by the sale will be to interfere with the salability of the property. It is said that the trustees of the first mortgage are parties to the bill, that no reason appears why the sale of new terminals may not be made free from the lien of the first mortgage upon that undivided part thereof upon which it is only a second lien, and that to permit the first mortgagees to retain a power of redemption in this undivided part of the terminals will be a cloud upon the title, discouraging to purchasers. Upon consideration we are satisfied of the wisdom of these suggestions, and the opinion heretofore filed is modified in so far as to direct that the new terminals shall be sold free from all lien except that held by the trustees under the first mortgage upon the undivided part thereof, upon which they shall be found to have a first lien. Should the sale produce more than enough to satisfy the first lien held by the terminal bondholders on their undivided part of the terminals, the surplus must be distributed to the trustees of the first mortgage for application to the interest and principal thereof. We change the order thus on the ground that a prior lienor has the right to bring in all subsequent lienholders, and to have the property sold free from all such subsequent incumbrances, in order that there may be realized from the sale as much as possible.

The Central Thomson-Houston Company complains that the court erred in denying to it a mechanic's lien on the ground that neither party to the contract contemplated a lien. The argument of counsel is that a lien exists independent of the intention of the parties to the contract, and the case of *Van Stone v. Manufacturing Co.*, 142 U. S. 128, 12 Sup. Ct. 181, is cited to sustain this contention. It is not held in that case that parties may not impliedly waive a lien, but only that under the statute of Missouri, as construed by its courts, the mere taking, by the contractor, of a promissory note for the amount due, payable after the time in which he must file his lien, but within the time in which he must bring his suit, though it may show that neither party when contracting contemplated a lien, does not constitute a waiver

of the lien. In the case at bar two of the notes provided for in the original agreement would not fall due until after the time within which suit must have been brought. Moreover, this was but one of several circumstances noted in the opinion which the court held to be affirmative evidence of an intention to waive the lien. It is true that the contract for security was not in every respect complied with, but security of a different kind was accepted under the contract. This the circuit court regarded as satisfactory evidence showing a modification of the contract in regard to security, and a compliance therewith. In this view we concur. It is not a case, therefore, in which, by a breach of a contract for security waiving a lien, the contractor is remitted to his lien, as in *Van Stone v. Manufacturing Co.* The petition of the Central Thomson-Houston Company for a rehearing is denied. The order in part affirming and in part reversing the decree of the circuit court is modified as indicated in the foregoing opinion.

BAXTER v. LOWE et al.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1899.)

No. 1,111.

INSOLVENT CORPORATION—CLAIM FOR ATTORNEY'S SERVICES.

A finding by the court, in sustaining exceptions to a master's report, that services rendered by an attorney who was a stockholder and creditor, and had been one of the officers of a corporation, were not for the benefit of the corporation, but in furtherance of a plan to wreck it, and therefore would not support a claim for compensation from the receiver, held to be supported by the evidence.

Appeal from the Circuit Court of the United States for the District of Minnesota.

George N. Baxter, in pro. per.

L. A. Merrick and A. N. Merrick, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. At the suit of Henry B. Lowe it was decreed that the Pioneer Threshing Company be dissolved, and its affairs wound up, and a receiver was appointed for that purpose. George N. Baxter, the appellant, filed his petition of intervention in the case, claiming there was due him from the dissolved corporation for attorney's fees, after allowing a credit thereon of \$432.56, a balance of \$1,084.45. His claim was referred to a special master, who reported in favor of its allowance. Exceptions were duly taken to the master's report by the receiver, and upon a hearing thereof the court sustained the exceptions, except as to two items, aggregating \$100, which were allowed. The court found that the appellant had "received from the defendant corporation the sum of \$432.56 on the 1st day of May, 1896," and ordered that the \$100 allowed the appellant for fees be credited on that sum,—the \$432.56 received by him from the corporation. Just how the appellant became possessed of this \$432.-

56 is not disclosed by the record; the master's report only stating that the "claimant credits the payment of a sum (\$432.56) made under peculiar circumstances." No judgment was rendered in favor of the receiver for the balance of the \$432.56, after deducting the \$100 allowed the appellant.

Some of the stockholders and directors of the corporation concocted a scheme to wreck the corporation for their own profit and benefit, and to the detriment of its other stockholders and creditors. This much has been judicially determined and decreed, and is not subject to review. It was the attempted accomplishment of this scheme that led to the decree dissolving the corporation and for winding up its affairs, and the appointment of the receiver for that purpose. The appellant was a stockholder and creditor of the corporation, and at times its secretary and attorney. He was fully advised of the action of those stockholders and directors who attempted to wreck the corporation, and actively aided, by his advice and counsel as an attorney, in the efforts that were made to accomplish that result. And the material question in the case is whether the services charged for were rendered for the corporation, or for and on behalf of those members of the corporation who attempted, for fraudulent purposes, to wreck it. The court below found the services charged for, with the exception of \$100, were rendered for the latter purpose, and not for, or in the interest of, the corporation. The finding of the lower court on this issue is presumptively correct. We have read the evidence and the record in the case very carefully, and are unable to say that the finding of the circuit court is not supported by the evidence; on the contrary, we think that it is.

From the record in the case it is apparent that litigation between these parties on this subject will continue without profit or gain to either, but with loss to both, as long as there is a thread to hang a controversy upon. A stop must be put to further litigation, and to that end the decree of the circuit court will be affirmed, with the modification that the decree below shall be deemed and held to be a full and complete satisfaction of all claims or demands of each party against the other growing out of the transactions mentioned, and especially a satisfaction of any claim or demand the receiver might or could assert against appellant for any balance of the \$432.56, admitted by the appellant to have been paid to him, after crediting thereon the \$100 found due the appellant. As thus modified, the decree below is affirmed.

WATSON v. FORD.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 612.

CONSTRUCTION OF CONTRACT—IMPLIED CONDITIONS—WHEN OF THE ESSENCE OF THE CONTRACT.

Defendant contemplated the establishment of works for the manufacture of soda ash and other chemicals, in which a large amount of capital would be required. Previous success in the manufacture of soda ash commer-

cially had been due to the use of patented processes and machinery. Plaintiff was a chemical engineer, and a reputed expert in the designing of machinery for soda ash manufacture, with which he was experimenting. The parties entered into a contract, by which plaintiff engaged to devote his entire time and skill to the service of defendant in his business for three years, for which he was to receive a yearly-increasing salary, and, if the business was made commercially successful, a bonus in stock of the manufacturing company to be then formed. The contract contained a provision that any inventions or discoveries made by plaintiff during the term relating to the manufactures contemplated should be disclosed to defendant, and, if deemed advisable, should be patented, at his expense, for the joint and equal benefit of the parties. *Held*, that such provision was an essential part of the consideration for the defendant's obligation, and constituted an implied condition, a breach of which by plaintiff justified the termination of the entire contract by defendant, and relieved him from liability for future salary or for the delivery of the stock; plaintiff having been paid his salary to the time of his discharge.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This was an action to recover damages for a breach of the following contract:

"Agreement made this 29th day of April, Anno Domini one thousand eight hundred and ninety-three, between J. B. Ford, first party, and John Robert Watson, second party, witnesseth: Whereas, said first party is the owner of certain property and improvements situate at Wyandotte, Michigan, and contemplates the use and operation thereof for the purpose of manufacturing soda ash and other chemicals; and whereas, said second party is by profession a chemical engineer, and has skill and experience in the business proposed to be conducted by said first party: Now, this agreement witnesseth that, in consideration of the respective covenants of the parties hereinafter set forth, it is agreed, by and between the parties, as follows, to wit: First. Said second party shall and will give unto said first party his services and his entire time, skill, and attention in and about the business proposed to be conducted by said first party, as aforesaid, at Wyandotte, Michigan, for and during the term of three (3) years, from April 3, 1893, and that during said term he will not willfully neglect or depart from said employment, nor do or cause, or willfully suffer to be done or caused, any act or thing whatsoever to the prejudice of the said first party in or about said business, but, on the contrary, shall and will order and direct all workmen, servants, and persons employed in and about said business to do their work, service, and duty to the utmost of his skill, knowledge, and ability, and for the highest profit and advantage of the said first party. Second. Said first party shall and will pay unto the said second party for his said services the just and full sum of two thousand seven hundred and fifty dollars (\$2,750) for the first year, three thousand two hundred and fifty dollars (\$3,250) for the second year, and three thousand seven hundred and fifty dollars (\$3,750) for the third year, each of said annual sums to be paid in monthly payments. Third. As soon as the works of said first party shall have been placed in successful operation under the processes and methods adopted by said second party, so as to manufacture soda ash at a commercial profit, said first party agrees to form a corporation, under the laws of Michigan, for the purpose of conducting said business, the capital stock of which shall be paid by the transfer to said corporation of the entire property, assets, and effects used or employed in or about said business; and upon the formation and organization of said corporation said first party shall and will further pay and deliver unto the said second party five-ninths of two per cent. ($\frac{5}{9}$ of 2 per cent.) of the whole amount of said capital stock, in full-paid shares. Said second party shall not, at any time, sell the whole or any part of the stock mentioned in article 'third,' without first offering the same to said company; and that, when offered, said company shall have the right of purchasing the same at the value actually as shown by the books and accounts of the company. Fourth. Should second party, during

said employment, make any inventions or discoveries pertaining to, or of use or advantage in, the business of manufacturing chemicals, the same shall be made known unto said first party; and, if so requested by said first party, said second party shall and will, at the cost and expense of said first party, procure letters patent therefor, the same to be granted and issued to and for the parties hereto, as joint owners in equal shares; but, should said first party, within three (3) months' notice of any such invention or discovery, fail or decline to avail himself of the option or privilege hereby granted, said second party shall be at liberty to procure letters patent in his own name, and for his own use and benefit. Fifth. Should it become apparent, in the judgment of the said first party, at the expiration of the period of six (6) months from and after the date at which the actual operation shall have begun, that said second party has not made the operation a commercial success, or cannot do so, owing to the inefficiency of the plant and process employed by him, the said first party, at his option, may terminate this agreement by giving thirty (30) days' notice of his intention to do so. In witness whereof, the said parties have hereunto set their hands and seals, the day and year first aforesaid.

"J. B. Ford.

[Seal.]

"By J. B. Ford, Jr.

"John R. Watson. [Seal.]"

It appears that the plaintiff, John R. Watson, entered the employ of the defendant under the contract, and remained in such employ until the 28th day of June, 1894, and received the monthly installments upon his salary due down until that day. Upon that day Watson declined to comply with the fourth paragraph of the contract, and refused to assign to the defendant a half interest in certain patents which Watson had taken out for inventions or discoveries pertaining to the business of manufacturing chemicals during said employment. He was given 24 hours' time within which to comply with the request. He refused, and was discharged. The sole question which the court finds it necessary to consider in this case is whether a breach of the fourth paragraph by Watson, the party of the second part, is such a breach as releases the first party from a further compliance with the contract on his part; or, in other words, whether the second and third stipulations are, with the fourth, dependent or independent covenants or conditions. The court below held that compliance with the fourth covenant by Watson whenever circumstances should arise making it operative was a condition precedent to a continuing obligation on the part of the defendant to pay future installments of wages or to transfer the stock mentioned in the third paragraph. The court, therefore, held that a breach of the fourth stipulation defeated Watson's right to subsequent salary or to the stock.

T. E. Tarsney, for plaintiff in error.

Otto Kirchner and W. J. Gray, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). Ford was about to invest a great deal of capital in a new and experimental business. The making of soda ash had been commercially successful when a certain patented process was used, but the field was not fully explored. There was believed to be room for extensive development and improvement in the process of manufacture. Watson was a reputed expert in designing and making machinery for the successful production of soda ash. It was a business in which the ownership of patents was exceedingly important. The contract, shortly stated, was that Watson, on his part, was for three years to devote his entire time and skill to the designing, erection, maintenance, and operation of a soda ash making plant, for the benefit of Ford so exclusively that Ford should have a one-half interest in all patents which Watson

might take out for improvements in the process or machinery used in the manufacture; while Ford, on his part, was to pay Watson an increasing annual salary, in monthly installments, and a bonus of company stock in the end, should the experiment be a commercial success. The salary and stock were the consideration for the services, skill, and patented discoveries. The question is whether the conveyance of the patent was an implied condition of further obligation of Ford to pay the future salary and the stock. Prof. Langdell, in his summary of the Law of Contracts, points out that breaches of implied conditions are divisible into two classes, according as they take place before any part of the condition has been performed ("in limine," as he terms it), or during the progress of its performance. Section 160. He says:

"Breaches of the latter class, which may be termed breaches after part performance, give rise to different considerations; for, if such a breach disables the party committing it from suing, the result may be that he will receive nothing for what he has already done, and that the other party will receive the benefit of the part performance without paying for it. If the breach goes to the essence of the contract, the party committing it cannot complain of this result; but if it is slight and unimportant, and especially if it happens after the performance is nearly completed, he may justly say that the penalty is out of all proportion to the wrong."

After pointing out that an express condition is to be enforced according to its letter, because the result of agreement, the learned author proceeds:

"An implied condition, on the other hand, is the creature of the court, and the court is therefore responsible for its consequences. If it is permitted to work injustice, the only excuse for the court is that it is unavoidable; and, if it is permitted to work more injustice than it prevents, not even that excuse is available, for, assuming it to be true, it shows that the condition has no right to exist. This responsibility rests upon the court, not only because an implied condition is its creature, but because, being its creature, the court has the power of molding it as the purposes of it require. * * * Influenced by the foregoing considerations, courts of law have adopted the principles of courts of equity (so far as their procedure would admit of their doing so) in respect to breaches of implied conditions after part performance; and therefore, if the breach goes to the essence, they permit it to be set up as a defense; but, if it does not go to the essence, they permit the plaintiff to recover, and leave the defendant to his cross action."

The principles above stated are illustrated in many cases, to some of which we may properly refer. In *Leopold v. Salkey*, 89 Ill. 412, the action was for damages for breach of a contract of employment. By the contract, the plaintiff agreed to serve the defendant as superintendent in a mercantile business for three years, at a fixed salary. The defendant pleaded that the plaintiff, after entering the employment, was absent two weeks. The plaintiff showed that he had been arrested, without fault on his part, and detained in jail for the two weeks of his absence, and that, on his release, he at once tendered his services. The defense was sustained, on the ground that the two weeks' absence from duty was a breach that went to the essence of the contract. In *Johnson v. Walker*, 155 Mass. 253, 29 N. E. 522, an action to recover the balance due upon a contract to work for defendants for a year as foreman in a shoe shop, it appeared that

the plaintiff, after working a part of the year, and receiving pay therefor at the stipulated rate, became ill, and was necessarily absent from work seven weeks, and that when, upon recovery, he offered to resume work, he was informed that he had been discharged, and a man hired in his place. Judgment was given for defendants. The court said:

"Whether a temporary illness of a few hours, or, in some instances, perhaps, of a few days, would in all cases come within the implied condition, we need not consider. In the present case, the plaintiff was sick about seven weeks, and during all that time, as the exceptions state, was incapacitated from work in the defendants' shop. We think that, as matter of law, this constituted such an interruption of and failure to perform his contract, on the part of the plaintiff, that the defendants were justified in terminating it and employing another person in his place."

In *Powell v. Newell*, 59 Minn. 406, 61 N. W. 335, a patient made a contract with a physician for a year's treatment, giving his note for the stipulated compensation. In a suit on the note, the defense was that defendant had applied to the physician for treatment, and could not see him because the physician was ill. Nothing was said to defendant as to how long he might have to wait for plaintiff's services. It was held that this was a good defense to the note. In *Poussard v. Spiers*, 1 Q. B. Div. 410, the action was on a contract for the employment of the plaintiff's wife as a leading opera singer, for a season of three months. She attended most of the rehearsals, but was by illness prevented from attending the first three or four public performances. It was held, as matter of law, that the plaintiff's inability to perform at the opening and early performances went to the root of the matter, and justified the defendants in rescinding the contract. In *Fillieul v. Armstrong*, 7 Adol. & E. 557, on the other hand, it was held that the failure of a French teacher engaged for a year to report for duty for three days after a vacation did not justify his discharge. In *Bettini v. Gye*, 1 Q. B. Div. 183, the action was for breach of a contract to employ plaintiff as a singer for a season of three months in theaters, halls, and drawing rooms. The plaintiff stipulated not to sing in England for three months before the engagement, and agreed to be in London six days before March 30th for rehearsals. He was detained by illness so that he was four days late, and could only give two days for rehearsals. It was held that this breach did not go to the root of the matter, and did not constitute a defense; that, if the contract had been for a season of opera, rehearsals would have been most important, and failure to attend them might have been a fatal breach, but here the singing was to be of a great variety. More than this, the singer had been obliged to abstain from earning money by his voice in England for three months before the rehearsals without compensation, which afforded a strong argument for saying that subsequent stipulations were not intended to be conditions precedent, unless the nature of the thing strongly showed they must be so. The reasoning of Mr. Justice Blackburn in the last case suggests one of the considerations which should be very persuasive with a court in determining whether a covenant involves an implied condition, and that is the extent of the penalty to which

such a construction must subject the defaulting party. As Prof. Langdell says in his Summary of the Law of Contracts (section 168):

"The following rules are to be taken, however, only as illustrations of the more general rule that a part performance, in order to raise an equity in the plaintiff's favor, must substantially change his position, to his own detriment and to the defendant's benefit; or, if not to the defendant's benefit, at least to his own detriment. It seems, therefore, that the slightest breach of condition will authorize the throwing up of a contract, whenever it can be done without putting the plaintiff in any worse position substantially than he would be in if the contract had not been made."

In the light of the foregoing authorities, we come to consider the case at bar. It is a case of part performance and a default. Is the default a breach of an implied condition? Does the failure to convey the patents go to the root and essence of the contract? Ford was seeking to establish a great business, the life of which was intended to extend far beyond the three years of Watson's employment. Watson was experimenting. His successful discoveries Ford necessarily counted on as material aids to success, and it was of the highest importance that he should secure such a title to those discoveries that he might use them and prevent others from using them. Previous success in the same business had been due to patented processes and machinery, and it was vital that Ford should protect his interest in discoveries and improvements he was paying so much to secure. Should Watson retain the right, after a successful development of the business, to prevent the use of such improvements as he might invent, it would materially interfere with the success of the enterprise. The agreement that Ford should share in the ownership of the patents was a material part of the consideration for which he was to pay Watson's salary and stock bonus. The contract affords no method by which any particular part of the consideration can be apportioned to the conveyance of the patents. That was merely part of the service, and an important incident to the devotion of all of Watson's time and skill to the new business. Watson received monthly pay for his services down to the day of his discharge. A construction of the contract which makes his refusal to convey the patents a breach of an implied condition does not visit him with the penalty of loss of pay for any work actually done. He had a chance of receiving a stock bonus; but this was remote and contingent, for Ford had the option, at the end of six months after actual operation began, to terminate the contract if he thought it not to be a commercial success. Considering the importance of the patent rights in the business, and the lightness of the penalty imposed for breach of the condition if implied, we hold that the breach went to the essence or root of the contract, and that the defendant, Ford, was entitled with the covenants on his part to be performed. *Cadwell v. Blake*, 6 Gray, 402, 411. The judgment of the circuit court is affirmed.

UNITED STATES v. YEE MUN SANG.

(District Court, D. Vermont. April 8, 1899.)

1. ALIENS—APPLICATION TO ENTER UNITED STATES—CONCLUSIVENESS OF DECISION OF IMMIGRATION OFFICERS.

Under the provision of the sundry civil appropriation act of August 18, 1894 (28 Stat. 390), which makes the decision of the immigration or customs officers refusing an alien admission into the United States final unless appealed from, such decision is conclusive against the applicant's right to enter as an alien, but not upon the question of his alienage, and does not preclude him from afterwards claiming the right to enter or remain in the United States on the ground that he is a citizen thereof; the question of citizenship being one which was not, and could not be, committed for final decision to executive officers.

2. SAME—PROCEEDING FOR DEPORTATION OF CHINESE LABORER—ISSUE AS TO CITIZENSHIP.

On an issue as to the citizenship of a person of the Chinese race arrested as a Chinese laborer unlawfully within the United States, the testimony of the defendant that he was born in this country is entitled to be considered and weighed by the same rules applicable to all other testimony, although, if untrue, it would be impossible to contradict it.

Appeal from United States commissioner.

This was an appeal by the defendant from the decision of a commissioner ordering his deportation as a Chinese laborer unlawfully in the United States.

Rufus E. Brown, for appellant.

James L. Martin, Dist. Atty., for the United States.

WHEELER, District Judge. The appellant is of the Chinese race, and presented himself to the customs officials of this district, at Richford, for admission to this country as a merchant, which was, on January 6th last, refused. On March 18th he was arrested as a Chinese laborer unlawfully in this country, and was brought before the commissioner for hearing. There he claimed the right to come into and remain within this country as a native-born citizen thereof. The government claimed that he was not such a citizen, and that the refusal of admission by the customs officials not having been appealed from to the secretary of the treasury, was final as to his rights in respect to coming into, or afterwards being in, this country. The commissioner appears to have held that the refusal of admission was not conclusive, but to have found against citizenship, and to have ordered deportation. From that order this appeal was taken, and the same questions have been made here.

The conclusiveness of the refusal of admission rests upon a provision in the sundry civil appropriation act of August 18, 1894, that:

"In every case where an alien is refused admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury." 28 Stat. 390.

The validity of this provision rests upon the power of congress to exclude aliens from the United States, and to commit the decision of their right to come or to remain to executive officers. Nishimura

Ekin v. U. S., 142 U. S. 651, 12 Sup. Ct. 336; *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967. This is because they are in fact aliens, and as such may be excluded, and not because the power to decide whether they are aliens or citizens has been or could be committed finally by congress to customs officials, or other executive officers. In this case the officers did not assume to decide that the appellant was an alien, but assumed that he was such, and to decide that he was not so made to appear to be a merchant as to entitle him to admission to this country as an alien Chinese merchant, and excluded him from admission as such. This decision is doubtless final as to his character as a merchant in that respect. But citizenship of the country is a status of the person that is attendant at all times, everywhere, and cannot be taken away, or but in a formal way, as provided by law, be renounced even by act of the person. If the appellant was in fact a citizen of the United States, he would not lose his citizenship by presenting himself as an alien merchant to the customs officials for admission to this country as such. He submitted his character as a merchant to their judgment, and their decision upon that extended no further. The only proper effect of that proceeding upon his claim of citizenship now is the bearing of the inconsistency of the claims upon his evidence as to citizenship. If he was entitled to come freely as a citizen, the question why he attempted to come qualifiedly as a merchant naturally arises, and, unexplained, would cast a serious doubt upon the good faith of the claim of citizenship. It would look like an afterthought. But his claim as a merchant is founded upon a declaration before a commissioner in Boston, supported by the affidavit of two witnesses, prior to leaving this country. It begins: "I, Yee Mun Sang, on oath declare that I was born in San Francisco, California, in the building numbered 711 Dupont street, on the sixteenth day of August, 1874, of Chinese parents; that I resided there fifteen years. From thence I came to Boston, Massachusetts, where I have resided ever since." This declaration is not evidence of the nativity now, but it shows that this claim is not an afterthought, and it is consistent with this claim now. He testifies now to his birth in that street at about that time, and he is supported as to this by his father. He appears to have been understood to have said, before the customs officials, that he did not know who his father was; and, if that statement had been understandingly made, it would justly detract much from his credibility. He now denies making it, and is understood with difficulty. It would have been so shallow and inconsistent that, while the truthfulness of those who now testify that he made it is not doubted, the fact of his understanding about it is doubted. Being of the Chinese race, and appearing at the border of the country, coming in, the burden of showing his citizenship would rest upon him. The testimony as to his place of birth is not preposterous or unnatural, and cannot justly be rejected, although it cannot be contradicted if not true. It must be weighed as lawful evidence in any case must be. When so weighed, it appears to prove the fact. There is said to be more evidence here than there was before the commissioner, and it seems to lead to a different result. Appellant discharged.

ANDREWS et al. v. SCHREIBER.

(Circuit Court, W. D. Missouri, W. D. March 4, 1899.)

1. SALE—COMPLETION OF CONTRACT—ACCEPTANCE OF OFFER BY TELEGRAPH.

An offer to sell, and an unconditional acceptance, by telegraph, constitutes a completed contract, to which conditions cannot be thereafter added, except by mutual agreement.

2. SAME—DELIVERY—TRANSFER OF BILLS OF LADING.

Plaintiffs contracted with defendant, who resided at a distance, for the purchase of wheat, to be shipped by a common carrier. By the custom of the market, understood by both parties, the grade and weights were to be fixed by the inspectors at the point of destination. Defendant made shipments, taking bills of lading to himself, to which he attached drafts, which were forwarded for collection, and accepted and paid by plaintiffs. *Held*, that there was a delivery of the wheat under the contract on the payment of the drafts and transfer of the bills of lading, though it had not then been inspected or weighed.

3. SAME—IMPLIED WARRANTY.

Under such circumstances, there was an implied warranty on the part of the defendant that the wheat shipped was of the grade called for by the contract, and where, on inspection, it fell below such grade, the plaintiffs were not obliged to return it, but had the right to retain it, and sue for the breach of warranty.

4. SAME—ACTION FOR BREACH OF WARRANTY—EVIDENCE.

In an action by a purchaser for breach of warranty, on the ground that wheat delivered by the seller was below the grade called for by the contract, evidence is not admissible in defense to show that a profit was realized by the plaintiffs.

The plaintiffs, who are commission grain merchants at Kansas City, Mo., brought action against the defendant, a shipper of grain from Otis, Kan., on a contract calling for the sale of 15,000 bushels of No. 2 hard wheat, at 57 cents per bushel on the cars at Otis, Kan., to be inspected by the state inspector and weighed at Kansas City, Mo., after deducting the expenses of weighing and inspection.

The second count of the petition upon which the court rendered judgment claimed as damages a shortage in the quantity shipped by the defendant; and also for damages in the difference in the quality of the wheat shipped; also for profits which would have been realized by the plaintiffs on the quantity and quality of the wheat called for by the contract, had the same been delivered; and also for an excess of drafts paid over and above the correct quantity of the wheat shipped. A jury being waived, the cause was submitted to the court on the pleadings and the evidence. The court made a special finding of facts, and declared the law to be that plaintiffs are entitled to recover of the defendant the sum of \$494.68 on account of drafts paid over and above the correct quantity of wheat shipped; also the sum of \$166.95, difference in the market value of No. 2 hard wheat, which should have been shipped, and No. 3 hard wheat, actually shipped; and also \$41.90, damages for the failure of the defendant to deliver the full quantity of 15,000 bushels of wheat called for by the contract. And the court also found against the defendant on his counterclaim for damages based upon the alleged conversion by plaintiffs of the No. 3 hard wheat shipped by defendant to plaintiffs; which defendant, in his counterclaim, asserted the plaintiffs were unauthorized to appropriate under the contract. The further essential facts sufficiently appear from the following opinion of the court.

Meservey, Pierce & German, for plaintiffs.

Lathrop, Morrow, Fox & Moore, for defendant.

PHILIPS, District Judge (after stating the facts as above). The important question, lying at the very threshold of this controversy, is, when was the contract for the shipment of wheat by the defendant to the plaintiffs entered into and completed? Both parties are agreed, in effect, by the pleadings, and in argument before the court, that at some time in July, 1897, these parties did make a contract whereby the defendant agreed to ship to the plaintiffs, and the plaintiffs to take on the railroad track at Kansas City, 15,000 bushels of No. 2 hard wheat, to be delivered within 15 days, at 57 cents per bushel, less inspection and weighing charges. And the parties are further agreed that the defendant was to load the wheat on the cars at his point of shipment (Otis, Kan.), and that he would, on the shipments, draw on the plaintiffs for the apparent quantity thereof, as ascertained by the railroad weights, less a specified drawback on each car, and attach his draft to the bill of lading, to be sent for collection from the plaintiffs; subject to the further condition, founded upon the recognized custom between such dealers, that the wheat, on reaching Kansas City in the cars, was subject to inspection under the state inspection laws, either of the state of Kansas or of the state of Missouri, where the car might be delivered; and the weights at Kansas City, and the grade as fixed by the inspector, should be conclusive; and, further, that, on receipt of the draft drawn by the defendant, the plaintiffs would honor the same.

As the whole negotiations between the parties were conducted by correspondence in the form of letters and telegrams, recourse must be had thereto in determining the question as to when the contract was completed. The proposition to open up this trade between the parties originated with the defendant. On July 22, 1897, he telegraphed the plaintiffs as follows: "Offer ten, fifteen thousand bushels two hard wheat sixty net." On the same day plaintiffs replied thereto as follows: "Market over cent lower. Buyers all scared. Sixty-seven track here best can do, fifteen days. Quick reply." On July 23, 1897, plaintiffs again wired defendant: "Market cent and a half lower. Do you want sell at sixty-seven track here?" This was followed by the following telegram from plaintiffs to defendant on the same day: "Think can work your fifteen wheat net you fifty-six half, if offered quick." To this defendant replied: "Take fifty-eight net fifteen thousand bushels two hard." To this plaintiffs immediately replied: "Market closed three cents lower; fifty-six best can do. Quick reply. Will sell lower sure." The next day, July 24th, defendant telegraphed plaintiffs: "If you can use it at fifty-seven, will sell." To this plaintiffs immediately replied: "Accept your fifteen thousand 2 hard fifty-seven track, Otis. Rush shipment." And on the same day plaintiffs sent defendant letter by mail, which was evidently written before the receipt of defendant's telegram of that date, and which it is not necessary, therefore, to consider. But, following this letter of the same date, plaintiffs mailed to the defendant the following letter, to wit:

"We have now your wire offering fifteen thousand bushels 2 hard at 58 cents [it is admitted by both parties that this should be 57 cents instead of 58 cents] on track, which we now confirm for fifteen-day shipment. Please let

them come forward fast as possible. * * * We are pleased to have made this starting trade with you, and hope to do more business with you. Keep us closely advised of what you have to offer, and will make you very close price. Please bill wheat to us here, making draft without exchange, leaving us fair margin."

On the same day following defendant's telegram of that date to plaintiffs, he sent to plaintiffs the following letter:

"We expeck you peple to give us 10-15 day. But I belive we can mack it next week as we sheap 3 lagh cars mondy mornig. Now as you ar stranzer to me in case some of the wheet sult file to graat I want you to notify me by wir as I hav Mr. E. D. Fisher Com. to look after may biznes in K. C. so I will mack draft within 10 to \$20.00 per car and if you want some refrance abut me ce Mr. Fisher and J. V. Brinkman Co. Bank at Gt. Bend as I du may bizness thru ther bank."

The plaintiffs made answer to this letter on July 26th, as follows:

"We have your letter of Saturday. We will look very carefully after the grading of your wheat here, and also after the weights. It will be all right if you make drafts, and leave us \$10.00 to \$20.00 per car. We note you refer to E. D. Fisher and your Great Bend Bank, which are entirely satisfactory. We think no references would be necessary, however, as your reputation is all right. We must congratulate you upon having made a good sale Saturday. The wheat would not be worth as much money to-day. Please ship as fast as possible, and let us know when you have more to sell."

It is evident, from the correspondence, that letters passing between these parties were received the day following their dates. The shipments made by the defendant on this correspondence were made on the dates, inclusive, beginning on July 26th and ending August 4th.

A contract between parties is complete whenever the minds of the contracting parties meet upon a given proposition. When the defendant, on the 24th day of July, 1897, telegraphed to the plaintiffs offering his wheat of the quality and grade proposed, at 57 cents, and the plaintiffs answered accepting the proposition, that moment the minds of the parties had met in agreement, and the contract of sale was complete. "The unqualified acceptance by one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance." *Taylor v. Insurance Co.*, 9 How. 390-402. "The rule of law now is that a contract is completed when its acceptance is forwarded, without reference to the time of its reception." *Lungstrass v. Insurance Co.*, 48 Mo. 201. The same rule applies in this day to correspondence conducted by telegraph. The letter from plaintiffs to defendant of the same date was but a confirmation of their acceptance of the contract, and this letter was presumably received by defendant on July 25th.

This general rule of law is not controverted by defendant's counsel, but their contention in this connection is that the letter of the same date from defendant to plaintiffs put a limitation upon the proposition submitted by telegram, to the effect that, if any of the wheat shipped by him should not grade No. 2, the plaintiffs were not to take it as of the grade fixed by the inspector, but they should turn such shipments over to Fisher. Waiving the question as to whether, after the minds of the parties had met, as evidenced by the telegrams, the

defendant could impose any other conditions upon the contract by a subsequent communication, we are unable to read the letter as construed by the defendant's counsel. The first sentence of the letter shows clearly enough that the defendant had received the plaintiffs' telegram of acceptance, for it says: "We expect you people to give us 10-15 days. But I believe we can make it next week, as we ship three large cars Monday morning,"—which would be July 26th, the day on which he did make the first shipment. And this shows the further fact that he had already consented in his mind to the contract consummated by the telegram and letter of acceptance. He then proceeded to say in this letter that, as the plaintiffs were strangers to him, in case some of the wheat should fail to grade, he wanted them to notify him by wire, as he had "Fisher Com." to look after his business in Kansas City. This language must receive the construction which comports with the plain meaning and common acceptance of such words by two parties situated just as these were. As the wheat was to be inspected by the inspector at Kansas City, who was to fix its grade, and the defendant would not be present, and therefore felt the importance of having some opportunity to look after the grade fixed by the inspector, to have any mistakes or errors therein corrected, and felt unwilling to rely upon the plaintiffs, because of his lack of intimate acquaintanceship with them, the letter merely asked them to notify him by wire if the wheat did not grade up properly; and his reference to "Fisher Com." clearly enough carried with it the impression to plaintiffs that he only expected them to notify him of any grading less than the requirement of the contract, so that he could have Fisher, who looked after his business in Kansas City, to take any steps he might desire to rectify any wrong done him by the inspector. It would be to read into this letter a term, which its language does not naturally import, to construe it unto a direction to turn over to Fisher all the wheat shipped by him which did not grade No. 2 hard. And it is made clear from the plaintiffs' answer to this letter of July 26, 1897, that they understood from his letter that his sole purpose was to have an honest inspection, and that he expressed a reluctance to trust that matter to the plaintiffs solely because they were strangers to him. Accordingly, the plaintiffs wrote him: "We will look very carefully after the grading of your wheat here, and also after the weights." And it is furthermore manifest, from what immediately thereafter followed, that the defendant himself accepted and acted upon this construction placed upon his letter by plaintiffs. In the due course of mail he received plaintiffs' letter of the 26th on the 27th, and on the 28th he made plaintiffs another shipment of several cars, and wrote plaintiffs the following letter:

"Otis, Ks., July 28, 97.

"Andrews Co.

"K. City, Mo.

"Dear Sir:

"We sheapt you the folowing:

cars 6874 I M 44000 #

cars 5057 M & P 44000 #

cars 15146 do. 58000 #

and mail draft for \$775.00 and \$500.00 last car.

"[Signed] L. Schreiber."

And the defendant continued thereafter each day to make shipments to the plaintiffs. The first two or three shipments, perhaps, graded all right, until, on July 31st, the plaintiffs wrote defendant that one car graded No. 3, which was applied on the contract at $1\frac{1}{2}$ cents off. And on July 31st the plaintiffs again advised him of another car received that day which graded No. 3, with a certain discount off. On August 2d plaintiffs notified defendant of the receipt of two other cars that day which graded No. 3. And it was not until August 2, 1897, that the defendant telegraphed to plaintiffs he could not stand one-half off on the car graded 3,—“turn them over to Fisher.” This was the first direction and the first intimation the plaintiffs had from the defendant that he wanted them to turn the wheat graded No. 3 over to Fisher. He also wrote them that he could not stand their work; to which plaintiffs replied, in effect, that as he did not say that he would ship No. 2 wheat to replace the stuff which undergraded, and as they were obliged to have wheat to fill their contracts, they did not see how they could turn it over to anybody else, with the further statement:

“We know just what we are talking about when we say we are applying your 3 wheat on the contract as closely as anybody else here can do it. 58-lb. 3 wheat is being applied on the contract at one cent off, and 57-lb. wheat at 2 cents off, and we do not think Mr. Fisher or anybody else could do any better by you. We have nothing whatever to do with the grading of your wheat, but at the same time, when we think the stuff is not properly graded, we always order a reinspection upon it. While you might have had more of the wheat which you shipped to Hall & Robinson grade No. 2 than the wheat you shipped us, it is quite likely that you shipped them better wheat. We have taken no advantage of you whatever, and have applied your wheat in just the same manner that we apply everybody else's.”

After the contract for the sale of this wheat was complete, the status of the parties in respect thereto was fixed; and it was not in the power of either party to add new terms or conditions thereto, or to recede therefrom, without the consent or acquiescence of the other. This is so axiomatic as to require no citation of authorities in its support. Moreover, under the contract as made between the parties, and in conformity with the custom in such transactions, as soon as the defendant loaded his wheat on the cars at Otis, Kan., and received the bills of lading, he drew upon the plaintiffs, with the bills attached, for the amount of each separate shipment, and the plaintiffs paid these drafts as they came. But the defendant, in his communication of August 4, 1897, directing the plaintiffs to turn over No. 3 wheat to Fisher, neither proposed to ship them other wheat in its stead, nor to refund the money which he had received from plaintiffs on the shipments, nor does it appear that he ever directed Fisher to pay it, nor did Fisher ever go to the plaintiffs and make any demand on them for the wheat; and while on this trial the defendant offered Fisher to testify that he was willing and able to have taken the wheat and paid the plaintiffs therefor, the rights of the plaintiffs are to be determined in this action by the facts as they existed at the time the controversy arose.

The further contention of defendant is (1) that by the terms of the contract the wheat did not become deliverable to the plaintiffs until after inspection at Kansas City; (2) that this inspector sustained the

relation to the parties similar to that of an arbiter, to determine by his inspection whether or not the wheat shipped came up to the required grade; and, (3) if this inspection was adverse to the shipper, the wheat did not become deliverable under the contract, and the title remained in the shipper, the vendor, and therefore the plaintiffs were guilty of a conversion in failing to turn it over to Fisher upon the defendant's order. In support of this contention, the following cases are cited: *Nofsinger v. Ring*, 71 Mo. 149; *Chapman v. Railroad Co.*, 114 Mo. 542, 21 S. W. 858; *Frost v. Woodruff*, 54 Ill. 155; *Martin v. Hurlbut*, 9 Minn. 142 (Gil. 132); *Dustan v. McAndrew*, 44 N. Y. 72; *Crane v. Roberts*, 5 Me. 419; *Benj. Sales*, § 870; 2 *Schouler*, Pers. Prop. § 286.

These cases but assert the proposition, in substance, that where A. agrees to sell B. a given article for future delivery, at a stipulated price, subject to inspection by an inspector selected or agreed upon by the parties, the inspection is a condition precedent to the vesting of the title in the vendee; and that, in the absence of other qualifying provisions, until such inspection is made, title remains in the vendor; and if, on inspection, the article fails to come up to the requirements of the contract, the vendee may refuse to accept it, and the vendor is without cause of complaint. But if such inspector, without fraud, reports that such article tendered complies with the contract, the vendee is concluded thereby; and, if he then refuses to accept and pay, the vendor is entitled to his action as for a breach of the contract. None of the cases, however, hold that if the inspector honestly decides that the article tendered is defective, and the vendee refuses to accept it, he may not, nevertheless, have his right of action against the vendor for damages.

As applied to the facts of this case, the doctrine contended for by defendant's counsel is wholly inapplicable. The rule of law is well established that where goods are bought by a distant merchant, to be delivered by the seller to the carrier at his place of business, and the vendor takes a bill of lading in his own name, and draws upon the consignee for the purchase money, and attaches a draft to the bill of lading, and forwards them to his banker or agent for collection, the property in the goods remains that of the vendor until the draft is honored and paid; but the moment the draft is paid, and the bill of lading is thereupon turned over to the consignee, the possession and right of property are thereby transferred to the purchaser. *Fowler v. Treadwell*, 13 Fed. 22; *Forty Sacks of Wool*, 14 Fed. 643; *Dows v. Bank*, 91 U. S. 618; *The Merrimack*, 8 Cranch, 317; *Benj. Sales* (2d Ed.) § 399.

In *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513, the rule is thus aptly stated:

"The general rule is that when one orders goods from a distant place to be shipped by a common carrier, and the order is accepted and the goods shipped, the delivery to the common carrier is a delivery to the purchaser, the common carrier being the agent of the purchaser to receive them; and, when this is done, the title, without more, passes from the vendor to the vendee. If, however, the vendor of the goods is not satisfied of the solvency of the purchaser, or is doubtful thereof, or wishes to retain the title in himself, he may vary this rule, when he makes the consignment and delivers the

goods to the carrier, by taking a bill of lading from the carrier to his own order. When the vendor does this, it is evidence that he does not part with the title of the goods shipped, but retains the same until the draft which he sends with the bill of lading is accepted or paid."

See, also, *Ramish v. Kirschbraun*, 107 Cal. 659, 40 Pac. 1045.

The defendant, as the evidence shows, had for several years been a large shipper of wheat to commission merchants at Kansas City, and was familiar with the usage and custom of the trade at that point. As soon as the wheat was weighed by the railroad company at Otis, Kan., he took bills of lading to himself, and drew upon the plaintiffs for the purchase money, attached the draft to the bill of lading, and forwarded the same to his correspondent at Kansas City for presentation to plaintiffs, which was promptly accepted and paid by plaintiffs before the wheat was inspected and weighed out at Kansas City. The moment the plaintiffs thus accepted and paid the drafts, and received the bills of lading, the delivery to them was completed, and the ownership and the risk changed to the purchaser. The only office of inspection at Kansas City, under such a state of facts, was to determine what was the true grade of the wheat, to prevent disputes thereafter between the shipper and consignees; and, clearly enough, neither party understood that this was essential to the delivery of the property and the passing of the ownership to the purchaser.

In this juncture, what were the rights of the purchaser? Such a contract on the part of the defendant to ship to the plaintiffs No. 2 hard wheat was, in contemplation of law, the same as a sale by sample, and carried with it an implied warranty that the wheat shipped was in accordance with the contract. *Zabriskie v. Railroad Co.*, 131 N. Y. 78, 29 N. E. 1006; 28 Am. & Eng. Enc. Law, p. 775; *Hardy v. Fairbanks*, James, 432; *Winsor v. Lombard*, 18 Pick. 59; *Hastings v. Lovering*, 2 Pick. 214; *Hogins v. Plympton*, 11 Pick. 97; *Bid. War.* 97. Any discussion of the question as to whether or not a vendee under a contract of implied warranty on the part of the vendor, upon failure of the article after inspection to comply with the terms of the contract, has a right to return the goods and sue upon the warranty, would be wholly academic, under the facts and situation of this case. See *Manufacturing Co. v. Vroman*, 35 Mich. 310. Undoubtedly, if the goods had been shipped to be paid for after inspection, and they proved defective by inspection, the purchaser would have had the right to refuse to receive them. And it is equally unquestionable that, under the facts of this case, the plaintiffs had the right to receive the goods, and bring action against the vendor for breach of warranty. *Lyon v. Bertram*, 20 How. 154; *Woodruff v. Graddy*, 91 Ga. 333, 17 S. E. 264; 28 Am. & Eng. Enc. Law, 814; *Benj. Sales*, §§ 894-1348; *Day v. Pool*, 52 N. Y. 420; *Weed v. Dyer*, 53 Ark. 155, 13 S. W. 592. The inspection was not a waiver of the warranty. *English v. Commission Co.*, 6 C. C. A. 416, 57 Fed. 451; *Gaar v. Patterson*, 65 Minn. 451, 68 N. W. 69; *Hull v. Belknap*, 37 Mich. 179. The English authorities upon this question are very aptly presented in the case of *Lewis v. Roundtree*, 78 N. C. 323, where it is ruled that an agreement like this amounts to a warranty on the part of the vendor that the goods shipped are of the required quality; and that even where the

purchaser has an opportunity to inspect the goods when delivered, and actually takes them, it does not amount to a waiver of the warranty that they should be of the specific description; and that although he does not return the goods to the vendor, or give notice of their failure to come within the description warranted, he is still entitled to bring an action for breach of the warranty. The plaintiffs, in the case at bar, notified defendant promptly of the undergrades.

The offer of the defendant to show that the plaintiffs realized a profit on the sale of the No. 3 wheat over the contract price for No. 2 wheat is certainly inadmissible. Any advance in the market was the legitimate fruit of the venture, just as the purchaser would have had to bear the loss of any decline in the market price prevailing at the time of delivery. *Cordage Co. v. Wohlhuter* (Minn.) 74 N. W. 175; *J. I. Case Plow Works v. Niles & Scott Co.* (Wis.) 63 N. W. 1013; *Bach v. Levy*, 101 N. Y. 511, 5 N. E. 345; *Brown v. Emerson*, 66 Mo. App. 63; *Medbury v. Watson*, 6 Metc. (Mass.) 246; *Brown v. Bigelow*, 10 Allen, 242; *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. 942.

The result is that the plaintiffs are entitled to recover on the second count of the petition, and the counterclaim pleaded by defendant is denied. Finding and judgment accordingly.

HUDSON RIVER LIGHTERAGE CO. v. WHEELER CONDENSER & ENGINEERING CO.

(District Court, E. D., New York. March 14, 1899.)

1. CARRIERS—CONSTRUCTION OF CONTRACT OF CARRIAGE.

A carrier under a contract for the carriage and delivery on a dock of heavy castings weighing several tons each constituting a part of machinery to be erected by the shipper is not bound to turn the castings over on delivering them, so as to leave them in position for placing together, in the absence of a special agreement to that effect.

2. SAME—INJURY TO GOODS IN SHIPMENT—PRESUMPTION OF NEGLIGENCE.

The fact that a casting was shipped in good order and was found cracked on delivery is presumptive evidence of negligence on the part of the carrier, and casts upon it the burden of proving in what manner the breakage occurred.

Peter S. Carter, for libellant.

Charles E. Lydecker, for respondent.

THOMAS, District Judge. This action is brought to recover for freight and demurrage, and the respondent seeks to offset injury to the cargo for the carriage of which said freight is alleged to have been earned and demurrage incurred.

In December, 1897, the respondent, having a large number of castings to be transported from Carterette or Jersey City, directly to Greenpoint, or in some cases to Mott Haven on the Harlem river, for finishing, and thence to Greenpoint, engaged therefor the libellant, through the latter's agent, one Schneider, who, as the representative of another carrier, had done similar work for the respondent. These castings were in three parts, known as tops, bottoms, and centers or

curbs. Each part weighed five or six tons, and their sum was about 200 tons. The carriage was made by the libelant on a barge rigged with a derrick; and the libelant's agent, in soliciting the business, stated to the respondent that it had all the facilities necessary for the proper handling of the freight. As has been stated, some of the castings were carried first from points in New Jersey to Mott Haven to be finished, and thence to Greenpoint for final delivery. Previous to the 11th day of May, the respondent had given notice to the carrier that certain parts at Mott Haven were ready for delivery at Greenpoint, and such parts could have been taken and delivered by the carrier at Greenpoint previous to the 11th day of May; and the respondent did not know that such carriage and delivery had not been made until the events arose which are the subject of this litigation. On the 11th day of May, 1898, the libelant's barge was at the dock at Greenpoint, with a lot of castings which it had taken on at Carterette, N. J.; and, while the barge lay at said dock ready for unloading, libelant advised the respondent that it would deliver the castings on the dock in the position in which each casting rested upon the deck of the vessel, but that it would not turn the castings over before delivering them upon the dock. It seems that the castings were intended for a sugar refinery, and that, unless they were delivered upon the dock in the relative positions in which they were to be placed in the refinery, it would be necessary for the respondent to rehandle them, and put them in such suitable position, before they could be used, and that he had no facilities upon the dock for handling matters of such weight and size, and that the company which its agent, Schneider, formerly represented, had been accustomed to so deliver them. It further appears that the libelant had turned, so far as was necessary, all previous pieces, but that some risk accompanied such turning, and that when the libelant discovered that its captain was turning the parts it forbade him doing so further, and advised the respondent that it would not turn such parts, giving as a reason for its refusal that such was no part of its duty as a carrier. This refusal led to some conversation between the parties; the libelant insisting that it was not its duty to turn the parts, and the respondent insisting that such was libelant's duty, and persisting in its demand that such duty should be performed. However, as the libelant continued in its refusal, the respondent, being urged by a penalty under which it rested for delay in setting the parts in the sugar refinery, according to its contention, agreed to take the risk of turning the parts, which were the bottom pieces of the plant; and representatives of each party went to the barge on the 12th day of May and watched the turning of the parts by the captain of the barge, who had sole control and direction thereof. All the parts were delivered safely upon the dock. On the 14th day of May, the load which had been taken to Mott Haven for finishing was brought to the dock at Greenpoint, and the captain of the barge proceeded to turn and to unload such parts; and, after they had been placed upon the dock, it was discovered that the flange of one of the upper parts was broken, and it was for such breakage that the respondent asks damages in this action. It is the contention of the respondent that at the time it made its agreement to assume the responsibility of unloading

the barge, which arrived on May 11th, it supposed that the pieces thereafter delivered from Mott Haven had been transported and delivered previously, and that its stipulation to assume the risk was confined entirely to the barge of the 11th, which it assumed to be the last lot to be delivered. The libelant claims, however, that the agreement was not so limited, but that it refused to take the risk of turning any pieces, and that the respondent, instead of agreeing to assume the risk of any particular load, assumed the risk of all the pieces that might be thereafter delivered. As a matter of fact, the respondent's foreman, who was present at the time of the delivery on the 11th, in company with the respondent's manager, was present during the entire unloading on the 14th, but states that he was not there for the purpose of superintending the unloading, but that he was at the refinery and on the dock for the purpose of superintending other work in which the respondent was engaged, and that, without any purpose or participation, he stood by and watched the unloading, and that he gave no direction, offered no suggestion, made no criticism, and did not know or even look to see whether there was any injury to the pieces until they were on the dock. It seems that one of the tops was placed on the ship with the broadest circumference down, and that it was necessary for the owner's convenience to turn it upon the ship and so deliver it on the dock. To do this, a stick was placed through a manhole between the two ends of the circular casting, and adjusted so that it was horizontal rather than vertical to the base; that a rope was tied to this, the casting raised, and, when sufficiently elevated from the deck, brought over onto its smaller end. Evidence is given on the part of the respondent which tends to show that the stick slipped around on account of being placed horizontally, as above stated, and slid up to the end of the opening,—a distance of about 12 inches,—which allowed the load to suddenly sag, bringing a great strain upon the casting, and that the casting also fell back and struck the deck, and that from such strain or striking, or both, the breakage, which was on the opposite side of the circumference from a point where the casting hit the deck, was caused. The libelant admits that there was some sagging of the rope, but claims that there was nothing more than was natural from the settling down of a heavy weight on the tackle, and contends that the casting was not broken at that time, but that, if it was, the same was caused by no negligence of the libelant, and that the shipper had assumed the risk.

The libelant, in addition to its claim for freight, asks for demurrage on the load arriving on the 11th, and which was not delivered until the 12th on account of the refusal of the carrier to turn it over as demanded by the respondent, and the consequent negotiation. The demurrage, it is said, began on the 11th day of May, at 6 p. m., and continued for 12 hours, at \$10 an hour. The respondent does not base its demand for damages upon the strict rule which requires a carrier to assure the safe transportation and delivery of goods, but upon the negligence of the carrier.

Upon this evidence, the following conclusions are reached: (1) That it was no part of the carrier's duty to turn over the castings so as to have them in readiness for suitable placement by the owner after a

delivery on the dock. (2) The carrier was justified in believing from the conversation with the shipper on the 11th that the subsequent load of castings should be turned over at the risk of the owner, and the turning over was done pursuant to that understanding. (3) It does not appear, by a preponderance of evidence, that the fracture was caused by such turning, and as the burden of proof is on the libellant to show the cause of fracture, and as it claims that it was not done at that time, it is considered that it was not done in the course of such turning. (4) The fact that the casting was shipped in good order, and was found cracked upon delivery, is sufficient evidence of negligence, and thereby the carrier is called upon to give evidence of the cause of the fracture, which shall overcome the presumptive case thus raised against it. *Phoenix Pot-Works v. Pittsburgh & L. E. R. Co.*, 139 Pa. St. 284, 20 Atl. 1058; *Ketchum v. Express Co.*, 52 Mo. 390, 395, 396; *Grieve v. Railroad Co. (Iowa)* 74 N. W. 192, 193, and cases cited; *Railroad Co. v. Sherwood*, 132 Ind. 129, 135, 31 N. E. 781; *Hinton v. Railroad Co. (Minn.)* 75 N. W. 373; *Hull v. Railway Co.*, 41 Minn. 510, 43 N. W. 391, following *Shriver v. Railroad Co.*, 24 Minn. 506; and see *Railway Co. v. Little*, 12 Am. & Eng. R. Cas. 37; *Rintoul v. Railroad Co.*, 16 Am. & Eng. R. Cas. 144; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413, 414. The libellant has not given evidence tending to show sufficiently the cause of such fracture. Therefore it must be concluded that it was done in the course of transportation, and in the performance of duties imposed upon the carrier as such, and compensation should be made by the carrier. (5) No recovery for demurrage is allowed. (6) The libellant should recover freight, less the damages for breakage of cargo. Let a decree, pursuant to this decision, be entered, with costs according to the future direction of the court.

KEENER et al. v. BAKER.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1899.)

No. 1,120.

1. REVIEW—MOTION FOR NONSUIT—DENIAL—EXCEPTION—WAIVER.

Introduction of evidence by defendant after the overruling of his motion for nonsuit is a waiver of any exception to the ruling.

2. SAME—MOTION FOR NEW TRIAL—DENIAL.

Denial of a motion for a new trial cannot be reviewed on appeal in United States courts,

3. MINES AND MINERALS—VENDOR AND PURCHASER—RECOVERY OF PRICE—PLEADING.

Where, in the sale of a mine, it, and not the stock of the corporation owner, was the subject of the transfer, and the stock was transferred as a mere incident and means of conveying the mine, a complaint in an action to recover the money paid for fraud, alleging that the mine was of no value, was not insufficient for failure to state that the stock was also worthless.

4. TRIAL—DEFECTIVE COMPLAINT—CURED BY VERDICT.

After verdict and judgment, it will be presumed that facts necessary to support it were proved, and in all formal and technical matters the complaint will be treated as amended to conform to the facts.

In Error to the Circuit Court of the United States for the District of Colorado.

John K. Vanatta, for plaintiffs in error.

Victor A. Elliott, Willis V. Elliott, and Thomas Mitchell, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought by Cyrus A. Baker, the plaintiff below, against George L. Keener, C. G. Kingsbury, and M. S. Herring, the defendants below, to recover the purchase money paid by the plaintiff to the defendants on account of the purchase of the Catherine lode mining claim, situated in Cripple Creek, Colo., upon the ground that the purchase was induced and the money obtained from the plaintiff by the false and fraudulent representations and devices of the defendants. The Nugget Mining Company owned the alleged lode mining claim, and the transfer of the title to the interest in the mine which the plaintiff purchased was to be effected by transferring to him 345,111 shares of the stock of this corporation. The plaintiff paid the defendants at the date of the purchase \$10,000, and afterwards the further sum of \$416.66. The answer denied the fraud. The case was tried before a jury, who found a verdict for the whole sum claimed by the plaintiff, upon which judgment was rendered, and the defendants sued out this writ of error. There was no demurrer to the complaint, and no exceptions were taken to the charge of the court.

At the close of the plaintiff's testimony the defendants moved "for a judgment as in case of nonsuit," upon the ground that the evidence was not sufficient to support the plaintiff's action; and the denial of this motion by the court is assigned for error. After this motion was overruled, the defendants introduced their testimony, and this was a waiver of any exception to the ruling of the court denying the nonsuit. *Jefferson v. Burhans*, 58 U. S. App. 597, 29 C. C. A. 487, and 85 Fed. 924.

There was a motion for a new trial, which was overruled, and that ruling is assigned for error; but it is well settled in the courts of the United States that the ruling on a motion for a new trial is not the subject of exception. *Condran's Adm'x v. Railway Co.*, 14 C. C. A. 506, 32 U. S. App. 182, and 67 Fed. 522.

The remaining assignment of error is that "the complainant did not, nor doth, state facts sufficient to constitute any cause of action." The ground upon which this contention is rested is that there is no specific allegation in the complaint that the mining stock which the plaintiff purchased was worthless. But there is an allegation that the mine for which the plaintiff paid his money "had no value whatever, except as a prospect," and that, by reason of the defendant's fraudulent representations in relation thereto, the plaintiff was damaged in the sum of \$10,416.66. It sufficiently appears from the complaint that the thing which the defendants sold to the plaintiff, and for which he paid his money, was a lode

mining claim, which was represented to be rich and of great value, and which the jury found to be no mine at all and to have no value. In making the sale and purchase according to the averments of the complaint, the stock was not considered at all, but only the mine. The mine was the thing purchased, and the stock passed or was to pass as a mere incident to the purchase of the mine, and as a means of conveying the interest in the mine purchased by the plaintiff. All this plainly appears from the complaint. If for any reason the stock of the Nugget Mining Company had any value dissociated from the mine, it could not, upon the allegations of the complaint, affect the plaintiff's right of recovery, because it was not the stock, but this mine, that the parties were contracting about.

But if the plaintiff was required to prove the stock, as well as the mine, had no value, after verdict and judgment the presumption is that such proof was made, and the objection that the complaint does not contain the technical averment that the stock had no value comes too late. This was the rule under the common-law system of pleading: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict." *Stev. Pl.* 150. And the rule is quite as liberal under the modern Codes. *Glaspie v. Keator*, 5 C. C. A. 476, 12 U. S. App. 281, and 56 Fed. 203; *Rush v. Newman*, 12 U. S. App. 635, 7 C. C. A. 136, and 58 Fed. 158.

This case comes from Colorado, and the supreme court of that state hold that, where the objection that the complaint does not state facts sufficient to constitute a cause of action is taken by demurrer in apt time, the pleading "must present defects so substantial in their nature and so fatal in their character as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever." *Herfort v. Cramer*, 7 Colo. 483-488, 4 Pac. 896; *Bliss*, Code Pl. § 425; *Richards v. Edick*, 17 Barb. 260. The rule is still stronger where the objection is taken for the first time after verdict and judgment; for then the presumption prevails that due proof was made of every fact essential to the recovery, and the complaint will be considered as amended to conform to the proofs.

In *Davis v. Goodman*, 62 Ark. 262, 35 S. W. 231, Chief Justice Bunn, delivering the unanimous judgment of the court, said:

"But, according to a uniform holding of this court, the trial court's findings and judgment will not be reversed, when they are in conformity to the evidence in the case, notwithstanding the pleadings fall short of the facts in evidence; for in such case the pleadings will be considered as amended to suit the facts."

The judgment of the circuit court is affirmed.

AMERICAN EXP. CO. et al. v. LANKFORD.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1899.)

No. 1,115.

1. UNITED STATES COMMISSIONERS IN INDIAN TERRITORY—JURISDICTION.

1 Sand. & H. Dig. Ark. § 4317, provides that justices of the peace shall have concurrent jurisdiction with the circuit court in matters of contract where the amount in controversy does not exceed \$300; and United States commissioners in Indian Territory have the same jurisdiction as justices of the peace in Arkansas. *Held*, that an action to recover the value of goods lost through the negligence of a carrier was an action for breach of contract, and hence a United States commissioner of Indian Territory had jurisdiction thereof, the amount claimed not exceeding the statutory limit.

2. WITNESSES—HUSBAND AND WIFE—COMPETENCY.

Under Sand. & H. Dig. Ark. § 2916, declaring that a husband shall be allowed to testify for his wife in any business transacted as her agent, a husband acting as his wife's agent in the shipment of goods was competent to testify in an action against a carrier by the wife for their loss.

3. TRIAL—MOTION TO STRIKE—EVIDENCE.

Where part of a witness' testimony is competent, a motion "to strike out all of his testimony" is too broad, and was properly overruled.

In Error to the United States Court of Appeals in the Indian Territory.

J. G. Ralls (G. T. Ralls, on the brief), for plaintiffs in error.

G. A. Pate and R. L. Williams, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. J. D. Lankford and E. Lankford, husband and wife, brought this action against the American Express Company, before a United States commissioner in the Indian Territory, to recover the sum of \$196, the value of a gold ring set with a diamond, alleged to have been delivered to the defendant as a common carrier, to be carried to Chicago, and lost through its negligence. It appearing that the ring was the property of Mrs. Lankford, the action was dismissed as to her husband, J. D. Lankford. The plaintiff recovered judgment before the United States commissioner, and also on appeal in the United States court for the Central district of the Indian Territory, which last judgment was affirmed by the United States court of appeals for that territory (39 S. W. 817, 46 S. W. 183), and the defendant sued out this writ of error.

It is assigned for error that the United States commissioner did not have jurisdiction of the case. The jurisdiction of United States commissioners in the Indian Territory is the same as that of justices of the peace in Arkansas, which is as follows:

"Sec. 4317. Justices of the peace shall severally have original jurisdiction in the following matters: First. Exclusive of the circuit court, in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars, excluding interest; and concurrent jurisdiction in matters of contract, where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest. Second. Concurrent jurisdiction in suits for the recovery of personal property, where the value of the property

does not exceed the sum of three hundred dollars; and in all matters of damage to personal property, where the amount in controversy does not exceed the sum of one hundred dollars."

The contention of the plaintiff in error is that this is an action for the "destruction of personal property" or "damage to personal property"; but it is neither. It is an action to recover damages for a breach of contract, and as such falls under that clause of the statute—copied from the constitution of the state—which confers on justices of the peace "jurisdiction in matters of contract where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest." *Koch v. Kimberling*, 55 Ark. 547, 18 S. W. 1040, and cases cited.

Exception is taken to the ruling of the court in refusing to strike out the testimony of Lankford, the plaintiff's husband. But the witness testified that, in shipping the ring, and in other matters to which his testimony related, "I was simply acting as the agent of my wife;" and the Arkansas statute in force in the Indian Territory provides that either husband or wife "shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent." Sand. & H. Dig. Ark. § 2916.

It is objected that the husband testified to some matters outside of his agency. The testimony of the witness was not objected to when it was introduced. His testimony relating to his agency was, confessedly, admissible. The motion, however, was not to strike out the alleged irrelevant parts of his testimony, if there was any part of it irrelevant, but it was "to strike out 'all' the testimony of the witness J. D. Lankford, for the reason that he was the husband of the plaintiff, and not a competent witness." The motion was too broad, and was properly overruled. *Bank v. Rush*, 29 C. C. A. 333, 85 Fed. 539.

An exception was taken to the refusal of the court, at the close of all the evidence, to give the jury a peremptory instruction to return a verdict for the defendant. This request was properly refused. Upon the evidence in the record, it would have been error for the court to have taken the case from the jury. The judgment of the United States court for the Central district of the Indian Territory, and of the United States court of appeals in the Indian Territory, are each affirmed.

OSBORNE V. ALTSCHUL.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 465.

TRIAL—POWER OF FEDERAL COURT TO AMEND VERDICT.

A federal court has the power, under Rev. St. § 954, which enjoins upon it the duty to disregard nicety of form, and to give judgment according as the right of the cause and matter in law shall appear to it, to amend a general verdict for plaintiff, in an action in ejectment, to conform to the requirements of a state statute, by inserting therein a finding that plaintiff is entitled to possession of the land in suit, and of the nature and duration of his estate therein, where, by a reference of the verdict to the issues litigated, it is plain that it can have but one meaning as to such matters.

In Error to the Circuit Court of the United States for the District of Oregon.

W. R. King, F. M. Saxton, and S. T. Jeffreys, for plaintiff in error.
Williams, Wood & Linthicum and T. C. Dutro, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error, Charles Altschul, brought an action of ejectment against the plaintiff in error, J. D. Osborne, alleging in his complaint that he was the owner in fee simple of the N. $\frac{1}{2}$ of section 1, in township 19 S., range 43 E., in Malheur county, Or., containing 320 acres, and was entitled to the immediate possession thereof, and that the plaintiff in error was wrongfully in the possession and wrongfully withheld the same, to his damage in the sum of \$3,500. The defendant in the action answered, denying each of the allegations of the complaint, disclaimed possession, right, or interest to 160 acres of the premises described, but alleged that he was in the possession of, and was the owner of, the remaining 160 acres. He also set up the defense of the statute of limitations. On the trial the plaintiff waived his demand for damages, leaving as the only question to be determined his alleged title and right of possession in the 160 acres which the defendant claimed to own. Upon the issues so narrowed, the case was tried and submitted to the jury. Under the direction of the court, the jury brought in a sealed verdict. The verdict was as follows: "We, the duly impaneled jury in the above-entitled action, find a verdict for the plaintiff." After the jury were discharged, the court, upon motion of the defendant in error, amended the verdict to comply with the requirements of the statute of Oregon (Hill's Ann. Laws, § 320), which provides as follows:

"A verdict of a jury in an action of ejectment shall be as follows: If the verdict be for the plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be."

The plaintiff in error contends that the verdict was fatally defective, for the reason that it did not comply with the statute above quoted, and that the court had not the power to so amend it as to supply its defects. Statutes similar to that of Oregon are found in some of the other states. In Florida, Illinois, Tennessee, and West Virginia, it is held that the omission from the verdict of the jury of the findings which the statute declares essential is a fatal defect. *Lungren v. Brownlie*, 22 Fla. 491; *Van Fossen v. Pearson*, 4 Sneed, 362; *Long v. Linn*, 71 Ill. 152; *Low v. Settle*, 22 W. Va. 387. In Illinois, it has been decided that the trial court has not the power, after the jury is discharged, to amend the verdict, and to insert the findings which the jury ought to have embodied therein. In Virginia and in Wisconsin, it is held that such an omission does not invalidate the verdict, if the court can see from the verdict, and from the issues presented, that the jury have found

all the facts which the verdict is required to contain, and can enter a correct judgment thereupon. *Hawley v. Twyman*, 24 Grat. 516; *Allard v. Lamirande*, 29 Wis. 502. It has been held, also, that the failure to express in a verdict for the plaintiff the nature or the duration of the plaintiff's estate is matter of which he alone can complain, and that it does not affect the substantial rights of the defendant. *Allard v. Lamirande*, 29 Wis. 502; *Elliott v. Sutor*, 3 W. Va. 37. In the absence of a statute prescribing the form of the verdict, it appears to be uniformly held that a general verdict for the plaintiff is sufficient. Such a verdict is referred to the issues, and, where so referred, it becomes certain and specific. 7 Enc. Pl. & Prac. 344; *Betz v. Mullen*, 62 Ala. 365; *Ewing v. Alcorn*, 40 Pa. St. 492; *Kirshner v. Kirshner's Lessee*, 36 Md. 309; *Hutton v. Reed*, 25 Cal. 479. In the present case there can be no doubt that the jury passed upon all the issues which the cause presented, and found the same in favor of the plaintiff. The verdict can have but one meaning, and that is that the jury found the title to be in fee simple in the plaintiff, and that he was entitled to the immediate possession of the premises. In other words, it can be seen that the jury has passed upon every question which the statute of Oregon declares shall be determined by the verdict, and has found the facts to be as they are alleged in the complaint and as they are stated in the amended verdict. It is not contended that in the course of the trial any question arose concerning the duration of the plaintiff's interest in the real estate. If he had any interest whatever, it could be none other than that of owner in fee simple. No evidence was offered of any less interest or estate, or claim of interest, upon his part. The amendment of the verdict, therefore, was but an amendment in form. The question of the power of the court to order such an amendment is not, as it is contended by the plaintiff in error, ruled by the statutes of Oregon or by the decisions of the courts of that state, but by reference to the powers conferred upon the trial court by the provisions of section 954 of the Revised Statutes. In construing that section, in *Parks v. Turner*, 12 How. 39, the court said:

"This is a remedial statute, and must be construed liberally to accomplish its object. It not only enables the courts of the United States, but it enjoins upon them as a duty, to disregard the niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them. And, although verdicts are not specially mentioned in this provision, yet the words, 'or course of proceedings whatever,' are evidently broad enough to include them; and, as they are within the evil, they cannot, upon a fair interpretation of the statute, be excluded from the remedy."

The construction given to the statute in the case just cited, and in other decisions of the courts of the United States, is sufficiently liberal to include the amendment which was made in the case at bar. *Matheson's Adm'r v. Grant's Adm'r*, 2 How. 279; *Stockton v. Bishop*, 4 How. 155; *Lincoln v. Iron Co.*, 103 U. S. 412; *Koon v. Insurance Co.*, 104 U. S. 106; *Gay v. Joplin*, 13 Fed. 650; *Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co.*, 29 C. C. A. 239, 85 Fed. 417.

It is urged that an element of uncertainty as to the meaning of the verdict arises from the fact that the defendant in his answer disclaimed

title to, and possession of, 160 acres of the 320 which were the subject of the action, and the further fact that in his reply the plaintiff conjunctively denied the defendant's averment that the latter held the remaining 160 acres under color of title and claim of ownership. To this it is sufficient to say that it is apparent from the record that the denial in the reply was intended as a denial of both color of title and claim of ownership by the defendant. That the court entered judgment for the plaintiff in the face of admissions in his reply is not assigned as error, and the contention that it did so is a matter with which we have nothing to do. Nor does an element of uncertainty intervene from the fact that the defendant disclaimed a portion of the land sued for. The premises which were in controversy in the action were the 160 acres of which the defendant held the possession and of which he claimed to be the owner. The plaintiff asserted title thereto in fee simple, under a grant from the United States. The defendant claimed under the homestead laws of the United States and by virtue of possession for a period sufficient to bar the action. If the judgment embraced lands of which the defendant disclaimed the possession and title, he is not affected thereby, nor does confusion arise therefrom as to what was the subject of the controversy. The judgment of the circuit court will be affirmed.

THOMPSON v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 462.

1. REVIEW—APPEAL OR ERROR.

Where a federal court, on the sale in foreclosure proceedings of railroad property which has been operated by its receivers, makes it a condition of the sale that the purchaser shall pay, in addition to the amount bid, as a part of the purchase price of the property, all claims which may be legally established against the receivers growing out of their operation of the road, and retains jurisdiction of the cause for the purpose of enforcing such conditions, and subsequently grants leave to a claimant to bring an appropriate action on his claim, which he does on the law side of the court, while any judgment recovered is required to be brought into the equity suit to be fixed as a lien on the property, and enforced under the decree, the action itself is a separate action at law, and is properly reviewable by writ of error.

2. PARTIES—ACTION ON CLAIM AGAINST RECEIVERS AFTER THEIR DISCHARGE—PURCHASER OF PROPERTY.

Under a decree in a railroad foreclosure suit, which requires the purchaser of the property, as a part of the consideration therefor, to pay all valid claims against the receivers growing out of their operation of the road, and reserves the right to the court to enforce such claims against the property, the purchaser is a proper party defendant to an action on such a claim, being entitled to defend, and, in an action commenced after the property has been conveyed to it and the receivers have been discharged, it may properly be made sole defendant.

3. RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Plaintiff was walking in the daytime on defendant's railroad track, across a bridge about 100 feet long, which was customarily used by the public as a footway, with the knowledge and acquiescence of the defendant. When at about the center of the bridge plaintiff was struck and injured by an engine, which approached him from behind. The evidence

showed that those in charge of the engine were negligent in failing to give any signal or warning of its approach. Both plaintiff and a companion testified that, on going upon the bridge, they looked back along the track, which could be seen for six or seven hundred feet, and that no engine was in sight. There was room upon the bridge for the plaintiff to have stepped aside and avoided injury. *Held*, that plaintiff could not be said, as a matter of law, to have been guilty of contributory negligence, but, under the circumstances shown, the question was one for the jury, under proper instructions.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

William Martin, for plaintiff in error.

Crowley & Grosscup and James B. Howe, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action for personal injuries alleged to have been sustained by Thomas A. Thompson (in whose behalf the action was brought by his guardian), by reason of the negligent operation of an engine on the railroad of the Northern Pacific Railroad Company. At the time of the injuries the road was the property of that company, but was in the hands of, and then being operated by, certain receivers appointed by the court below, in a suit theretofore brought in that court by the Farmers' Loan & Trust Company, a New York corporation, against the Northern Pacific Railroad Company for the foreclosure of a mortgage covering its property. That suit resulted in a decree of foreclosure and sale of the road, and, although no action for the injuries here complained of had then been commenced, the court, in order to guard and protect all rights, provided in its decree, among other things, that the purchaser of the road on which the accident in question occurred "should pay, as part consideration and in addition to the sum bid [for such property], and should take the same and receive the deed therefor upon the express condition, that he, the purchaser, his successors or assigns, would pay, satisfy, and discharge, among other things, all unpaid indebtedness, obligations, and liabilities, contracted or incurred by the receivers of said Northern Pacific Railroad Company, before delivery of possession of the property of said Northern Pacific Railroad Company, sold within the jurisdiction of said court, or to any party or parties who are citizens and residents of said district, to wit, the state of Washington, provided that an action be brought to establish such indebtedness or liability within the time, after the accruing of such indebtedness or liability, allowed by the statute of limitations of the state wherein such indebtedness or liability shall have accrued, for the commencement of suit thereon; and that in event the purchaser [of said property], after demand made, shall refuse to pay any indebtedness or liability incurred by said receivers, upon fifteen (15) days' notice to such purchaser, his successors or assigns, the person holding the claim thereon might file his petition in said court to have the said claim established and enforced against said purchaser, his successors or assigns." At the sale under this decree, the defendant to the present action, the Northern Pacific Railway Company, was the purchaser of the property; and in the de-

cree of the court confirming the sale the court imposed the same terms and provisions as conditions accompanying the confirmation, and expressly reserved and retained jurisdiction of the cause, and power to enforce all the provisions of the decree of sale, and of the order of confirmation, "including the right to retake and resell any of the property within this district, if sold to such purchaser, in case such purchaser, its successors or assigns, shall fail to comply with any order of this court in respect of any payment of any of the prior indebtedness, obligations, or liabilities required in said decree, or in respect of any other of the terms or conditions of the said decree, or of this decree, within thirty days after the entering of such order." Thereupon the road, with appurtenant rights, was turned over to the purchaser railway company, which thereupon entered into the possession and operation of the road, and has so continued ever since, subject to the terms and conditions of the decree of sale and of the order of confirmation.

The plaintiff in error was injured on one of the tracks of the Northern Pacific Railroad Company on or about August 31, 1894, and while the road was being operated by the receivers. After it had been acquired by the defendant railway company, he presented, through his guardian, a claim for damages for the injuries so sustained by him to the defendant railway company, which for more than 15 days neglected and refused to pay the claim; and thereupon the plaintiff in error, by his guardian, filed in the foreclosure suit a petition for leave to sue for the damages claimed to have been sustained by him, upon which petition the circuit court made an order reciting, in substance, the facts above stated, and directing "that said petitioner, T. A. Thompson, by his guardian, Nels Thompson, be and is hereby permitted to bring and prosecute an action for said injuries in the circuit court of the United States for the district of Washington, Northern division, holding court at Seattle, Washington."

The plaintiff in error, by his guardian, thereupon commenced on the law side of the same court the present action against the defendant railway company, to recover damages for the injuries alleged to have been sustained by him through the negligent operation by the employés of the receivers of an engine on the railroad then in their charge, the complaint in the action setting out, among other things, the facts already stated. The action was tried before the court with a jury, and, upon the conclusion of the evidence on behalf of the plaintiff in the action, the court directed a verdict for the defendant thereto, upon the ground that the evidence showed such contributory negligence on the part of the injured plaintiff as precluded a recovery by him. The case is brought here by writ of error, and, on the part of the defendant in error and in support of the judgment given below, it is contended that, independently of the views of the trial court respecting the evidence, the judgment should be affirmed, on the ground that the error, if any, was without prejudice to the plaintiff in error, because, as it is claimed, the complaint does not state any cause of action against the defendant railway company. It is also claimed on the part of the defendant in error that the writ of error should be dismissed on the ground that the case was only subject to review by appeal. This latter view pro-

ceeds upon the theory that the plaintiff's proceeding for the enforcement of his demand, although in form an independent action at law, was in reality a petition in intervention in the foreclosure suit, and should therefore be regarded as an equitable proceeding.

By keeping in mind the origin of the alleged cause of action, and the proceedings necessary to enforce it, it is not difficult, we think, to correctly answer these objections. At the time of the injury complained of, the road on which it occurred belonged to a corporation that had been adjudged insolvent, on which ground the court below had taken the property into its possession, and committed its operation to certain receivers. The insolvent corporation, the Northern Pacific Railroad Company, was not liable for any damages inflicted in the operation of property of which it had thus been dispossessed, and in which operation it had no control or voice. The engineer and fireman upon the engine which caused the injuries complained of were not in the employ of that company, but were employés of the receivers of the court. Those officers, in their representative capacity, were responsible for the negligent acts of their employés, but they were not personally responsible for them. Any judgment recovered upon such a cause of action could be properly satisfied, under the direction of the court having jurisdiction over it, out of the property of the insolvent company in their hands, but not out of their own property. The termination of their trust relations to the property, therefore, ended their relations to the cause of action of the plaintiff in error. They were no longer subject to be sued therefor, for they were not personally liable, and they were no longer receivers. Any judgment that the plaintiff in error might have recovered during the receivership would, of course, have been provided for by the decree of the court administering the property. But the court was not unmindful of the fact that there might be obligations and liabilities not already established, incurred by the receivers, for which the property being administered by it was properly responsible; and, accordingly, in the decree directing its sale, the court provided that the sale be made upon the express conditions that the purchaser should pay, satisfy, and discharge, among other things, all such obligations and liabilities contracted for or incurred by the receivers before delivering over the possession of the property, provided that an intervening petition in the foreclosure suit, or an action to establish such indebtedness or liability, "has been or shall be brought within the time, after the accruing of such indebtedness or liability, allowed by the statute of limitations of the state wherein such indebtedness or liability shall have accrued, for the commencement of suit therein," and that such conditions should constitute a part of the consideration of the purchase. The purchase of the defendant railway company was made upon those express conditions, the sale was confirmed subject to the same conditions, and the property passed into the hands of the purchaser charged with those liabilities and obligations. And, in order to guard and protect the rights of all such claimants, as well as those of the purchaser, the court, directing and confirming the sale, retained jurisdiction of the cause to the extent necessary to afford such protection.

In the case of *Jessup v. Railway Co.*, 44 Fed. 663, where a railroad in the hands of a receiver of the circuit court had been decreed to be sold, and the order directed the receiver to turn over to the purchaser the property sold, upon the conditions that the purchaser "agrees to pay, satisfy, and fully discharge all the debts and liabilities of such receivership of every kind now remaining unpaid, and that it may further defend in the name of such receiver all litigated claims or demands against such receivership, now pending in this or other courts, and will fully abide by and pay any and all judgments and recoveries, together with costs, which may be rendered in any of such actions or litigations, and always protect and save harmless the said receiver from such claims, or any of them," the court held that the conditions constituted a part of the consideration exacted from the purchaser for the property, and that the adjudication of all such debts and liabilities pertained to that court, and accordingly enjoined one from proceeding in a state court to recover damages for an act committed by the receiver, saying, among other things:

"The promise and agreement of the purchaser constituted an additional consideration, and therefore added to such fund, as we have before stated; but, in good faith to said purchaser, it is the duty of this court to sift, scrutinize, and finally determine what claims shall be paid and what claims shall be rejected. In order to do this satisfactorily, this court should require all parties who assert any claim against such fund, or who claim any right to recover against such purchaser because of the stipulation and covenant made in this court, to establish such claim in this tribunal by proceedings usual in this class of cases. But if the said Potterf were permitted to prosecute his action in the state court, and recover a judgment therein, he would have a right to satisfy such judgment out of any property subject to levy in the hands of the purchaser, the Wabash Railway Company; whereas, under the covenants and agreements made in this court between the court and the purchaser, placing upon said covenants the legal construction hereinbefore given, any claim he might have against the receiver was to be satisfied out of the funds arising from the sale of this mortgaged property."

The appropriate proceeding for the recovery of damages for personal injuries is an action at law, in which the parties have the constitutional right of trial by jury. So, when the plaintiff in error, by his guardian, presented his petition to the court in the foreclosure suit, jurisdiction over which the court retained for the purpose of enforcing and protecting such claims, that court did not undertake to determine, in that equitable suit, the legal liability asserted by the plaintiff in error, or to assess any damages therefor, but very properly authorized the petitioner to bring and prosecute, in the same court, an appropriate action, which he proceeded to do on its law side. Should such action result in establishing the demand, he will be required by the court to bring his judgment into the equity suit, where, in pursuance of the decree of sale, and of the order confirming it, the court will make the judgment a lien upon the property, and enforce the lien by a sale of the property, if necessary. This is the appropriate and orderly course of proceedings in such cases, and secures the rights, and enforces the obligations, of all parties intended to be covered by the decree of sale and order of confirmation under which the defendant railway company purchased and took the property from the court's receiver.

ers. See *Farmers' Loan & Trust Co. v. Central R. Co. of Iowa*, 7 Fed. 537, 17 Fed. 758. The present proceeding, therefore, is not, as contended on behalf of the defendant in error, an equitable proceeding, but is, what it purports to be, an action on the law side of the court, and is properly reviewable by writ of error. The motion made on behalf of the defendant in error for the dismissal of the writ is therefore denied.

The next question to be determined is whether the defendant railway company is a proper defendant to the present action. It is not necessary to decide whether its promise, constituting one of the considerations for the property acquired through the receivers, to pay all liabilities incurred by them, rendered it liable to answer generally therefor. As receivers are not personally responsible for torts committed by their subordinates, and in which they were in no way personally concerned, it is obvious, as said by the court in *Farmers' Loan & Trust Co. v. Central R. Co. of Iowa*, 7 Fed. 539, that such suits against them are really and substantially suits against the fund or property of which they are the custodians; for they only represent the property out of which any judgment against them, in their representative capacity, is satisfied. In the present case, the property responsible to the plaintiff in error, if he shall make good his allegations, passed from the receivers under the order of sale and confirmation made by the court to the defendant railway company, subject to the condition that the property should continue charged with any liability that existed against the receivers, together with the promise on the part of the defendant railway company, made as a part of the consideration of its purchase, to pay such liability. Upon the question as to whether the liability in reality exists, the defendant company is manifestly entitled to be heard, and it was for that reason that it was made party defendant to the action; and, since the relations of the receivers to the cause of action of the plaintiff in error ceased upon the termination of their trust relations to the property, the defendant company was properly made sole defendant thereto.

In *Sloan v. Railway Co. (Iowa)* 16 N. W. 331, the *Farmers' Loan & Trust Company* had brought an action in the United States circuit court for the foreclosure of a mortgage executed by the *Central Railroad Company of Iowa*, in which suit a receiver was appointed by the court, who took possession of and operated the road. The suit resulted in the decree of sale, and subsequently in a decree directing the transfer and delivery of the property, together with all additions thereto, to the *Central Iowa Railway Company*. In the latter decree were inserted the following clauses:

"And it is further ordered that the lawful debts contracted by the receiver during the litigation, and the costs and expenses of such litigation, do constitute, and are hereby made, a first and paramount lien, upon all said property, moneys, credits, and all additions thereto, to all other liens, and to the title acquired by the purchaser at the foreclosure sale and by the conveyance to the *Central Iowa Railway Company*; and since it is not desirable to further continue said property under the control of the receiver for the purpose of making net earnings for the payment of said debts, costs, and expenses, and the creditors having been notified, and making no valid or satisfactory objection thereto, it is further ordered and decreed that all said claims, and

all claims pending in this court, debts, and liabilities, including the claims of attorneys and others, heretofore referred to Special Master Rogers, and reported on by him, and still pending on exceptions, shall be presented to the said Central Iowa Railway Company for adjustment and settlement; and the said Central Iowa Railway Company are ordered and directed to pay the said debts, costs, and expenses; and the creditors entitled thereto are hereby required to accept payment thereof, with interest at the rate of 7 per cent. per annum, in one year from the date hereof; and for the purpose of enforcing the payment thereof, if need be, this court will and does retain jurisdiction of said cause for the purpose of enforcing said payment, and the lien herein provided for, without other action or independent proceeding."

In accordance with this order and decree, the property was transferred to, and accepted by, the Central Iowa Railway Company. While the road was in charge of the receiver, a claim for damages was presented to the circuit court, and permission asked to bring a suit against its receiver, resulting in an order by that court that the claimant "be permitted to bring a suit at law in this court, or in the district or circuit courts of Iowa, on his said claim, against the Central Iowa Railway Company, the Central Railroad Company of Iowa, and H. L. Morrill, receiver; that, if suit is brought in the state courts, the judgments and orders be certified to this court." The claimant having brought suit in one of the courts of the state, it was taken to the supreme court of Iowa, where that court, in speaking of the order made by the circuit court, said:

"The order made by the court is exceedingly broad, and includes 'claims, debts, and liabilities.' Against whom? The answer must be, the receiver, or property which, in his hands, was liable for the claim, debt, or liability. We have determined that the receiver, or rather the property in his charge, was liable for the payment of the plaintiff's claim. The appellant, therefore, received the property charged with this liability. If it had been made a condition in the order that appellant, before the property was transferred or conveyed to it, should execute a written obligation, binding itself to pay this claim, and it had done so, its liability, we think, would not be doubted. There would have been a sufficient consideration for the promise. What was done in legal effect amounts to the same thing. The jurisdiction of the court must be conceded. It had possession of the road through its receiver, and, during the time it was operated by the receiver for the court, a supposed liability to the plaintiff occurred. The court, in substance, said to the appellant: 'We will discharge the receiver, and place the road, and all property and rights connected therewith, in your possession, and vest you with the legal title thereto, provided, you will assume and pay all liabilities incurred during the time the road has been operated by the receiver.' The appellant accepted the road upon the conditions annexed. There was an offer and an acceptance. Ordinarily, this is sufficient to constitute a contract. Whether there was a valid contract or not is not material, because the appellant cannot retain the property and repudiate the conditions. If the appellant was entitled, absolutely, to the property, it should not have accepted, but contested, by appeal or otherwise, the legality of the conditions. It is true, the appellant was not a party to the action of foreclosure, but it becomes a party to the order when it accepted the property. Whether the order of the court was valid or not, we have no occasion to determine in this collateral proceeding, because its validity is not assailed, and possibly could not be, successfully, for the reason that appellant's possession, if not its title, is based thereon. We think the plaintiff is entitled to recover of the defendant. Whether, or in what manner, the judgment can be enforced, is not before us."

See, also, authorities *supra*.

It remains to consider whether or not there was error on the part of the court below in directing a verdict for the defendant.

The accident occurred on a bridge of the railroad company constructed on Hood street, in the city of Tacoma, at its intersection with Fifteenth street. The bridge is built over Fifteenth street at such height as to admit of the passage of teams, as well as foot passengers, under it. On its top were constructed three railroad tracks, separated by a solid wood fence about three feet high, extending the entire length of the bridge. Along the tracks that crossed the bridge people were accustomed to travel on foot, with the knowledge, acquiescence, and license of the railroad company. The plaintiff in error had for more than 10 months prior to his injury been accustomed to pass along them in going to and from his work. He knew that the trains and engines of the company were constantly passing over the tracks, and, consequently, that it was a place of danger. The accident occurred as he was going to his work one morning, about 7 o'clock. A number of workmen were crossing the bridge at the time, and one—a man named Larson—was walking with plaintiff in error, but on another track. The plaintiff was walking along the left side of the middle track when he was struck. The engine that inflicted the damage approached from his rear. The evidence tended to show that no signal of its approach was given by those in charge of the engine. The trial court, in passing upon the defendant's motion for an instruction to the jury to return a verdict in its favor, said:

"The evidence shows that there was negligence in this case in not giving some signal,—ringing the bell. I cannot say, as a matter of law, that there was negligence in not stopping the engine when the plaintiff was seen upon the track, if he was seen by the engineer; but it would be negligence to run against him, and not stop the engine, but keep on going, and strike him, without giving some sign or warning. In a place of that kind, it is not necessarily the duty of the engineer to stop his engine when he sees some one ahead of him on the track on foot, because he had a right to assume, in a place like that, when a man traveling afoot could get out of the way, that he would get out of the way. * * * Now, this much may be assumed in the case: That there is evidence to go to the jury tending to prove that there was negligence on the part of the defendant, but, notwithstanding that negligence, the plaintiff cannot recover, where, in making out his case, he shows by his own testimony that he was negligent in a manner which contributed to cause the injury. * * * As I have already said, in this testimony it appears that there, in the clear open space, a man with eyes could not have failed to see the danger from this particular locomotive, if he was on the alert; and, if he did not look, he is guilty of negligence; and if he did look, and saw the engine in time to have avoided the collision with it, and did not get out of the way, he is guilty of negligence. There is no escape from the proposition that his own negligence was a contributing cause to this injury. * * * It would be the duty of the engineer to stop after seeing the man, if he was in a position where it was plain that he could not get out of the way: but that is not the case here. A man on any part of that bridge, by stepping a foot or two, could get out of the way of that engine,—or I will say five or six feet,—and that railing in the center of the bridge is not such an obstruction that a man could not get over it, or get on it. This man could have got out of the way, and the engineer had the right, if he did see him, to assume that he would get out of the way."

It is undoubtedly true that if the engineer saw the plaintiff in error, and had given warning of his approach, he would have had the right to assume that the plaintiff in error would get out of the way. But it seems that the engineer did not give any warning of

the approach of the engine; certainly, there was testimony to show that he did not. There was also testimony tending to show that the plaintiff in error, just before going upon the bridge, looked back to see if there was any train or engine approaching; that the track could be plainly seen for at least six or seven hundred feet, and that no train or engine was in sight. He knew, as has been stated, that the place was a dangerous one; but those in charge of the engine also knew that people were in the habit of walking along the railroad tracks over the bridge. It was, therefore, the clear duty of the engineer to keep his eyes open and his face to the front. It was equally the duty of the plaintiff in error to keep his eyes open, and a careful watch in both directions. Manifestly, he could not look in opposite directions constantly. Whether or not he exercised the degree of care required of him by the law ought, we think, to have been left to the jury, under appropriate instructions in respect to contributory negligence. It is entirely true that, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it should withdraw the case from the consideration of the jury, and direct a verdict; but ordinarily negligence and contributory negligence are questions of fact, to be passed upon by a jury. *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85, and cases there cited.

Both Larson and the plaintiff in error testified that, when within five or ten feet of the bridge, they looked back over the track, which was plainly visible for six or seven hundred feet, and that no engine was in sight; yet, when about halfway across the bridge, the whole length of which did not exceed 100 feet, the plaintiff in error was run over by the engine approaching from the rear. Where the engine came from does not clearly appear. On the part of the defendant in error it was endeavored to be shown that it was on a switch as the plaintiff passed, and that it had to make two switches, and move 700 feet, before overtaking the plaintiff in error. Its counsel cite certain portions of the testimony in their brief, and say:

"It is clear from the foregoing abstract of the testimony that, had the plaintiff looked around at any time while the engine which struck him made two switches and moved over a distance of 700 feet, he would have seen the engine in time to have escaped. One of the two following conclusions is therefore inevitable: (1) That, before going on the bridge, the plaintiff did not look for the engine; or, (2) if he did look, he saw the engine and took his chances. In either event, he contributed to the accident, and cannot recover."

In response to a somewhat similar argument, the court, in the case of *Low v. Railway Co.*, 72 Me. 313, 322, said:

"Defendant's counsel put the dilemma thus: 'If the night is light enough to see the gangway, no railing or light is necessary to enable a person to avoid it; and if the night is too dark to allow of its being seen, then a person groping around in the dark, and unconsciously walking into it, is guilty of such negligence as to preclude him from recovering.' But, if this plausible statement is absolutely correct, there never can be an accident of this description for which the injured party can recover. The idea seems to be that there is no necessity for any precautions on the part of the wharf owners, because constant vigilance on the part of those who come there when it is light enough

to see the danger will enable them to avoid it; and, duty or no duty, they must not come without a light in the nighttime, or they will be set down as wanting in ordinary care, and so forfeit their right to protection or compensation. The argument establishes, if anything, too much. The questions are not of a character to be disposed of by a little neat logic. They are rather, as remarked by the court in *Elliott v. Pray*, 10 Allen, 384, 'questions which can be best determined by practical men, on a view of all the facts and circumstances bearing on the issue.' No such sweeping syllogism as this presented by defendant's counsel can be adopted as a rule of decision."

We are of the opinion that the case should have been submitted to the jury under appropriate instructions. The judgment is reversed, and cause remanded to the court below for a new trial.

SOUTHERN RY. CO. v. POSTAL TEL. CABLE CO.

(Circuit Court of Appeals, Fourth Circuit. March 30, 1899.)

No. 298.

WRIT OF ERROR—FINAL ORDER.

An order in condemnation proceedings appointing commissioners to assess the damages is not a final order, to which a writ of error will lie.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

On June 11, 1898, the Postal Telegraph Cable Company, a corporation of New York, filed in the office of the clerk of the superior court of Guilford county, N. C., a petition, making the Southern Railway Company the sole defendant, to obtain by condemnation the right to construct, maintain, and operate a telegraph line along and upon the right of way of the Southern Railway Company, from a point on the state line between the states of North Carolina and Virginia south to Charlotte, and from Greensboro, in Guilford county, to the city of Raleigh, passing through the intervening counties, the whole distance being about 193 miles. This petition was filed under the provisions of chapter 49 of the Code of North Carolina of 1883, and under sections 2007 to 2013, which provide that any telegraph company, incorporated in North Carolina or any other state, shall have the right to construct, maintain, and operate lines of telegraph along any railroad in that state, to be so constructed and maintained as not to obstruct or hinder the usual travel on said railroad, upon making just compensation therefor, and further providing in what manner proceedings for condemning such a right should be conducted. The Southern Railway Company, a corporation of Virginia, appeared and filed its petition for removal on the ground of diverse citizenship, and such proceedings were had that the case was removed into the circuit court of the United States for the Western district of North Carolina. Opinion of Judge Simonton, 88 Fed. 803. The railway company resisted the proceedings upon various grounds,—among others, that there was then no law in North Carolina providing for the condemnation of land or rights of way for the use of telegraph companies; that, if there was such a law, the petition of the telegraph company did not in essential particulars follow it; and that the petition was too vague and uncertain in its statement of the nature of the tenure by which the railroad company held the right of way over which the easement for the telegraph company was sought to be condemned. These objections were overruled (opinion of Judge Simonton, 89 Fed. 190), and the court ordered, on September 15, 1898, as provided by section 1945 of the North Carolina Code of 1883, that three commissioners be appointed to assess the damages which the railway would sustain by reason of the erection of the petitioner's telegraph line in the manner proposed, and that they should hear the testimony, and make their award in writing, and file it with the clerk of the court. Subsequently, upon the petition of the railway company for leave to answer the original petition, leave was granted

to it, and the order for the appointment of the commissioners was suspended. The answer was filed, setting up much the same objections that had already been passed upon, with the additional allegation of fact that the railway company's right of way was in some places so narrow that to erect a telegraph line upon it as proposed in the petition would imperil the safe operation of the railroad, and obstruct or hinder the usual travel upon it, and that condemnation proceedings must be instituted in each and every county in which any of the land used by the railroad company for its line is owned by it in fee. To this answer the telegraph company demurred, and the court sustained the demurrer (opinion of Judge Simonton, 90 Fed. 30), and by its order of October 24, 1898, reinstated the order appointing commissioners. To the granting of these orders the railway company has sued out a writ of error to bring the case here for review. The telegraph company moves to dismiss the writ of error, as granted improvidently to an order which was interlocutory, and not final.

Robert Stiles, A. L. Holladay, and F. H. Busbee, for plaintiff in error.

J. R. McIntosh, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge (after stating the facts as above). The rule that a writ of error or appeal does not lie, except to a final judgment which determines the controversy between the parties, is so conclusively settled that the burden is upon the plaintiff in error to show that this is a case to which that general rule does not apply. The contention of the plaintiff in error is that it is not appealing from the order appointing commissioners, but from the action of the court below in refusing to allow it to introduce testimony to sustain its contention that the proposed telegraph line could not be so constructed and operated as not to obstruct and hinder the usual travel upon the railroad. Its contention is that, in an adversary proceeding in court for condemnation, there are two separate and successive proceedings, the first of which determines the right to condemn, and the second the amount of compensation, and that the first of these, even when the right to condemn is sustained, is a final and appealable judgment, although not made so by statute.

There can be found no case in the decisions of the supreme court of the United States which has so held. In the case of *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 Sup. Ct. 302, the supreme court did hold that the judgment in that case for the condemnation was a final, appealable judgment; but this was solely upon the ground that the case came to the supreme court by writ of error to the supreme court of appeals of West Virginia, and that it had been held by that court that the judgment was final under the West Virginia statute. Mr. Justice Field said:

"The judgment appears to have been considered as so far final as to justify an appeal from it; and if the supreme court of a state holds a judgment of an inferior court of the state to be final, we can hardly consider it in any other light, in exercising an appellate jurisdiction."

In *Luxton v. Bridge Co.*, 147 U. S. 337-342, 13 Sup. Ct. 358, Mr. Justice Gray, commenting on the ruling in the case just above quoted, said:

"To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the constitution and laws of the United States; for, if the highest court of the state held the order appointing commissioners to be final and conclusive, unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the circuit court of the United States."

Even if the fact was pertinent, in condemnation proceedings under the provisions of the state law when conducted in a circuit court of the United States, that the state court had held the appointment of commissioners to be a final, appealable order, the plaintiff in error cannot have the benefit of such a contention in the present case, for the reason that the supreme court of North Carolina has decided to the contrary with respect to the very statute under which these proceedings were taken. In *American Union Tel. Co. v. Wilmington & A. R. Co.*, 83 N. C. 420, the supreme court of North Carolina held, in a similar proceeding to condemn a right of way for the construction and operation of lines of telegraph along the defendant's railroad, that no appeal was allowable from the order adjudging that the petitioner was entitled to the right of way demanded, and appointing commissioners to ascertain and report the compensation to be paid to the defendant railroad as damages for the condemned property. The court said:

"Upon a careful examination of the statute, and the portions of the act of February 8, 1872, by reference incorporated with it, and regarding the policy indicated in both to favor the construction and early completion of such works of internal improvement, telegraphic being upon the same footing as railroad corporations, we are of opinion it was not intended in these enactments to arrest the proceedings authorized by them at any intermediate stage, and the appeal lies only from a final judgment. Then, and not before, may any error committed during the progress of the cause, and made the subject of exception at the time, be reviewed and corrected in the appellate court; and an appeal from an interlocutory order is premature and unauthorized."

In *Hendrick v. Railroad Co.*, 98 N. C. 431, 4 S. E. 184, the supreme court of North Carolina again held that under the law of that state the order appointing commissioners to assess damages is interlocutory, and no appeal will be entertained until after final judgment upon the report of the commissioners, and said:

"This case is in all material respects like *American Union Tel. Co. v. Wilmington & A. R. Co.*, 83 N. C. 420; *Commissioners v. Cook*, 86 N. C. 18; *Railroad Co. v. Warren*, 92 N. C. 620. They settle the course of practice in such proceedings as the present one, and sufficiently state the reasons for it."

The case of *Luxton v. Bridge Co.*, 147 U. S. 337-341, 13 Sup. Ct. 358, above cited, is, we think, conclusive of the present question; for in that case, although the proceedings in the circuit court of the United States were directed by the act of congress to be according to the laws of the state within which the land to be condemned was located, and by that state law the appointment of the commissioners could be reviewed by the supreme court of the state on writ of certiorari, yet it was held by the supreme court of the United States that so much

of the state law as allowed such review was inapplicable to a proceeding in the circuit court of the United States. The court said:

"The case throughout, from the application of the corporation for the appointment of commissioners to assess damages to the owner of the land proposed to be taken until judgment upon the award of the commissioners or upon verdict of a jury assessing those damages, remains in the circuit court of the United States and under its supervision and control. The action of that court in this case, as in other cases on the common-law side, is not reviewable by this court by writ of certiorari (U. S. v. Young, 94 U. S. 258), but only by writ of error, which does not lie until after judgment disposing of the whole case and adjudicating all the rights, whether of title or of damages, involved in the transaction. The case is not to be sent up in fragments by successive writs of error. Act Sept. 24, 1789, § 22 (1 Stat. 84, c. 20); Rev. St. § 691; Rutherford v. Fisher, 4 Dall. 22; Holcombe v. McKusick, 20 How. 552, 554; Bank v. Whitney, 121 U. S. 284, 7 Sup. Ct. 897; Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32; McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. 170."

Writ of error dismissed for want of jurisdiction.

WILLIAMS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 452.

1. JURORS—QUALIFICATIONS—OPINIONS—REVIEW OF TRIAL COURT.

A juror had discussed the case with a former attorney of defendant, with whom he was intimately acquainted, and became prejudiced against defendant. Although he said he did not have a fixed opinion as to defendant's guilt, he stated that his mind was "strongly colored" in the matter, and that his prejudice was so strong that it would require evidence to remove it, and would perhaps, in some degree, shape his convictions or judgment; and, in reply to a question whether he could return a verdict solely on the evidence, he said: "I am not infallible. * * * I think I would. I feel that I might." *Held*, that it was error to overrule a challenge for bias.

2. EXTORTION—INDICTMENT AND PROOF—VARIANCE.

An indictment alleging that money was extorted from one person is not at variance with evidence that, when the extorsive demand was made on such person, he obtained the money from another, in defendant's presence, and then handed it to defendant.

Gilbert, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of California.

Geo. D. Collins, for plaintiff in error.

Henry S. Foote and Bert Schlessinger, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. Against the defendant below (the plaintiff in error here), Richard S. Williams, two indictments, numbered, respectively, 3,267 and 3,268, were returned in the district court of the United States for the Northern district of California; each indictment containing two counts. The cases were consolidated and tried together, resulting in a verdict of guilty in each case. The accused interposed a motion in arrest of judgment on the second count of

each indictment, and also moved for a new trial in each case. The first motion was sustained by the trial court, and, the motion for a new trial having been overruled, judgment was entered against the defendant on the first count of each indictment, from which judgment an appeal was taken to the supreme court, where the judgment was reversed and the case remanded for a new trial. 168 U. S. 382, 18 Sup. Ct. 92. Upon the retrial in the district court upon the first count in each indictment, a verdict was returned finding the defendant not guilty as charged in indictment numbered 3,268, and guilty as charged in the first count of indictment numbered 3,267, on which verdict he was sentenced by the court below under the first count of the last-mentioned indictment. On the present appeal, therefore, we have only to consider the first count of that indictment, by which it was, in substance, charged that the plaintiff in error, an officer of the treasury department, duly appointed and acting under authority of the laws of the United States, and designated as Chinese inspector of the port of San Francisco, and by virtue of his office being authorized, directed, and required to aid and assist the collector of customs of that port in the enforcement of the various laws and regulations relating to the coming of Chinese persons and persons of Chinese descent from foreign ports to the United States—

"Did then and there, as such officer, willfully, knowingly, corruptly, and feloniously, for the sake of gain, and contrary to the duty of his said office, and by color thereof, ask, demand, receive, extort, and take of one Wong Sam, a Chinese person, a certain sum of money, to wit, one hundred dollars, which said sum of money was not due to him, the said Richard S. Williams, and which the said Richard S. Williams was not then and there, or at all, by virtue of his said office, entitled to ask, demand, receive, or take of said Wong Sam, or any other person. That is to say, that on the 31st day of August in the year of our Lord 1895 there arrived at the port of San Francisco aforesaid, from a foreign port or place, to wit, the port of Hongkong, in the empire of China, a male person, of Chinese descent, to wit, one Wong Lin Choy, who claimed to the collector of customs that he was entitled to land, be, and remain in the United States, on the ground that he was a native born of said United States; that thereafter, * * * on the 18th day of September in the year of our Lord 1895, at said city and county of San Francisco, state and Northern district of California, the said Richard S. Williams corruptly and extorsively, for the sake of gain, and contrary to the duty of his said office, and under color thereof, did extort, receive, and take of said Wong Sam, who was then and there interested in the application of claim of said Wong Lin Choy as aforesaid, a sum of money, to wit, the sum of one hundred dollars, as aforesaid; the said Richard S. Williams, under color of his said office, having previously, to wit, on the 31st day of August in the year of our Lord 1895, at said city and county, state and district, aforesaid, feloniously and corruptly obtained and exacted a promise from said Wong Sam for the payment thereof by him to him, the said Richard S. Williams, by then and there falsely and corruptly representing to the said Wong Sam that without the payment thereof to him, the said Richard S. Williams, the said Wong Lin Choy would not be permitted to land at said port, be or remain within the United States, but would be returned to said foreign port whence he came,—against the peace and dignity," etc.

The first point relied upon by the appellant, and in respect to which error is assigned, relates to the ruling of the court below in respect to the qualifications of one Elliott to serve as a juror. He was examined on his voir dire as to his qualifications. The bill of exceptions states that in response to a question put to him by the

United States attorney, as to whether he knew anything of the case, Elliott answered that "he had discussed the case with one Lyman Mowry, at one time the attorney of said defendant in said action, that he was intimately acquainted with said Mowry, and that, as the result of said discussion, he (said Elliott) was prejudiced in the case." The bill of exceptions proceeds:

"Said Elliott further stated: 'I have not a fixed opinion as to the guilt or innocence of the defendant, but my mind is colored, and perhaps, in some degree, it would shape my convictions or judgment. It is strongly colored in the matter.' That thereupon counsel for the defendant asked said Elliott whether his (said Elliott's) said prejudice was so strong that it would require evidence to remove it, and said Elliott answered that it was of that strength, and that it would require evidence to remove it. That defendant challenged said Elliott upon the ground that he was biased and prejudiced. The prosecution joined issue on said challenge. The court then asked the following question of the juror, viz.: 'The Court. Q. Do you think you will be able to sit as a juror, and return a verdict based solely upon the evidence that you would hear?' To which said Elliott answered: 'A. I am not infallible. From what I said, I think I would. I think I possess a natural sense of justice. I think I would. I feel that I might.'"

The court below overruled the challenge, to which ruling the defendant duly excepted, and Elliott was sworn, and served as a juror; prior to which the defendant had exhausted all of his peremptory challenges.

We are of opinion that Elliott was not an impartial juror. No one, we apprehend, will deny that the accused was entitled to an impartial jury. That right was not only secured to him by the sixth amendment of the constitution of the United States, but is recognized by every court of justice. It is entirely true that mere hypothetical opinions, expressed or unexpressed, derived from public rumor, statements in public journals, common notoriety, and other like sources, do not disqualify a juror, when it is made to appear that notwithstanding such opinions he can and will be governed in his actions in the case entirely by the evidence that may be introduced upon the trial. All authorities concede, said the supreme court in *Reynolds v. U. S.*, 98 U. S. 145, 155, "that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside." The court then quotes the rule as stated by Mr. Chief Justice Marshall in *Burr's Trial*, 1 Burr's Tr. 416, Fed. Cas. No. 14,692g, that:

"Light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him."

The supreme court, in the *Reynolds Case*, then proceeds:

"The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is, almost, as a matter of necessity, brought to the attention of all the intelligent people in a vicinity; and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that, upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine

whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that by the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."

The rule thus declared by the supreme court has been subsequently adhered to. *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614; *Spies v. Illinois*, 123 U. S. 132, 8 Sup. Ct. 21.

Now, turning to the examination of the juror Elliott, it is seen that he had previously discussed the case with the former attorney of the defendant thereto, with whom he was intimately acquainted, and from that discussion he became prejudiced, which prejudice is shown by his answer to the question asked by the court to have been against the defendant. And, although the juror stated that he had not a "fixed opinion" as to the guilt or innocence of the defendant, he stated that his mind was "strongly colored" in the matter, and that his prejudice was so strong that it would require evidence to remove it, and that perhaps, in some degree, it would shape his convictions or judgment. Surely, a mind so affected cannot be properly said to be open to a fair consideration of such evidence as should be given, or to be in such condition as to be fairly presumed to yield, without any resistance, to the force of the evidence. And that the juror himself did not feel certain that the strong prejudice he entertained could be overcome by the evidence plainly appears, we think, not only from his statement that it would perhaps, in some degree, shape his convictions or judgment, but from his answer to the question of the court, in which he was asked whether he thought he would be able to sit as a juror, and return a verdict based solely upon the evidence he would hear; his answer being:

"I am not infallible. From what I said, I think I would. I think I possess a natural sense of justice. I think I would. I feel that I might."

Certainly, this answer also indicated a decided doubt in the mind of the juror whether he would be able to disregard the strong prejudice he derived from his discussion of the case with the defendant's former attorney therein, and be controlled solely by the evidence introduced on the trial. The law does not and cannot deem such a juror impartial. Every defendant in every criminal case is by the law presumed to be innocent until his guilt is established by proof beyond a reasonable doubt, and to the benefit of that reasonable doubt the defendant is entitled from the beginning to the end of the trial; and it applies as well to the examination of jurors as to any other step in the trial. In *Wright's Case*, 32 Grat. 941, the court said:

"The jury must be able to give the accused a fair and impartial trial. Upon this point nothing should be left to inference or doubt. All the tests applied by the courts, all the inquiries made into the state of the jurors' feelings,

are simply with a view of securing a tribunal competent to receive and weigh the evidence, and render a verdict accordingly, unimpaired by prejudice or preconceived opinions. If there is a reasonable doubt of whether the juror comes up to the standard, that doubt should be resolved in favor of the accused."

In *Holt v. People*, 13 Mich. 224, Judge Cooley said that in criminal cases, wherein, after full examination, the testimony given upon a challenge leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt.

In *People v. McQuade*, 110 N. Y. 300, 18 N. E. 162, the court of appeals of that state, speaking of the statutory modification of the common-law rule, said:

"There has been no change of the fundamental rule that an accused person is to be tried by a fair and impartial jury. Formerly the fact that a juror had formed and expressed an opinion touching the guilt or innocence of a person accused of crime was in law a disqualification; and, although he expressed an opinion that he could hear and decide the case upon the evidence produced, this did not render him competent. * * * Now, as formerly, an existing opinion, by a person called as a juror, of the guilt or innocence of a defendant charged with crime, is *prima facie* a disqualification; but it is not now, as before, a conclusive objection, provided the juror makes the declaration specified (that he believes that such opinion or impression will not influence his verdict, and he can render an impartial verdict according to the evidence), and the court, as judge of the fact, is satisfied that such opinion will not influence his action. But the declaration must be unequivocal. It does not satisfy the requirement, if the declaration is qualified or conditional. It is not enough to be able to point to detached language, which, alone construed, would seem to meet the statutory requirement, if, on construing the whole declaration together, it is apparent the juror is not able to express an absolute belief that his opinion will not influence his verdict."

In *State v. McClear*, 11 Nev. 39, 67, Hawley, C. J., in concluding a well-considered opinion, said:

"When not regulated by statutory provisions, we think that whenever the opinion of the juror has been formed upon hearing the evidence at a former trial, or at the preliminary examination before a committing magistrate, or from any cause has been so deliberately entertained that it has become a fixed and settled belief of the prisoner's guilt or innocence, it would be wrong to receive him. In either event, in deciding these questions, courts should ever remember that the infirmities of human nature are such that opinions once deliberately formed and expressed cannot easily be erased, and that prejudices openly avowed cannot readily be eradicated from the mind. Hence, whenever it appears to the satisfaction of the court that the bias of the juror, actual or implied, is so strong that it cannot easily be shaken off, neither the prisoner nor the state ought to be subjected to the chance of conviction or acquittal it necessarily begets. But whenever the court is satisfied that the opinions of the juror were founded on newspaper reports and casual conversations, which the juror feels conscious he can readily dismiss, and where he has no deliberate and fixed opinion, or personal prejudice or bias, in favor of or against the defendant, he ought not to be excluded. The sum and substance of this whole question is that a juror must come to the trial with a mind uncommitted, and be prepared to weigh the evidence in impartial scales, and a true verdict render according to the law and the evidence."

See, also, *People v. Wells*, 100 Cal. 227, 34 Pac. 718; *People v. Casey*, 96 N. Y. 122; *Stephens v. People*, 38 Mich. 739; *Smith v. Eames*, 36 Am. Dec. 515, and cases cited in note thereto.

One other point made on behalf of the appellant it is necessary to decide, as, if it should be sustained, it would, in view of the evidence

in the case, be useless to direct a new trial. That point is that there is a fatal variance between the proof on the part of the prosecution and the allegations of the indictment. It is contended in support of this point that the proof shows that the money was extorted by the defendant, if at all, not from Wong Sam, as alleged, but from one Chin Deock; and this, upon the ground that the money really came from Chin Deock, although the defendant dealt in the unlawful and criminal transaction with Wong Sam, and received the money from him. Both Wong Sam and Chin Deock were witnesses on the trial, and, according to their testimony, it was at the request of the latter that Wong Sam agreed to pay the defendant \$100 for securing the landing of Wong Lin Choy, and that, when the defendant came to Wong Sam for the \$100, the latter sent for Chin Deock, who brought the money, and, in the presence of the defendant, handed it to Wong Sam, who, in turn, handed it to the defendant, after trying to induce him, without avail, to accept \$90. We do not think the circumstance that Wong Sam got the money that he paid the defendant from Chin Deock of any importance. The transaction constituting the crime, according to the evidence, was between the defendant and Wong Sam. The defendant, so far as appears, did not know Chin Deock, in the matter, at all, and had nothing to do with him. It was from Wong Sam that he demanded \$100 for procuring the landing of Wong Lin Choy, and from Wong Sam that he received the money. This is in accordance with the averments of the indictment, and there was no variance.

It is not necessary to consider any other assignment of error, as they all relate to the rulings of the court below, which, if in any respect erroneous, can be readily corrected on the new trial which must follow for the reason first stated herein. Judgment reversed and cause remanded for a new trial.

GILBERT, Circuit Judge (dissenting). The examination of the juror on his voir dire, as set forth in the bill of exceptions, is chiefly presented in narrative form. We have not before us the questions which he answered; nor have we the benefit, which the trial court had, of noting his demeanor, his appearance, or the tones of his voice. Nor does the bill of exceptions state that all of his examination is embodied therein. The certificate is that it contains all the evidence necessary to explain the exceptions. But, assuming that the record contains substantially all that the juror testified, is the decision of the trial court, overruling the challenge to the juror, ground for now reversing the judgment?

By section 819 of the Revised Statutes it is provided that all challenges for cause or favor shall be tried by the court. In construing this provision, the United States courts, upon writ of error, have uniformly deferred to the decision of the trial court, and have exercised their power to set aside its decision with hesitancy. In *Reynolds v. U. S.*, 98 U. S. 156, Chief Justice Waite said:

"The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set

aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."

In *Hopt v. Utah*, 120 U. S. 435, 7 Sup. Ct. 616, where a juror had formed an opinion, but stated under oath that notwithstanding such opinion he could and would act impartially and freely, the court said:

"The judgment of the court upon the competency of the juror in such cases is conclusive."

In *Spies v. Illinois*, 123 U. S. 179, 8 Sup. Ct. 30, the language from *Reynolds' Case*, above quoted, was repeated, with the approval of the court.

In *Publishing Co. v. McDonald*, 19 C. C. A. 517, 73 Fed. 442, the circuit court of appeals for the Second circuit said:

"But it must be remembered that the question before the trial judge, although one of mixed law and fact, is, in the main, a question of fact, and that, while he may be sometimes wrongly influenced by a desire to expedite the trial or by impatience of delays, yet, if his mind is undisturbed, the impression which the juror makes, of his intelligence, fairness, and evenness of mind, from a personal inspection of him, and the belief, in regard to his probable character, which is created by his appearance under examination, his bearing, and willingness to disclose the nature and extent of his preconceived opinions, are valuable, and have deserved weight before an appellate court; and therefore the finding of fact by the trial court will not be set aside, except for manifest error."

Turning to the decisions of the supreme court of California, we find that a similar view of the conclusiveness of the ruling of the trial court has been entertained by that court. In *Trenor v. Railroad Co.*, 50 Cal. 230, Rhodes, J., said:

"And we are inclined to the opinion, though we do not expressly so hold, that the decision is final, and not subject to review either on motion for a new trial or on appeal. But, however that may be, if the decision is subject to review, it is only on the ground that the evidence is insufficient to sustain it. This court would not, except in the clearest case, interfere with the decision, for the determination of the court below is based more largely than in ordinary questions in litigation upon the bearing, manner, appearance, etc., of the juror while giving his testimony."

In *People v. Wells*, 100 Cal. 229, 34 Pac. 719, referring to section 1073 of the Penal Code which defines actual bias to be "the existence of a state of mind on the part of the juror in reference to the case or to either of the parties, which will prevent him from acting with entire impartiality, and without prejudice to the substantial rights of either party," the court said:

"Whether the state of mind of the juror is such as to constitute actual bias, within the above definition, is a question of fact, to be determined by the court. * * * The court's decision upon these points, when the evidence disclosed upon the examination of the juror is susceptible of different constructions, is to be regarded on appeal like its determination of any other question of fact resting upon the weight or construction of evidence."

In *People v. Fredericks*, 106 Cal. 559, 39 Pac. 945, the court said:

"This court is only allowed to review an order denying a challenge to a juror upon the ground of actual bias when the evidence upon the examination

of the juror is so opposed to the decision of the trial court that the question becomes one of law, for it is only upon questions of law that this court has appellate jurisdiction. * * * The evidence of each juror was contradictory in itself. It was subject to more than one construction. A finding by the court either way upon the challenge would have support in the evidence, and under such circumstances the trial court is the final arbiter of the question; for under such conditions the question presented to this court by the appeal is one of fact, and our power to hear and determine is limited to appeals upon questions of law alone."

Guided by the principles announced in the foregoing decisions, both of the courts of the United States and of California, I think the finding of the trial court in this case upon the question of the competency of the juror is conclusive. Conceding that the juror's evidence appears contradictory, and that there are portions of it which would lead to a contrary conclusion, it must be borne in mind that it is not our province to weigh the evidence, and to say whether or not the trial court should have found differently upon the facts. The only question for us to consider is whether there was evidence to support the finding. The record shows that there was. When asked if he would sit as a juror, and render a verdict based solely upon the evidence, he answered: "I think I would. I feel that I might." The force of these words would, it is true, largely depend upon the manner and tones in which they were uttered. They might be said in a hesitating, doubting manner, such as to convey the impression that the speaker himself distrusted his ability to divest himself of his bias; and, upon the other hand, they might be expressed with such earnestness and sincerity as to carry to the court the conviction that notwithstanding his bias the juror could and would act impartially. The trial court had a better opportunity than have we to judge of the effect and the credibility of that testimony, and he had the right to trust and act upon it. In so doing, he exercised a discretion which was vested in him by the statute; and his finding upon the facts is not, I think, subject to our review.

UNITED STATES, to Use of SICA, v. KIMPLAND et al.

(Circuit Court, E. D. New York. April 18, 1899.)

1. PRINCIPAL AND SURETY—BOND OF CONTRACTOR FOR PUBLIC WORK—FURNISHING LABOR OR MATERIALS.

The condition in a bond of a contractor with the United States for public work, prescribed by 28 Stat. 278, which requires that the contractor shall make prompt payments to all persons supplying him labor and materials in the prosecution of the work, is intended to cover payments only for the visible material furnished for direct use and incorporation in the work, and of wages to the men whose services are directly employed in doing the work; and an action against the sureties on such a bond can only be maintained, under the statute, by one who has title to a claim for labor or materials so supplied. A person furnishing board and lodging to laborers employed on the work does not supply either labor or materials, within the statute.

2. SAME—ACTION ON BOND.

Plaintiff brought action, under 28 Stat. 278, on the bond of a contractor for public work, conditioned, as therein required, for the payment by the contractor of all persons supplying him labor and materials in the prose-

cution of the work; alleging that she furnished board and lodging to laborers employed on the work, under an agreement between herself, the laborers, and the contractor, by which the latter agreed to pay for such board and lodging, retaining the amount from the wages due the men. *Held*, on demurrer, that the complaint alleged facts which enabled the plaintiff to maintain an action against the contractors, and also the sureties, unless the contractors had paid the laborers entitled to the wages, without knowledge on the part of the sureties of the right of the plaintiff to receive the wages, or some part thereof, and that it was not necessary that the complaint should negative such payment by the contractors.

This is an action in the name of the United States, for the use and benefit of Ellen Sica, against Charles N. Kimpland, impleaded with others, on a bond given by contractors for public work. Heard on demurrer of the defendant Kimpland to the complaint.

Wilson, Bennett & Underhill (Mr. Bennett, of counsel), for plaintiff.
Kellogg, Rose & Smith (Mr. Rose, of counsel), for defendant Kimpland.

THOMAS, District Judge. The complaint shows that, by contract concluded August 11, 1897, certain persons, under the firm name of Mairs & Lewis, agreed with the United States to furnish all labor and materials for the construction of two gun emplacements and a mining casement on Plum Island, in the state of New York, together with a wharf or pier, in accordance with certain specifications; that Kimpland, defendant, and another, by bond, guarantied that Mairs & Lewis "should, in all respects, duly and fully observe and perform, all and singular, the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Mairs & Lewis to be observed and performed, according to the true intent and meaning of the said contract, * * * and shall promptly make full payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract." This bond was given pursuant to an act of congress passed in 1894, which provides that:

"Hereafter any person or persons entering into a formal contract with the United States, for the construction of any public building, or the prosecution and completion of any public work, or repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and material in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payments for which have not been made, shall be furnished with a certified copy of such contract and bond, upon which said person or persons supplying such labor or materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit, against said contractor and sureties," etc. 28 Stat. 278.

On the 3d day of September, 1897, the contractors agreed, in writing, with Ellen Sica, that the latter should "keep a boarding house on Plum Island, while such work shall continue, whether it be for a longer or shorter period than one year, and to board all the workmen of second parties engaged in said work who may wish to board with

her, and furnish them such other supplies as they may need, and render to second parties, once in each month, a bill of the amount of the indebtedness of each of said workmen to her for such board and supplies." In consideration whereof, the second parties agreed "to pay the bills which shall be presented to them, as above provided, by first party, for board and supplies furnished by her to said workmen during the continuance of the said work, out of any moneys which may be due from second parties to said workmen as wages for their work, within reasonable time after the presentation thereof, provided that there shall be sufficient sums due to said workmen, respectively, from second parties to pay their respective bills, and provided that said workmen shall respectively consent that so much of their wages as shall be necessary for that purpose may be paid by second parties to first party, in payment of their respective bills for board and supplies." The complaint alleges that, pursuant to this contract, said Sica furnished board to the contractors' laborers, bread and other merchandise to the contractors, and loaned money to the contractors on account of the said contract with the government, for which payment has not been made; and suitable allegations of compliance with the terms of the contract between the said Sica and the contractors are made; and judgment therefor is demanded against the contractors and their sureties. And to this complaint one of the sureties demurs. The learned counsel for the plaintiff insists that the "furnishing of board and necessities to the men engaged in this government work constituted a supplying of labor, within the meaning of this statute"; and that "it is literally true that the plaintiff supplied labor to the contractors, by assisting the contractors in paying for their labor in part"; and also that it was supplying material; and the argument is fortified by the decision in *Lybrant v. Eberly*, 36 Pa. St. 347, where the contractor agreed to pay his laborers, and also to board them, as part of the consideration, and the court stated that "the board of the hands appears to have been part of the compensation to be paid for the work and labor in the erection of a house, and, therefore, the cost of it is a proper item in the claim for a lien." The defendant's answer is that the agreement of the contractors was that they would be answerable for the board bills of their men, so far as they had wages therefor and the men consented to the withholding thereof and the payment of the same to the boarding-house keeper; and cites *McCormick v. Water Co.*, 40 Cal. 185, where it was decided that a person hired by a contractor to cook for the men engaged in a construction was not entitled to a lien on account of services rendered in that capacity. The bond and statute are similar in their provisions, and it is quite unimportant whether the language of one or the other be taken for construction. In either case, the liability of the sureties will not be extended by implication, or beyond the fair meaning of the statute or bond. The statute required the bond as security for the performance of the work of construction, and to insure the payment for "labor and materials" supplied "in the prosecution of the work." To execute the work, materials were needed. Such materials must be fashioned for placement in the structure, conducted to such place, and deposited therein. This required

labor. Hence, the United States required that these two essential elements of the construction should be paid for by the contractors, thereby avoiding all trouble from liens, and affording security to those inclined to aid the work. The first question is this: Is the board, which the contractors have agreed conditionally to pay out of the men's wages, labor or material supplied in the prosecution of the work? Sica gave food and necessities to the men, to give the men strength and facilities to labor; hence, the men worked. But this labor was not the service rendered by Sica. But the argument proceeds: (1) The men labored. (2) Sica furnished board for a portion of their wages. (3) Hence, she advanced an equivalent of money to pay the wages of the laborers. (4) Hence, she furnished labor. It is considered that the word "labor," as used in the statute, does not admit of such remote and indirect equivalents, but requires the sureties to insure the payment for the visible material that was furnished for direct use and incorporation in the work, and the payment of the wages to the men whose service was directly employed in doing the work. Thereby the sureties had a clear conception of the limits of their liability. They were not concerned to see to it that money borrowed or advanced to aid the prosecution of the work should be repaid; that persons who furnished stores or food or lodging to the workmen, under an agreement by the contractor to pay for the same out of the wages due those benefited, should be paid. The contractor was under no such primary duty to the United States. His duty as a contractor, and as regards the sureties, was to pay his laborers their wages, and allow them to buy their board and clothing where they would, and also to pay the persons supplying the material, and allow them to disburse their own money. The condition that the "contractors shall promptly make payments to all persons supplying" them "labor and materials in the prosecution of the work" means, at least as regards the sureties, directly what it states; so that only he who has title to the claim for the labor or material furnished, from the person furnishing it, could invoke the benefit of the statute. This summarizes the court's conception of the meaning of the statute. In the case at bar, Sica has contributed neither labor nor material, within the contemplation of the statute.

The next inquiry is this: Does Sica stand in the place of the workmen whom she boarded under the arrangement, so as to entitle her to sue the contractors and sureties for their wages? The contractors agreed to pay Sica the amount of the board, from moneys due workmen boarded by Sica, if the boarders consented. Hence, if Sica boarded A., a workman, and he consented, so much of the money due A. as should be necessary to discharge A.'s board bill was payable to Sica. This arrangement, after A.'s consent, gave Sica the right to recover from Mairs & Lewis such sum. Let it be supposed that the contractors owed A. \$50, and that there was due Sica \$25 for A.'s board. Now, by the tripartite agreement, A. releases the contractors from payment to A. Sica has no claim against A., and upon the payment Sica has no claim against the contractors. The agreement amounts to the supplying of A. with board, and the promise to accept, in payment, such wages as the contractors might owe

A. In that case, the contractors would have no right to pay the sum to A., nor would the latter be entitled to receive it. Both A. and the contractors have agreed that it shall be paid to S. The contractors owe the duty of payment to S., and to nobody else. The three persons have agreed that such shall be the legal status of the parties, and it is clear that no one of such parties should be heard to say that the payment should not be made according to the exact terms of the agreement.

The next inquiry is this: If the contractors owe the duty of paying a portion of the money due, to Sica, instead of paying it to the persons furnishing it, and fail to do so, do the sureties assure such payment? The obligation of the sureties is that they will guaranty to A. full payment for all the labor furnished. Hence, if the contractors should not pay A., the latter could sue the contractors or the sureties, or both, for the same, in an action at law. But A. has agreed with the contractors and S., for a legal consideration, that the contractors shall not pay for the labor to A., but to S., who has boarded A. Does the liability of the surety to pay A., in default of the contractors paying him, bind the surety to pay S., whom both the contractors and A. have substituted as the creditor, in such a way that she could sue the contractors? This may be illustrated. Suppose that A. furnished, for use on the work, a car load of stone to the contractors, at the agreed price of \$100, and that the contractors and A. agreed that all moneys for stone delivered should be paid to S., who, upon such mutual agreement, had boarded S.'s men while quarrying the stone. Now, the sureties have agreed that they will see that A. is paid for his stone, and must do so. Do they also agree that they will see that any person who is legally subrogated to A.'s right of payment shall be paid? That is, do the sureties impliedly agree in the bond, construed in the light of the statute, that they will pay A., or anybody to whom A. sells his claim, if the contractors not only had notice of the sale, but also procured the sale, with the view of helping along the work? Of course, if the sureties knew of the arrangement, and consented thereto, this immediate question would be of easier solution; but there is no evidence of such knowledge or notice to the sureties; and the question is whether the surety impliedly agreed to guaranty payment to such persons. Let the proposition be systematically stated: (1) The contractors agreed to pay A. for his labor. (2) The contractors, by a binding arrangement, agreed to pay an assignee of A. (3) Does the sureties' agreement to pay A. bind them to assure the assignee of A., without notice to them of the assignment? If the contractors had not paid A., and it appeared that thereafter the claim was owned by S., justice would require, if nothing in the form of the remedy or otherwise, prejudicial to the sureties, stood in the way, that the payment should be made to S., and all technicalities should be swept aside to do justice. But, if payment has been made to A. without any notice or knowledge of S.'s claim by the surety, then the justice of the case, and maybe the rule of law, would be different. The complaint does not show whether the contractors have paid A., and the court does not consider that it is required to pass upon a question which may be corrected by a new

pleading, if the demurrer be sustained. It may be that a final conclusion could be reached without use of the absent facts; but it is deemed better to forbear a decision until all the facts shall be before the court, when the protection of the rights of the parties may be more intelligently attempted; and this is so, although it be the duty of the plaintiff to plead the facts essential to a just determination. Therefore, the question of the liability of the sureties for the payment of the money to Sica, with the solution of any pertinent technical questions relating thereto, is reserved until the precise situation may be known, and meanwhile the demurrer is overruled. The defendant may, if so advised, plead over within 20 days.

JEFFREY MFG. CO. v. CENTRAL COAL & IRON CO.

(Circuit Court, D. Kentucky. April 1, 1899.)

1. CONTRACT—DELAY IN PERFORMANCE—WAIVER.

Where plaintiff agreed to furnish certain machinery by a fixed time, but failed to perform his contract in time, and defendant did not cancel the contract, or release plaintiff from its obligation thereunder, or reject the machinery and material, when tendered, as coming too late, but accepted them and put them into use, the stipulation as to time was waived, and the obligation to pay the agreed price was complete, subject to the right to recoup the damages, if any liability therefor had been incurred by plaintiff.

2. SAME—DAMAGES—MEASURE.

Plaintiff agreed to furnish certain machinery within 90 days from the approval of the contract; foundation and material therefor to be put in place, ready for machinery, by defendant, the purchaser, but to be constructed under plans furnished by plaintiff, who was to furnish experts to superintend the erection of the plant. Shortly after the execution of the contract, plaintiff demanded a modification thereof so as to make the notes given for the price payable in gold. The delay consequent on this desired change resulted in failure to perform the contract within the specified time. The plan for the construction of the foundation was not supplied promptly by plaintiff, and defendant did not put in the foundations ready for the apparatus until after the 90 days had expired within which the contract was to be performed. Defendant alleged that its failure to construct the foundations was the result of the failure of plaintiff to furnish the plans, and of plaintiff's announcement that it would not perform the contract unless the alterations in the contract were made. *Held*, that as the failure of defendant to furnish the foundations in due time was, to a certain extent, the fault of defendant, in that, if it had performed on its part, the damages alleged to have resulted to it from the delay would have been in part reduced, defendant will not be allowed the entire amount of damages which it claims to have suffered by reason of the delay in the completion of the contract, but the amount of interest that it would have paid on the notes that it was to give for the purchase price, but which it failed to give, from the time the work was accepted until the time of bringing suit.

Barnett, Miller & Barnett and H. B. Arnold, for complainant.
Humphrey & Davie, for defendant.

EVANS, District Judge. On the 5th day of June, 1896, the complainant and defendant entered into a contract whereby the former was to furnish to the latter, f. o. b. cars at Central City and Ren-

der, Ky., certain machinery and materials specified in the contract, for the agreed price of \$15,500, to be paid in 30 equal monthly notes, to be dated 60 days from the starting of the power plant; provided that the entire plant was up to the requirements of the contract; and all but the first two of the notes were to bear interest from date, until paid, at the rate of 6 per cent. per annum. The parts of the contract important to be considered here are in the following language:

"The foundations, power house, and material for the same, will be put in place, ready for the apparatus, by the purchaser. They shall be constructed from plans furnished by the Jeffrey Manufacturing Company, and shall meet the approval of the company's engineer. All steam and water connections shall be brought inside the building by the purchaser, and, unless otherwise designated, shall be continued to the apparatus of the purchaser. The Jeffrey Manufacturing Company will furnish expert attendants as follows: Expert to superintend installation and erection of plant, covering a time not to exceed 60 days. The Jeffrey Manufacturing Company guaranty the above apparatus from inherent mechanical and electrical defects of labor and material, and will replace any part shown to be defective within one year from installation. The above apparatus will be delivered in season for starting the plant 90 days from date of approval of this contract."

The contract was executed on the 5th day of June by the complainant, through its executive officer for this purpose, the vice president of the company, and by the defendant. On the next day the president of the complainant began a vigorous and peremptory effort, by correspondence, and by at least one visit to Louisville, to induce the defendant to modify the contract so as to make the notes agreed to be given for the price payable in gold. Otherwise, he demanded that there should be a cancellation of the instrument. So persistent was this effort, that it lasted up to about the 9th of August, 1896, though the defendant, from the beginning to the end of the effort, emphatically declined and refused to consent to any change or alteration of the agreement whatever. Meantime little or nothing was done by either party towards performing the contract, except that a desultory correspondence was carried on between some of the subordinate officers of the respective companies about the plans to be furnished by the complainant. The evidence leaves it uncertain whether there was any great interest manifested on either side to secure a speedy or expeditious execution of the agreement; and the correspondence between the two subordinate officers, so far as could be seen, resulted only in the furnishing by the complainant of a blue-print plan for the foundations and the power house to be constructed for the reception of the machinery. A corrected copy of this seems to have reached the defendant about the 17th day of August, 1896. There is no dispute that the machinery and materials were supplied, nor that they were put in working order at Render by October 14, 1896, and at Central City by the 31st day of the same month. It is admitted, and, indeed, proved by defendants' witnesses, that the machinery and materials were ascertained to be fully up to the requirements of the contract, if not, indeed, superior to those requirements; and, after a thorough test, it was all fully accepted about the 18th of January, 1897.

Analyzing the contract between the parties, and considering it as far as it appears to be important to do so in this case, it will be seen that it required the complainant—First, to furnish the machinery and materials specified; second, to furnish plans for the construction of the foundations and power house; third, to furnish an expert to superintend the installation and erection of the plant, covering a time not to exceed 60 days; fourth, to deliver the apparatus in season for starting the plant 90 days from the approval of the contract; and, fifth, to guaranty the apparatus to be free from defects, etc. On the part of the defendant, it will be seen to require—First, that it put in place, ready for the apparatus, the foundations and power house, and furnish all material for the construction of the same; second, that the construction of the foundations and power house should be done according to plans to be furnished by complainant; and, third, that it should execute to complainant the 30 notes for the purchase money within 60 days from starting the plant. The proof is clear that the machinery and material were furnished by the complainant, but that they were not delivered in season for starting the plant 90 days from June 5, 1896. The proof shows that the machinery and materials furnished were up to contract requirements, and satisfied the guaranty of the complainant. The proof is also clear that the plan for the construction of the foundation and power house was not supplied in accurate form until in August, 1896, and that the expert to superintend the installation and erection of the plant was furnished by the complainant. There can be no doubt, from the evidence, that defendant did not put in place, ready for the apparatus, the foundation and power house which it was to erect, and for which it alone was to furnish the material, until after the 5th day of September, 1896, and that its reason for doing this was largely, if not altogether, based upon the supposition that the correspondence between the presidents of the two companies in reference to a modification of the contract made it unwise for the defendant to proceed in this work, though, of course, some of the delay may have resulted from the failure of the complainant to supply the plans called for by the contract. It is a fact admitted upon the record that the defendant did not execute the notes representing the unpaid part of the price of the machinery and materials. Upon this state of facts, the complainant seeks the judgment of the court for \$10,450, being the part of the agreed price which yet remains unpaid, and for which notes were not given, together with interest thereon from the time the notes should have been executed; and, upon the averments of the bill, it also claims a mechanic's lien upon the property described in the pleadings, and prays for a judgment enforcing it. By its answer the defendant seeks to recoup the damages it claims to have sustained by reason of the failure of the complainant to deliver the machinery and material in season for starting the plant 90 days from the 5th of June, 1896. It insists that its failure to construct the foundations and power house was the result of a failure on the part of the complainant to furnish plans, and, furthermore, was particularly the result of the complainant's announce-

ment that it did not intend to perform its part of the contract unless certain alterations of it were agreed to. The defendant also insists in the answer that its damages amounted to the sum of \$5,175.03, made up of the various items set forth in that pleading; but on the hearing its counsel abandoned all claims to damages, except the following, namely: The difference in cost of mining coal during parts of September and October, 1896, amounting to \$3,106.96; the difference in the cost of hauling, \$782; and the difference in the cost of pumping, \$138.75; making a total of \$4,027.71. It may be proper at this point to say that although mentioned occasionally in general terms by the defendant in its letters to the complainant, beginning with the one dated January 18, 1897, there was no statement of the amount claimed until the letter of December 4, 1897, when it was put at \$5,680.71; being the gross amount of damages alleged to have been caused by the delay of 56 days, including Sundays, at Central City, and 39 days, including Sundays, at Render. This claim was for an amount exceeding one-third of the value of the entire machinery and materials furnished by the complainant, and is somewhat discredited by its obvious extravagance. Indeed, the complainant itself has voluntarily diminished it quite $33\frac{1}{3}$ per cent.

The case has been ably argued. The complainant contends that the delay upon its part was the result alike of defendant's fault, and of causes over which it had no control. The opinion of the court is that these contentions are both equally unfounded. The complainant also contends that, if it is liable for any damages, the measure thereof is the fair rental value of the machinery and materials it sold during the time of the delay of delivery beyond September 5, 1896. The defendant, on the other hand, contends: First, that the persistent and somewhat peremptory demand of the complainant for a cancellation of the contract unless the payment in gold clause was inserted in the notes to be given, and particularly in view of the language used in the letters demanding it, showed so much of a purpose (coupled with the delay to furnish plans for the foundations and power house) not to deliver the machinery and material at all as to excuse the defendant, and put upon complainant all the blame for the delay in getting the foundations and power house ready, inasmuch as it was useless, if not foolish, under that view, to erect those structures, if complainant did not intend to supply the machinery; second, that the delay was entirely the fault of the complainant (a proposition that may become important when we consider what delay is referred to,—whether that of the complainant or that of the defendant); and, third, that the measure of damages should be the difference between the cost of the mining of the coal actually taken out of the mines, during the time of the delay after September 5th, by the old pick method, and what would have been the cost of taking it out by the machinery, if it had been delivered according to the contract.

The decision of the court must rest upon the duties of the respective parties under their contract. Those duties were material, and to some extent, at least, mutual and dependent. It was the duty, for

example, of complainant to deliver the machinery and material in season for starting the plant 90 days from June 5, 1896. It was also its duty seasonably to furnish the plans for the structures to be erected by the defendant. Its failure in both respects, in the opinion of the court, as before indicated, was without reasonable or just excuse. Complainant knew as well on the 4th day of June of the public questions involved in the political campaign of 1896 as it did on June 6th; and it should not have executed the contract without intending to perform it faithfully, or else it should have taken its chances by a decided and unequivocal repudiation of it, in which event the defendant's remedy would have been clear and well understood. The court has no difficulty as to these phases of the case, nor any doubt that the defendant had some ground for supposing that it was complainant's purpose not to comply with its agreement, though none, under the rule laid down in *Dingley v. Oler*, 117 U. S. 503, 6 Sup. Ct. 850, to treat the contract as broken, and none, in fact, for failure upon its part to put itself in position to demand damages while insisting upon performance by complainant. The trouble the court has had has been as to the rights of the defendant. It never for a moment consented to cancel the contract, nor to release the complainant from its obligation thereunder; and, though the machinery and much of the material were tendered after the 5th of September, they were not rejected as coming too late. On the contrary, they were accepted and put into use by the defendant, which still has them all in its possession, and confesses that they are fully up to the contract guaranty and requirement. The stipulation as to time was waived, and the obligation to pay the agreed price was therefore complete; subject to the rule laid down in *Construction Co. v. Seymour*, 91 U. S. 651, as to the right to recoup the damages if any liability therefor had been incurred by the complainant. The defendant must be held to have waived any right to sue for actual breach of contract, if there was one (which the court does not believe), in the mere acts of the complainant respecting the insertion of the gold clause, and defendant's right must be confined to that of recouping its damages, if any, growing out of other considerations; and the question in that connection is, has the defendant shown a right to damages? As already pointed out, the contract provides that the defendant itself shall construct the foundations and power house. Without these, the machinery and material furnished by the complainant would be unavailable for mining purposes at defendant's mines. The proof is clear that these structures were not completed by the defendant in time to have made it possible to put the machinery in operation by September 5, 1896. This may, indeed, have been because defendant reasonably supposed that the complainant did not intend to comply with the contract; but does that alter the fact that the foundations, etc., were not ready in season, or does it excuse the defendant for that failure when it comes to demand damages? Especially must we consider another question: Does this failure of the defendant entitle it to damages against complainant, or, rather, can the defendant maintain a claim to damages in spite of its failure in this respect? The defendant, it must be remembered,

was insisting that the contract should remain intact. It positively declined to alter, modify, or cancel it. If, in addition, the defendant had in due season performed its part of the work to be done, and which performance was necessarily a condition precedent to the operation of the machinery, the defendant would be in a position to insist, with much greater force, not only upon the measure of damages it contends for, but also upon the consequences of the complainant's delay in furnishing the plans required, and, indeed, upon its delay generally.

The difficulties of the case, as they present themselves to the court, are increased by the circumstances of the failure of the defendant to do promptly what it was required to do in order to make the machinery it was purchasing available for its own beneficial use. The court cannot overlook the fact that the complainant was, without right, insisting upon a change of contract, the troubles about which were as well known the day before it was executed as they were the day afterwards, nor of the other fact that complainant failed to furnish the plans until an inexcusably late date. Possibly time was of the essence of this contract, but it cannot be forgotten that it was as much so respecting the defendant and its duties as it was respecting the complainant and its duties. If the defendant had promptly performed its necessarily precedent work, it could have recovered full damages in case the complainant had entirely failed to perform its obligations. If the defendant had performed its part promptly, then, indeed, the complainant, when it began compliance, might have been able to complete it much sooner than in fact was the case, and thus have greatly diminished the damages. It is therefore impossible to find that either party to this contract so performed its part of the obligations imposed by the writing as to put the blame entirely upon the other, so far as the injuries resulting were concerned, and this fact takes this case out of any well-established rule for measuring the damages. Each party had its duties to perform. Neither party performed its duties in time to make the machinery available to the defendant by September 5th. Whatever may have been the reasons for this on the part of the defendant, the fact nevertheless remains that it did not seasonably prepare the foundations and the structures, although it may have supposed the fault for this to have lain with the complainant. The court is therefore clearly of the opinion that it should not yield to the contention of either side respecting either the criterion or the amount of the damages; but, having reached that conclusion, its difficulties are not altogether solved, because the court cannot avoid the conviction that some wrong was done to the defendant, though by no means so great an injury as the latter suggests. It cannot, indeed, be overlooked that the claim of the defendant for any damages growing out of the delay was very mildly pressed; and, indeed, defendant did not appear really to press it at all until near the close of 1897, although mentioning it in previous letters in general terms, nor then until some irritation in the correspondence between the parties on other matters had been excited, nor until defendant, after a long course of calculation, had figured out a very astonishing result as to the amount of its injuries.

After much reflection upon the case, and without attempting to define with any degree of precision a criterion of damages applicable to a case like the present, where so many of the factors are indefinite and uncertain, and where both sides have manifestly contributed to the difficulties, the court has reached the conclusion that there is enough merit in the claim of the defendant to warrant the court in measuring the damages by the amount of the interest that would have accrued on the notes between January 1, 1897, and January 1, 1899, had they been given, and not paid; and judgment may be rendered for the balance due to the complainant, with interest only from January 1, 1899, until paid, and the costs of the action, and also a judgment enforcing the mechanic's lien set up in the bill.

UNITED STATES v. PARKS.

(Circuit Court, D. Colorado. March 21, 1899.)

No. 3,824.

1. DISBARMENT PROCEEDINGS—SUFFICIENCY OF PETITION.

While proceedings in a federal court for the disbarment of attorneys are subject to judicial regulation, to the end that they shall be conducted without oppression or unfairness, there is no established, formal procedure, and a petition for disbarment is sufficient which states sufficient facts to advise the respondent of the nature of the charge against him.

2. SAME—GROUNDS FOR DISBARMENT—LIMITATION OF CRIMINAL PROSECUTION.

A court is warranted in disbaring an attorney for acts showing moral turpitude or unprofessional conduct, and whether or not such acts constitute crimes under a statute is not of controlling importance; hence, if the act charged constitutes a crime, neither the fact that the respondent has not been convicted thereof, nor that a prosecution is barred by limitation, is a defense to proceedings for disbarment.

This is a proceeding for the disbarment of defendant as an attorney. Heard on motions and demurrer attacking the sufficiency of the petition.

Ralph W. Smith, for the United States.

E. C. Miles, for defendant.

HALLETT, District Judge (orally). This is a petition to disbar. In the first count the respondent is charged with entering into an agreement, in the month of April, 1891, with certain officers of the county of Lake, by which he was to have judgment against the county of Lake for the sum of \$60,000 upon a false claim for compensation for legal services rendered by him to the county, as an attorney at law, in respect to certain suits which had been theretofore prosecuted against the county, and that, upon the entry of such judgment, bonds were issued by the county in satisfaction of the judgment, to the amount of the judgment. Of these bonds, the officers who had concurred in the scheme for allowing the judgment against the county received one-half. In the second count it is alleged that the county of Lake, in the month of November, 1895, brought suit in the district court of Lake county to set aside and vacate the judgment

for \$60,000, obtained by the respondent, as related in the first count, and obtained an injunction against the transference of the bonds then held by the respondent, and that the respondent did, nevertheless, transfer the bonds, in defiance of the injunction, and with a view to defraud the county of the amount specified in the bonds. In the third count it is alleged that certain suits were brought, in the years intervening between 1882 and 1889, against the county, upon interest coupons attached to bonds which had been issued by the county, and that respondent was employed as attorney and counselor by the county in those suits, and thereafter he represented that he had succeeded in the defense made by him in behalf of the county, and had defeated the plaintiffs in those actions in respect to the matters in which they sought to recover; that since that time he has abandoned the service of the county, and taken up with the owners of the bonds, accepted employment from them, and is now engaged in prosecuting suits against the county in respect to the same matters which he had formerly defended for the county. Objection is made to the petition by motion to strike out some parts as irrelevant and impertinent, and also by a motion to make some of the counts more definite and certain in respect to matters which are charged in them, and also (to the first count of the petition as amended) by demurrer, upon grounds which will be stated a little further on.

In respect to the motion to strike out parts of the petition, and the motion to make it more definite and certain in some parts, they will be overruled, upon the ground that the matters alleged are sufficiently stated to give notice to the respondent of the charges against him. In *Randall v. Brigham*, 7 Wall. 540, the supreme court says:

"It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit, and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

In this instance the proceeding was begun upon a letter written to some one by the injured party. The court, having come into possession of the letter, after some inquiry by the grand jury, which inquiry was begun upon the same letter, notified the attorney that on a certain day inquiry would be made as to his conduct in the premises; and upon that inquiry, so begun, the attorney was disbarred. So, in *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, the proceeding against the attorney was upon an order entered by the court upon information received from parties in attendance on the court of the conduct of the attorney in participating in a lynching just outside of the court room. The charge in the present instance is quite as specific as it was in *Ex parte Wall* and in *Randall v. Brigham*. Numerous cases have been

decided to the same effect. In the judgment of the court, the relator has sufficiently stated the facts to apprise the respondent of the nature of the charge against him, and no more can be demanded.

The demurrer to the first count in the petition as amended is put upon the ground, apparently, that the matter charged in that count is a crime under a law of the state of Colorado, and that it was at the beginning of this proceeding barred by a statute of limitation of the state. It is alleged in the petition that the offense, which is bribery, was committed on April 1, 1891, and this petition was filed in December, 1898. It is also contended that, if the case be regarded as not within the statute of limitations, there still must be a conviction, or must have been a conviction, of the crime, before there can be any proceeding to disbar based upon it. In respect to the statute of limitations it has been decided in several cases that it has no application in a case of this kind. One of the cases is *In re Lowenthal*, 78 Cal. 428, 21 Pac. 7; another, *Ex parte Tyler*, 107 Cal. 78, 40 Pac. 33. And as to the objection that no proceeding can be had until there has been a conviction of the offense under the statute, the case of *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, is a sufficient answer.

Respondent quotes largely, in support of his position, from the dissenting opinion of Mr. Justice Field in that case. Quotation would be apt, if it had been found in the opinion of the court, rather than in the opinion of a dissenting judge. The case itself is full authority to the point that no conviction is necessary where the misconduct alleged amounts to the commission of a crime. In that case the charge against the accused was of homicide, and it would seem that, if in any case the rule be that a conviction of the crime must first be had, it would have been applicable in that case. There are cases in which it has been held that, if the offense be committed by the attorney in some matter not connected with his office as an attorney, there must be a conviction of the crime before prosecution to disbar. Those authorities are not recognized by the supreme court in *Ex parte Wall*. And this must be the correct rule, as any one may learn from a consideration of the ground upon which a proceeding to disbar proceeds. The matter alleged against an attorney in disbarment proceedings may or may not be a crime under the law. It may be an act of unfaithfulness to his client, or misconduct in court, which is not punishable by any statute, state or federal; or it may be, as in this instance, an act which is forbidden by a law of the state. The circumstance that it is or is not forbidden by any statute of the state is of no controlling importance. An attorney at law must be of good moral character. In this court he must make oath to demean himself uprightly and according to law. In any proceeding to disbar, the question is as to his conduct as an attorney, and, if he be found delinquent in that respect, if his conduct shows moral turpitude, then he may be disbarred, whether the offense be one which is forbidden by the criminal law or not.

And so, as to the statute of limitations, it may be true, as said by the California court, that the court will not encourage stale charges,—those which, by their age, have passed from the memory of men,—especially in a case where the conduct of the attorney has been ex-

emplary in recent times. But, of the matters alleged in this petition, it is charged that some of them are still pending. The suits which it is charged have been unlawfully induced and promoted by the respondent are still pending, in this court and in other courts of this jurisdiction. And it is also alleged that the county is still seeking to set aside and annul the bonds which are charged in the petition to have been fraudulently obtained by the respondent. So that, upon all grounds, I find nothing in the demurrer or in the motions which can prevail against the charges.

The motions and the demurrer will be overruled, and the respondent will be required to answer the petition within 30 days from this day.

In re FOWLER.

(District Court, W. D. Wisconsin. April 12, 1899.)

No. 41.

BANKRUPTCY—EXAMINATION OF WITNESSES—WIFE OF BANKRUPT.

Where, by the law of the state in which the proceedings are had, a wife cannot be a witness for or against her husband, she cannot be required, in proceedings in bankruptcy against the husband, to testify concerning property in her possession alleged to have been conveyed to her in fraud of the bankrupt's creditors. The trustee in bankruptcy, seeking to recover such property, should proceed by bill of discovery against the wife.

In Bankruptcy.

Reed & Reed, for bankrupt.

Ross, Dwyer & Hanitch, for creditors.

BUNN, District Judge. Theodore M. Thorson, the referee in bankruptcy to whom the above cause was referred, has certified to this court the following questions, which he says arose pertinent to the said proceedings; the creditors claiming that the wife of the bankrupt holds property in her possession, and under her control, which she has, directly or indirectly, obtained from her husband, and with her husband's money, in fraud of creditors and the particular creditor raising the question: First. May the wife be compelled to testify as to such property, and as to how she acquired it, and as to how she holds it? Second. May the wife be compelled to testify to any facts or transactions to which she was not a party or witness, or compelled to testify to mere confessions or admissions of the husband in regard to his dealings with third persons?

In answer to these questions, it may be observed that, by the bankrupt act of 1867 (section 5088, Rev. St. U. S.), for good cause shown, the wife of any bankrupt might be required to attend before the court, to the end that she might be examined as a witness; and, if she did not attend at the time and place specified in the order, the bankrupt should not be entitled to a discharge, unless he proved to the satisfaction of the court that he was unable to procure her attendance. This provision is omitted in the new bankrupt law, and there is no provision whatever requiring or permitting a wife to attend as a witness either

for or against her husband in any bankruptcy proceeding, and by the laws of the state of Wisconsin, where these proceedings are had, she could not be a witness either for or against her husband. I am of opinion that the proper way to reach property in the hands of the wife which it is charged was fraudulently conveyed to the wife by the husband would be by bill of discovery brought by the trustee. If such a bill were brought against the wife, there can be little doubt that she might be then compelled to testify. She would then be a party to the suit. She would not be testifying in a suit either for or against her husband in that case, but would be testifying for or against herself; and, by the law of the state, a party to any suit may testify in his own behalf, or may be compelled to testify against himself. But, in an ordinary bankruptcy proceeding, the wife is not a party in any sense, and I know of no rule by which she can be required to testify, or be permitted to testify, either for or against her husband. If the creditors think fit, they can have suit instituted by the trustee against the wife of the bankrupt for a discovery of property in her hands belonging to the bankrupt, or fraudulently conveyed to her.

In re SCOTT.

(District Court, N. D. Texas. April 12, 1899.)

No. 63.

1. BANKRUPTCY—PROOF OF DEBT—STATEMENT OF CONSIDERATION.

In a proof of debt in bankruptcy, the statement of the consideration must be sufficiently full and specific to enable other creditors to pursue proper and legitimate inquiries as to the fairness and legality of the claim. If too meager or general to serve this purpose, it will be held insufficient, and the proof of debt will be expunged, unless amended on leave.

2. SAME.

In a proof of debt by attorneys at law against the estate of a bankrupt, a statement that "the consideration for said debt is for legal services performed for said bankrupt during the year 1898" is insufficient. Unless itemized and made specific, on leave given to amend, the claim will be expunged.

In Bankruptcy. On exceptions to ruling of referee.

Victor H. Hexter, for petitioning creditors.

Craddock & Looney, pro se.

MEEK, District Judge. Petitioning creditors in the matter of Murrell Scott, bankrupt, except to the action of the referee in overruling motion to compel amendment or expunge the claim of Craddock & Looney, attorneys, against the estate of the bankrupt, which had theretofore been allowed by the referee at the first meeting of creditors. The matter is before me on certificate of the referee. The formal parts of the proof of debt conform to the provisions of the bankruptcy law and the forms promulgated by the supreme court. The statement of the consideration is as follows: "That the consideration for said debt is for legal services performed for said Scott

during the year 1898." Subdivision (a) of section 57 of the bankrupt act provides, among other things, that proof of claim shall set forth the claim and the consideration therefor. General order 21 of the supreme court is in part as follows: "Depositions to prove debts existing in open account shall state when the debt became or will become due; if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it." The statement of the claim and the consideration therefor, as set forth in the proof of debt of Craddock & Looney, is of the most general character, and affords no light to parties in interest. The claim may be for a retaining fee; it may be for one transaction extending through a portion of the year, or it may be for several items of professional service rendered during the course of the year. While order 21 does not directly provide that accounts made up of items shall be itemized, and would seem to relate to the fixing of an average due date where items fall due at different dates, and provides a penalty for failure to fix the average due date by the forfeiture of interest on said account, yet the order is predicated on the theory that accounts consisting of items will be itemized. It is conforming to the simplest business method to set forth the items which make up the account which is to be presented to the debtor. It is very necessary that this should be done when the debtor's property has become a common fund for application ratably in the payment of his debts, for then all creditors have an interest in each account presented, and they can know nothing of the nature of the account except through the disclosures of the proof of debt. The statement of consideration should be sufficiently specific and full to enable creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim, and, if it is so meager and general in character as not to do this, it must be held insufficient. I am of the opinion that the statement of consideration in this instance is insufficient in this respect, and that the steps taken by the petitioning creditors are sufficient in law to secure to them the rights sought to be enforced. Wherefore, the action of the referee in refusing the application of petitioning creditors to have claim of Craddock & Looney amended or expunged is hereby set aside, and the said Craddock & Looney are given 10 days from date hereof within which to amend proof of debt, and, in event of their failure so to do within said time, the referee will expunge the proof of debt now on file from the record of the case.

In re EASLEY.

(District Court, W. D. Virginia. November 23, 1898.)

1. BANKRUPTCY—ASSETS—PROCEEDS OF EXECUTION SALE.

Where a judgment has been recovered in a state court, execution issued, and levied on personal property, and sale thereunder made by the sheriff, before the commencement of proceedings in bankruptcy against the debtor, the proceeds of sale, remaining in the hands of the sheriff, are beyond the jurisdiction of the court of bankruptcy, and he will not be enjoined from paying the same to the execution creditor; and it is immaterial that

the time limited by law for the sheriff to make his return has not yet expired, the creditor's title to the money being complete from the sale.

2. SAME—DISSOLUTION OF LIENS.

Bankrupt Act 1898, § 67, subsec. c, providing that "a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity * * * which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt," if fraudulent or preferential, does not affect the lien of an execution issued and levied within the four months, but founded on a judgment recovered two years before.

3. SAME—VOLUNTARY AND INVOLUNTARY CASES.

Bankrupt Act 1898, § 67, subsec. f, providing that "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," applies only to cases of involuntary bankruptcy.

In Bankruptcy. On motion to dissolve an injunction.

Wm. Leigh, for bankrupt.

Mr. Barksdale and G. E. Cashie, for execution creditors.

PAUL, District Judge. This is a motion to dissolve an injunction heretofore awarded on the petition of the bankrupt, restraining the sheriff of Halifax county, Va., from paying over certain money in his hands to T. B. Johnson & Bro., creditors of the bankrupt. The facts to be considered are as follows: At the September term, 1896, of the circuit court of Halifax county, said T. B. Johnson & Bro. recovered a judgment against said Easley, the bankrupt, for \$158.91, with interest and costs. On the 5th day of September, 1898, an execution was issued on said judgment, and under proceedings had before a commissioner of the circuit court of Halifax, in accordance with the provisions of section 3603, Code Va. 1887, the said Easley was required to deliver to the sheriff certain property, to wit, a watch and chain, and one share of stock in the Bannister Mills Company, as being subject to the lien of the execution. After advertising according to law, the sheriff, on the 27th day of September, 1898, sold said property for the sum of \$127.25 cash, which was paid to the sheriff. On the 30th day of September, 1898, Easley filed his petition in bankruptcy, and was on the 6th day of October, 1898, adjudicated a bankrupt. Thereupon he filed a petition in this court, praying that the sheriff be enjoined from paying over to the execution creditor the said sum of \$127.25, and that the same be set apart to him as exempt under the provisions of the bankrupt act. The sheriff files his answer to the petition for an injunction, admitting substantially the facts as herein stated, and that he holds the money subject to the order of this court.

The question to be determined is, does the levy of the execution on personal property of the bankrupt, and a sale thereunder, prior to the order of adjudication in bankruptcy, place the property, or the proceeds of the sale thereof, beyond the jurisdiction of the bankrupt court? The contention of the counsel for the bankrupt is that, the money being in the hands of the sheriff, and not having been paid to the creditors at the time of the adjudication in bankruptcy, the right

thereto is vested in the trustee, and that it is under the control of this court as part of the assets of the bankrupt estate. By the provisions of sections 3587, 3601, Code Va. 1887, a writ of fieri facias is a lien upon all the personal property of the execution debtor, whether capable of being levied on or not, from the time it is delivered to the sheriff or other officer to be executed. *Savage's Assignee v. Best*, 3 How. 111, was a case arising under a statute of Kentucky which made a fieri facias a lien upon the real estate and personal property of the debtor by its delivery to the sheriff to be executed. After the execution went into the hands of the sheriff, the debtor was adjudged a bankrupt under the bankrupt act of 1841. The sheriff, after the adjudication in bankruptcy, sold the land under the execution, and in a controversy between the purchaser of the land at the sheriff's sale, and the assignee of the bankrupt estate, the supreme court held that the purchaser of the land had a title superior to that of the assignee. In *Marshall v. Knox*, 16 Wall. 551, a lessor had, under a law of Louisiana providing for the collection of rent, levied a writ on certain property before the debtor was adjudicated a bankrupt. The supreme court held that the goods in the hands of the sheriff could not be taken out of his hands by the assignee, under the bankrupt act of 1867; the court in that case saying:

"Such case is similar to that of an execution, in reference to which it has been held that, where a levy is made before the commencement of proceedings in bankruptcy, the possession of the officer cannot be disturbed by the assignee."

The cases cited show that, as between the officer of a state court who has levied an execution on property before the debtor is adjudged a bankrupt, and the assignee, the process of the state court is superior to the title of the assignee or trustee appointed by the court of bankruptcy. This being so, the question before this court is not difficult of determination. Here not only was the execution levied before the adjudication in bankruptcy, but a sale had been made of the property, and the money for which it sold paid to the sheriff. The levy by the sheriff on the personal property of the debtor, if of sufficient value, was a prima facie satisfaction of the execution. 7 Am. & Eng. Enc. Law (1st Ed.) 157. Where the property levied on is not sufficient to satisfy the whole execution, it is by such levy satisfied pro tanto.

It is contended that, as the sheriff had 90 days in which to make his return, the title to the money did not vest in the execution creditors until the expiration of the time. In *Turner v. Fendall*, 1 Cranch, 117, a case where the sale had been made by the sheriff, the supreme court held that the title of the creditor to the sum levied is complete. It is insisted that under section 67, subsec. c, of the present bankrupt act, the levy of the execution being within four months before the filing of the petition in bankruptcy, it was dissolved by the adjudication of the debtor to be a bankrupt. Under said subsection c it is provided:

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if," etc.

The judgment in this case was obtained in 1896, and the provisions of said subsection c have no application in this case. A lien created on personal property by issuing an execution on a judgment obtained two years before is not a lien created pursuant to any suit or proceeding at law or in equity begun against the bankrupt within four months of his being adjudicated a bankrupt. Subsection f, § 67, of the bankrupt act is also invoked to sustain the contention that the levy of the execution issued on the 5th day of September, 1898, was null and void, because made within four months prior to the filing of the petition against the bankrupt. This provision so clearly applies to a case of involuntary bankruptcy as not to admit of discussion in a case like this, of voluntary bankruptcy. An order will be entered dissolving the injunction.

In re COFFMAN.

(District Court, N. D. Texas. April 12, 1899.)

No. 9.

BANKRUPTCY—EXEMPTIONS—GROWING CROPS.

Where the homestead laws of the state do not include growing crops, a bankrupt cannot claim, as exempt property under the bankruptcy act, a crop growing on his homestead at the time of the adjudication in bankruptcy, although an execution could not have been levied on such crop before its severance; and if, after the appointment of the trustee, the bankrupt gathers and removes the crop, he must surrender the same, or the proceeds of its sale, to the trustee.

In Bankruptcy. On review of decision of referee. Affirmed.

Seay & Seay, for B. F. Coffman.

D. A. Eldridge, pro se.

MEEK, District Judge. The bankrupt, B. F. Coffman, complains of the action of the referee in sustaining the motion of the trustee, asking that the bankrupt be compelled to turn over to the trustee, or account for, the proceeds of the sale of three bales of cotton. The cotton composing the three bales was, at the time Coffman was adjudicated a bankrupt, growing on his homestead. Subsequent to the appointment and qualification of the trustee, it was gathered and taken from said homestead. The bankrupt claims said cotton as exempt to him under the laws of Texas. The exemption laws of the state of Texas in effect at the time of the filing of the petition herein did not include crops growing upon the homestead. Rev. St. Tex. 1895, art. 2395. While execution could not be levied upon a crop growing upon a homestead, yet execution can be levied on a crop after it has been gathered and removed from the homestead. *Coates v. Caldwell*, 71 Tex. 21, 8 S. W. 922; *Silberberg v. Trilling*, 82 Tex. 526, 18 S. W. 591. This cotton not being exempt to the bankrupt, the title to the same which he may have possessed at the time he was adjudged a bankrupt vested, by operation of law, in the trustee, upon his appointment and qualification, as of the date of said adjudication. Bankruptcy Act 1898, § 70. The trustee could not, at the time of his appointment and qualification, take possession of said cot-

ton, without entering upon the homestead of the bankrupt to gather it. The law does not countenance such intrusion and violation of the homestead right in the levy of an ordinary execution upon a judgment. *Coates v. Caldwell*, 71 Tex. 21, 8 S. W. 922. But in a case of voluntary bankruptcy, where the bankrupt comes forward, and tenders all of his property subject to execution, to be applied ratably on his debts, in order that he may reap the benefits of the bankruptcy act, the question may well be asked, does he not, by his act, extend an invitation and give warrant to the trustee to come upon his homestead and gather that which belongs to his creditors? This question, however, does not arise here, as the trustee only seeks to have reduced to his possession three bales of cotton, or the proceeds thereof, which had been gathered and removed from the homestead. In view of the holding of the court that such cotton was not exempt to the bankrupt, and that the title to the same passed to the trustee as of the date of his adjudication as a bankrupt, the ruling of the referee herein will be affirmed, and the costs of this appeal will be taxed against the bankrupt.

In re GARDEN.

(District Court, N. D. Alabama, S. D. February 10, 1899.)

BANKRUPTCY—EXEMPTIONS—WAIVER.

Where a debt, proved and allowed against the estate of a bankrupt, is founded on a promissory note, in which the bankrupt, as authorized by the laws of the state, and in the manner therein prescribed, has waived his right of exemption, he will not be entitled, as against such debt, to have property set apart to him as exempt under section 6 of the bankruptcy act (30 Stat. 548).

In Bankruptcy. On petition of the Birmingham Dry-Goods Company, a proving creditor, for review of an order of the referee in bankruptcy in the matter of the allowance of exemptions to the bankrupt.

Ward & Houghton, for creditor.

BRUCE, District Judge. M. Garden filed his petition in voluntary bankruptcy in this court, and was duly adjudicated a bankrupt. The schedule of assets filed with petition shows about \$800 worth of property, all of which the bankrupt claims as exempt. The Birmingham Dry-Goods Company, a creditor of the bankrupt, proved its claim in the cause, which claim was allowed; and it set forth an indebtedness of the bankrupt, due upon promissory notes in which there is a waiver of exemptions in due form. The creditor, the Birmingham Dry-Goods Company, moved to disallow the claim of exemptions made by the bankrupt, so far as its debt was concerned, which motion was overruled by the referee; and the correctness of this ruling is the question here presented for review.

The naked question is the right of a bankrupt to exemptions of personal property in the face of his waiver of exemptions contained in his note to his creditor, who has proved his claim in bankruptcy.

Section 6 of the bankrupt law provides:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The question of waiver arises in connection with the question of exemptions, and for the rule upon this subject we are remitted to the state law in force in the state at the time when the petition in bankruptcy is filed. Article 10 of the constitution of Alabama treats of "Exempted Property," and the first section provides:

"The personal property of any resident of this state to the value of one thousand dollars, to be selected by such resident, shall be exempted from sale on execution or other process of any court issued for the collection of any debts contracted since the 13th day of July, 1868, or after the ratification of this constitution."

Subsequent sections are upon homesteads, not important here; and following is section 7, which provides:

"The right of exemptions hereinbefore secured may be waived by an instrument in writing, and when such waiver relates to realty the instrument must be signed by both the husband and the wife and attested by one witness."

These are the provisions of the constitution of the state of Alabama; and the statute law upon the subject is more full, and furnishes details as to how these provisions shall be carried out. Article 5 of the Code of Alabama, under the head of "Waiver of Exemptions" provides:

"Any person by an instrument in writing may waive his right to an exemption in any property exempt from levy and sale under execution or other process."

So the subject of waiver is provided for in the constitution and laws of the state of Alabama; and not only so, but the mode and manner in which such waiver is to be carried out are clearly, and with detail, provided for by the statute law.

In the case at bar the creditor, the Birmingham Dry-Goods Company, filed its motion asking that the claim of exemptions of the said Garden be disallowed, as to the debt due to it, on the ground that the exemptions claimed by the bankrupt, Garden, had been waived, and that it was therefore entitled to the property, or its proceeds, to the extent of its debt. The question then is, what is the effect of the waiver? Is it of any force at all? It certainly was intended to be of force when it was given, and accepted by the creditor. It is even more than probable that without the waiver the note would not have been accepted, and that it (the waiver) was the main consideration upon which the note was accepted; and so, as between the parties, it was a contract founded upon a legal consideration. The argument on the bankrupt's behalf is that the exemption of property from sale on legal process is the creature of the federal law, and that the state law is referred to only for the measure or quantum of the exemption, and that there is no question in the case about any waiver. How is it, then, that this question of waiver comes into the case? Under the law of Alabama, the matter of waiver of exemp-

tions is a part of the law of exemption from levy and sale under legal process. Code Ala. c. 50, art. 1. The bankrupt, in this case, comes into the bankruptcy court with his petition in voluntary bankruptcy, and claims exemptions under the law of Alabama in force at the time of the filing of the petition; and the creditor, the Birmingham Dry-Goods Company, replies and says: "I have proved my claim against the bankrupt, and hold his written waiver of his right of exemption, part and parcel of my claim; and I am therefore entitled to subject the bankrupt's exempt property to the payment of my claim." Now, what answer is there to this position? Can the bankrupt claim his exemptions under the law of Alabama, and at the same time repudiate his waiver of these exemptions under the same law? It is said this claim of waiver is not a lien, and perhaps it is not in the ordinary sense in which that word is used in the law; but what is it, if anything? Suppose the bankrupt had not only at the time of the transaction waived his exemption claim to his property as to the obligation he then executed, but absolutely gave the property into the possession of his creditor, like a pledge; would the bankrupt law divest the creditor of the property? What section of the bankrupt law is offended by such transaction, or where is it shown that such a contract is within the condemned classes? I am not saying here that the case is that of a full pledge delivered to the creditor by the debtor, but only that it is like it, and the right of waiver given as in this case must be held to be of some force and effect. The question remains, what is this right of exemption from execution and sale of exempt property on legal process? It is statutory purely, and, if the bankrupt does not find his warrant for it in the law of Alabama, there is no other source where it can be found. If there is no question of the waiver of the right of exemption in the case, then there should be no question of exemption, but the bankrupt insists upon his right of exemption in the face of his express contract of waiver of such right of exemption. It is said there is nothing to support the claim of exemption; that it must fall with the debt. But that is begging the question. If there was no property in the case, then it might be said there was nothing upon which a contract of waiver of exempt property could act; but here there is property scheduled with the petition filed by the bankrupt, and here, also, is his contract of waiver given to his creditor, the Birmingham Dry-Goods Company, with the proof of his debt, and the court is asked to hold that his waiver goes for nothing, and that his property claimed as exempt is to be held as his property. There are two prime purposes in the theory and operation of the bankrupt law: (1) The release of the burdened and hopeless debtor from his personal debts and obligations; and (2) the distribution of his property, or the proceeds of the same, to his creditors, and his right to a discharge from his debts, are contingent upon his making an honest return as to his property (not exempt) for the benefit of his creditors, and in the administration of the law the right both of bankrupt and creditor are to be kept in view; and a clear distinction exists between the creditor who holds merely a personal claim against the bankrupt, and a creditor who, in addition to his per-

sonal claim, holds a substantial right under and by virtue of the law of Alabama, such as the right of exemptions from sale on legal process of personal property to the amount of \$1,000. It is argued that to grant the creditor's motion in this case is to give the creditor a preference to which he is not entitled under the bankrupt law, but the equality which is to prevail among creditors of the bankrupt in the disposal of his property applies to creditors standing in equal right, and not, as in this case, where there is not only a debt or personal obligation of the bankrupt, evidenced by a promissory note, but coupled with this, and of the consideration of the contract, is the waiver by the bankrupt of his right of exemption from legal process under the laws of Alabama. It appears that the property in the case is personalty,—mainly a stock of goods; and with the parties before the court, and the property scheduled, and constructively, if not actually, in the possession of the court, through its trustee in the case, there would seem to be nothing in the way of the court in making a proper order in the premises. The result of these reviews is that the order of the referee refusing the motion of the Birmingham Dry-Goods Company is reversed, and it is so ordered.

In re OGLES.

Ex parte TROUNSTINE et al.

(District Court, W. D. Tennessee. March 23, 1899.)

No. 2.

1. **BANKRUPTCY—PETITION—MULTIFARIOUSNESS.**

A petition in involuntary bankruptcy, which unites with a prayer for an adjudication against the debtor a prayer for a provisional seizure of his property by the marshal, and a prayer for an injunction forbidding certain attaching creditors and a receiver of a state court to dispose of property of the alleged bankrupt in their hands, is multifarious.

2. **SAME—INFORMALITY—AMENDMENT.**

A petition in bankruptcy, under the act of 1898, filed before the promulgation of the official forms by the supreme court, should not be dismissed for want of conformity thereto; but the court will order a new petition, in the form prescribed, to be filed *nunc pro tunc*, the original petition, however, not to be withdrawn from the files.

3. **SAME—JURISDICTION—INJUNCTION AGAINST ATTACHING CREDITORS.**

Attaching creditors of an alleged bankrupt, and a receiver of his property appointed at their instance by a state court, do not become amenable to the control of the bankruptcy court by the mere filing of the petition against the debtor, though it is therein charged that they have received an unlawful preference; and if they are not regularly made parties to the petition and served with process, and have not voluntarily appeared thereto, the court cannot issue an injunction forbidding them to dispose of property of the alleged bankrupt in their hands, held and claimed by them adversely to the debtor and to the petitioning creditors.

4. **SAME.**

Where a petition in involuntary bankruptcy charged that certain creditors of the alleged bankrupt had gained an unlawful preference by attachments upon his property, and had procured the appointment of a receiver by a state court, who had sold the property and held the proceeds, and prayed for an injunction against such creditors and the receiver, forbidding them to take proceedings in the state court for the distribution of

the fund so held, but it was not shown that such creditors were insolvent, or that, for any other reason, a suit against them by the trustee in bankruptcy, subsequently to be appointed, would not be an adequate remedy for the avoidance of the alleged preference and the recovery of its fruits, quære whether the injunction should not be refused, and the parties left to work out their rights through the trustee when appointed.

In Bankruptcy. On application for injunction.

This petition for involuntary bankruptcy was filed on the 8th of November, 1898. The acts of bankruptcy alleged to have been committed within the four months next preceding the filing of the petition are thus stated: "(1) Being insolvent, and while insolvent he did convey, transfer, and remove, or cause to be sold and removed and disposed of, a large part of his property, to wit, the said merchandise owned by him, and kept at his store, with an attempt to hinder, delay, or defeat his creditors, and particularly your petitioners. (2) The said J. F. Ogles, during the early part of October, 1898, and about the time he made the purchases of goods hereinbefore stated, of your petitioners, purchased large quantities of goods from other merchants, namely: [The names of the sellers of the goods are here mentioned.] These goods and merchandise were purchased by the said J. F. Ogles at the usual market prices, and taken to his store in Benton county, Tennessee, and thereupon he immediately began to sell the same at greatly less than their value, and to dispose of the same with the intent and for the fraudulent purpose of converting the same into money and defeating and defrauding his creditors." The petition then states that certain creditors, who are named, on the 25th day of October, 1898, filed bills of attachment in the chancery court of Benton county, Tenn., against Ogles, whereby they caused to be attached the stock of goods which had been recently purchased from the attaching creditors and the petitioning creditors in bankruptcy. It alleges that the grounds of attachment were that Ogles "was fraudulently conveying, selling, removing, and disposing of his said property, with the intent to hinder, delay, or defraud his creditors, said complainants and others"; that writs of attachment were issued and levied, and that by subsequent orders of the chancery court a receiver, one D. G. Hudson, was duly qualified, and is now in possession of the goods, acting in pursuance of the orders and under the directions of that court; that the receiver had advertised the stock of merchandise for sale to the highest bidder, for cash, on the 12th day of November, 1898, and would proceed to sell the same. The petition then proceeds to say: "Wherefore your petitioners say that within the last four months, namely, on the dates hereinbefore mentioned, the said J. F. Ogles did commit an act of bankruptcy in suffering and permitting, while insolvent, the said creditors to obtain a preference through said legal proceedings, and not having, at least five days before the said date of sale or disposition of the property, vacated or discharged such preferences. Petitioners say that the said J. F. Ogles is wholly insolvent, and that all his property is not sufficient, at a fair valuation, to pay his debts, and that all his property, including the said property so disposed of by him, is wholly insufficient for such purpose." "(3) Petitioners further show that, within the period of four months before the filing of this petition, the said J. F. Ogles sold and conveyed a certain tract of land, of the value of two thousand dollars, at and for the price of one thousand dollars in cash, and that he sold and conveyed the same, it being lands in Benton county, Tennessee, with the intent to convert the same into money, and to conceal and to hide the said money, to defeat and defraud his creditors." The petition is in the form somewhat of a bill or petition in equity, and, besides the above allegations as to the acts of bankruptcy, it sets out the amount and the character of the debts, respectively, of the petitioning creditors, and alleges that the goods were purchased by the alleged bankrupt from these creditors, as above stated. It then states that Ogles is a merchant in Benton county, and the jurisdictional facts in reference to the amount of his debts, etc. The allegations of the petition are not separated into the technical forms required for stating the acts of bankruptcy, but relate the facts, along with others concerning the conduct of the bankrupt, his attaching creditors, and the receiver, in the manner indicated by the above quotations from the petition. It then prays as follows: "Wherefore your peti-

tioners pray that the said J. F. Ogles may be declared a bankrupt, and that a warrant may be issued to take possession of said J. F. Ogles' estate, that the same may be distributed according to law, and that such other proceedings may be had thereon as the law in such cases prescribed. And your petitioners further pray that meanwhile the said J. F. Ogles be restrained and enjoined from disposing of, or in any manner interfering with, the said property, and that an order be issued to the marshal of said district requiring him to take possession, provisionally, of all the property, books, and effects of the said debtor, J. F. Ogles, and safely keep the same until the further order of the court, and that in the meanwhile the said Warren, Neely & Co. and the other creditors aforesaid, and the said D. G. Hudson, receiver, be restrained and enjoined from disposing of said bankrupt stock." The petition is verified by the separate oaths of the petitioning creditors.

To this petition the alleged bankrupt, on the 28th day of November, filed an answer in the usual form of an answer in chancery. He admits that he owes debts to an amount exceeding the sum of \$3,000; that the petitioning creditors have correctly set forth the nature of their respective demands; that he was merchandising at the time and place stated, and that the goods, wares, and merchandise alleged to have been sold to him by the petitioners were so sold at his request; and that he is in no way related to the petitioners. He denies that, while insolvent, he did convey, transfer, and remove, or cause to be conveyed, removed, and disposed of, a large part of his property, to wit, the said merchandise owned and kept by him at the store, "with an intent to hinder and delay or defeat his creditors, and particularly the petitioners." He then states that he has been merchandising in Benton county for over two years, and that while it may be true that, within the past four months next before the filing of the petition, he could not have paid all of his indebtedness out of his property, yet he denies that he sold, transferred, or caused to be sold or removed and disposed of, the merchandise owned by him at his store, except in due course of trade. He admits that he was selling and disposing of them in due course of trade during the time, but he denies that there was any attempt to hinder, delay, or defeat his creditors. He admits that he disposed of some of the goods at less than their cost value, but alleges that it is equally true that he disposed of other portions of the goods at more than their cost. He admits that he bought goods in October last from the parties named in the petition, and supposes that he bought them at the usual market prices, but denies that he immediately began to sell the same at greatly less than their value, with the intent to defraud his creditors. He admits that, after a few of his creditors began to press him for money, he did sell a few of the articles at greatly less than their value; and admits that on the 25th of October, 1898, the attaching creditors named seized his goods by attachment in the chancery court of Benton county. He admits that the petition correctly states the grounds of the attachment alleged in the bill, and that Hudson was appointed receiver of the goods, and had advertised the stock of goods for sale. He denies that he either suffered or permitted the creditors to obtain preferences by their legal proceedings, if it is meant by the said allegation that he consented thereto. He admits that he did not discharge the attachments before the sale of the property, and that he is now wholly insolvent, and that all his property is not sufficient, at a fair valuation, to pay his debts. He denies that, within a period of four months before the filing of his petition, he sold and conveyed a certain tract of land in Benton county, of the value of \$2,000, for the price of \$1,000. He admits that within this period he did sell and convey a tract of land in the county for \$1,075 in cash to one Smothers, and says that the said consideration was the full value of the land. He explains that the tract of land conveyed to Smothers was a portion of a tract which he owned with his brother, as tenant in common, which they had purchased for the sum of \$2,000, and that after the purchase they divided the land into two equal parts; that about two years ago he sold a small part of his share to his brother for \$125, and afterwards the remaining portion, as before stated, to Smothers, for \$1,075. He denies that he sold the land with any intent to convert the same into money, for the purpose of defeating or defrauding his creditors. He then claims the exemptions that are to be allowed him by the bankrupt law, in the event he is adjudicated a bankrupt.

On the 16th of March, 1899, an affidavit was filed and presented as the basis of an application for an injunction. It is the affidavit of W. B. Dowell, who states that he is the agent of Trounstine Bros. & Co., one of the petitioning creditors. He sets out the fact of the filing of the petition in bankruptcy against Ogles, refers to it, and adopts its statements in support of the application for injunction. The affidavit states that the attaching creditors mentioned in the bankruptcy petition obtained an order for the sale of the goods attached in that case since the petition in bankruptcy was filed; that the goods have been sold by the receiver, Hudson; and that he now has the proceeds in his hands, subject to the orders of the court of which he is receiver. It states that the court will convene on the 20th of March, and that he is informed and believes that the attaching creditors will then apply for a distribution of the proceeds to them according to their rights, respectively, unless restrained by the order of this court. It states that he is informed and believes that Ogles has no other property than the merchandise above mentioned, except the small interest in the real estate mentioned in the petition, and that, if the distribution in the chancery court takes place, the proceeds of the stock of merchandise "rightfully distributable among his creditors, under the bankruptcy law, will have been disposed of and put beyond the reach of the court." The affiant states that he makes the affidavit to the end that the attaching creditors named therein "may be enjoined from taking any other or further proceedings in the said cause in the chancery court of Benton county, looking to a distribution of said fund, until the further orders of this court." The affiant further states that on the 4th of March, 1899, he personally delivered a true copy of the notice attached to the affidavit, marked "Exhibit No. 1," and made a part thereof. That notice informs the attaching creditors that the petitioning creditors in bankruptcy will apply to this court on the 16th day of March, 1899, for a writ of injunction restraining and enjoining the receiver, Hudson, appointed by the chancery court, from distributing the proceeds of the sale of the stock of goods attached, and to enjoin the attaching creditors themselves, and each and every one of them, from further prosecuting the said cause, or obtaining therein any order or decree for the distribution of said proceeds among themselves, until the further order of the bankruptcy court. The petitioning creditors appeared on the day named in the notice, and moved for an injunction according to the prayer of the affidavit and original petition in bankruptcy. The attaching creditors have not appeared to make any defense to this application.

Hays & Biggs, for petitioners.

HAMMOND, J. (after stating the facts as above). Obviously, this petition is multifarious. It unites with a prayer for an adjudication in bankruptcy against the debtor, which alone it should contain, a prayer for a seizure by the marshal, provisionally, of all the property, books, and effects of the debtor, and also a further prayer for an injunction against the attaching creditors and the receiver of the state court. It is subject to all of the infirmities in pleading and practice suggested by this court in *Re Kelly*, 91 Fed. 504. But as there is no application at this time for any warrant of seizure of the bankrupt's property, it is not necessary further to scrutinize the proceedings in regard to that prayer of the petition.

The petition should be dismissed for the defect of multifariousness, were it not for the fact that it was filed before the supreme court had promulgated the general orders and forms in bankruptcy now in force. The bankruptcy statute of 1898 permitted petitions to be filed after four months from the passage of the act, but since the supreme court had not regulated the practice, as required by the statute, necessarily parties and their counsel were left to such forms of pleading as they might adopt. This petition follows the analo-

gies of the bill in chancery, though it might have found a more appropriate analogy in the form prescribed for a creditors' petition under the bankruptcy statute of 1867 (Form No. 54, Act 1867; Bump, Bankr. 933). The provisions for warrants of seizure, under the statute of 1898, are somewhat different from those of 1867, but with that exception the form and prayer of the petition by creditors might be substantially the same under either act. It is my opinion that, under the circumstances, the courts should retain the informal petitions, however defective, that were filed before the promulgation of the general orders in bankruptcy and the forms regulating the practice, by the supreme court, but that the pleadings necessarily should now, by amendment, be conformed to the practice prescribed by the supreme court. Therefore this petition should be remodeled to follow Form No. 3, prescribed by the supreme court for a creditors' petition in a case of involuntary bankruptcy, and it is so ordered in this case. And it will be observed that, according to that form, the only prayer of the petition is that "service of this petition with a subpoena may be made upon (the alleged bankrupt) as provided in the acts of congress relating to bankruptcy and that he may be adjudged by the court to be a bankrupt within the purview of said acts." All other prayers in this petition extraneous to Form No. 3 are foreign to the purpose of an involuntary petition in bankruptcy, and should therefore be eliminated. It is intended by congress that the practice in bankruptcy should be uniform under the rules prescribed by the supreme court, and there can be no departure from them, except as allowed by Gen. Ord. 37. Similarly, and for the same reasons, the answer of the alleged bankrupt is informal and unknown to the practice; and it is ordered that it shall be remodeled, and made to conform to the "Denial in Bankruptcy" prescribed by Form No. 6 of the supreme court rules in bankruptcy, under the statute of 1898. But neither the petition nor the answer thereto should be withdrawn from the files, the parties having a right that the record shall remain intact in respect of that. But the clerk will enter an order and serve notice thereof upon the parties and their counsel, requiring them to reform their pleadings according to this opinion. Of course, the new pleadings should be filed as of the same date as the original pleadings; to save the rights of the parties already accrued. In strict practice, all the multifarious matter in this petition should be disregarded as nugatory; but, as it was filed before the promulgation of the rules of the supreme court in bankruptcy, I am of the opinion that the parties should not lose the benefit of such proceedings as have been taken without a knowledge of what forms in practice would be prescribed by the supreme court. Therefore I have determined that this petition shall stand, as to such multifarious matter, as an independent petition, seeking the relief asked for; and that the original petition and answer and the affidavit just filed shall have the same effect as if the same matter had been pleaded in point of law, as it should have been, as a proceeding in bankruptcy supplemental to the creditors' petition for an involuntary adjudication.

So taken, how does the case stand upon this application for an

injunction? The fifth amendment to the constitution of the United States provides that "no person shall be deprived of life, liberty or property without due process of law"; imposing the same limitation upon congress in respect of this that is imposed by the fourteenth amendment upon legislation by the states. Neither the attaching creditors in the state court, nor the receiver of that court, who is alleged by this petition and affidavit to hold the property in controversy, have been made parties to this petition, nor has any process been prayed against them as such. Neither has any been issued or served, although they are named in the petition, in the progress of the recitals therein. The petition is purely one against the alleged bankrupt, and there is no manifestation of an intention to make the attaching creditors of the receiver parties to that proceeding, except that it may be that it was in the mind of the pleader that the attaching creditors and the receivers became amenable, ipso facto, to the control of the court upon the filing of the involuntary petition against the debtor. This, to my mind, is wholly untenable, and finds no warrant in any of the provisions of the bankruptcy statute. It is contemplated by several provisions of the statute that creditors, other than petitioning creditors, may become formal parties to the proceedings in bankruptcy, either before or after the adjudication, and, in some respects, they are bound whether they become formal parties or not, as, for example, in the matter of the bankrupt's discharge. But by section 59, subsecs. f, g, St. 1898, it is specifically provided that outside creditors may come in to join as plaintiffs in the petition for adjudication, or to "file an answer and be heard in opposition to the prayer of the petition." Therefore, unless these attaching creditors have voluntarily appeared to contest the petition or to join as plaintiffs in it, they have not, in any sense, become parties to the bankruptcy proceedings qua proceedings in bankruptcy. Now, it is a familiar rule of law that one holding property or claiming rights adversely to another, no matter how, must have a day in court, by proper process, upon appropriate proceedings for that purpose, or he cannot be said to have been subjected to the power of the courts "by due process of law." The attaching creditors and the receiver, as is shown by the averments of this petition, are holding and claiming adversely to the alleged bankrupt and his other creditors. It is plain, therefore, that they cannot be deprived of their right to this property, whatever it be, nor any claim they have to it, except upon plenary proceedings for that purpose, to which they have been made parties by process issuing from a court having jurisdiction of the subject-matter, and the authority to bring them in to answer whatever adverse claim may be set up against them.

This petition, in its present form, is not such a proceeding. No process has been issued upon it against the attaching creditors, and they are therefore not bound to take any notice of it for the purpose of answering this application for an injunction. Even if, upon a proper proceeding filed in this court, they could be provisionally enjoined from proceeding with the attachment suit, as prayed for in this petition and application for an injunction, when they had been

by due process made parties thereto, without that, it seems to me, they cannot be so enjoined.

The case does not stand in any better attitude in respect of this fatal defect upon the affidavit of Dowell, the agent for the petitioning creditors. That affidavit, like the original petition, proceeds upon the erroneous assumption that these creditors and the receiver are parties to the bankruptcy proceeding and are already amenable thereto. But this, as we have endeavored to show, cannot be true. Therefore the notice served upon the attaching creditors and annexed to the affidavit is nugatory. Not being parties to any proceeding or served with any process, the attaching creditors were not bound to appear in response to that notice, and defend this application for an injunction. They and their receiver can only be called to do that by an independent proceeding for that purpose, upon which proper process has been issued from the court. Besides, if this petition could be treated as one making the attaching creditors and their receiver parties thereto, and could be considered independently as a bill for injunction and relief, then, under our practice as regulated by statute and the rules of equity prescribed by the supreme court, the notice of the application for an injunction, to be binding, must be issued from the court itself, and not by the parties. Rev. St. §§ 716, 718, 719. Equity Rule No. 55. For this reason, if for no other, the notice to the attaching creditors of this application, as annexed to the affidavit, cannot be considered as "due process of law," or as having been issued according to the practice of the court. Apart, therefore, from all other considerations, the fact that the attaching creditors and their receiver have not had legal notice, and have not been made parties to any bill or petition upon which an application for an injunction might be founded, is sufficient for the denial of the application as now made.

If the above-mentioned objections were out of the way, it is very doubtful whether an injunction should be granted upon a proper application for that purpose. It does not appear by anything stated, either in the original petition or the affidavit, that the remedy provided for recovery of the property illegally obtained as a preference, through a suit by the trustee against the preferred creditor, would not be adequate in this case. If the conditions prescribed in section 60 of the bankruptcy statute of 1898, and subsection 3 of section 3, exist, the trustee, by proper suit in a court of competent jurisdiction, as declared in the statute itself, may recover whatever amount the preferred creditors have received by way of preference, or he may recover from such preferred creditors the value of the property which they have attached; and, possibly, he might do this against the creditors in solido, or against any one for the value of goods seized by the writ, as against joint trespassers; and upon common-law right, either of the bankrupt or his own creditors, if they had reasonable cause to know that they were committing a fraud upon the bankrupt statute by the seizure of the bankrupt's effects and obstructing their administration in the bankruptcy court. It might be remedial as a conversion of the goods, wherefore the remedy at law would be adequate. Rev. St. § 720.

The affidavit avers that, unless restrained by this court, the proceeds of the sale of the goods will be paid over to said attaching creditors, and that in that event those rightfully distributable among the creditors under the bankruptcy law will have been disposed of and put beyond the reach of the court. But, surely, the trustee can pursue the preferred creditors by proper suits in courts of competent jurisdiction, wherever they may be, and therefore the property is not beyond the reach of the remedies prescribed for its recovery by the bankruptcy statute itself. There is no allegation that these creditors are insolvent, and unable to respond to the suit of the trustee for whatever judgment he may obtain against them, and, in the absence of such a condition of insolvency, it may be doubtful whether the bankruptcy court, or any other court of competent jurisdiction, would enjoin the attachment suit; more particularly is it doubtful whether a federal court should issue such an injunction against parties proceeding in the state court to pursue whatever remedies they think they have under the state laws. The issuing of an injunction is largely a matter of discretion in the court, and is not a matter of strict right; and under our dual system of government, guided by the provisions of the Revised Statutes (section 720), prohibiting the federal courts from enjoining proceedings at law in the state courts, they should, in doubtful cases, and even in many cases where it might be technically lawful to issue the injunction, decline to issue it from motives of public policy, especially where the complaining parties have provided for them such a remedy as that which is given by section 60 of the bankruptcy statute of 1898.

Again, it is very doubtful whether the allegations of this petition in relation to the attachment proceedings constitute an act of bankruptcy, under subsection 3 of section 3 of the bankruptcy statute of 1898. There is no allegation of consent by the alleged bankrupt to that proceeding, or of any aiding or abetting him, or of collusion or conspiracy between him and the attaching creditors, to have it instituted, nor any allegation of any act or conduct by the bankrupt, or by the attaching creditors, from which such consent, collusion, or permission could be implied. There is not alleged in the petition or affidavit even any slight circumstance which would tend to show the existence of any affirmative desire on the part of the alleged bankrupt to give a preference to these attaching creditors through the legal proceedings which they have taken. The only allegation in the petition or the affidavit is that he suffered or permitted the proceedings to be taken, but no fact or circumstance or conduct of his own, or that of the creditors, is alleged, in support of that allegation. It is the bare expression of an opinion on the part of the petitioning creditors, using, parrot-like, the language of the statute, and not in any way showing to the court, by the real facts concerning the proceedings, anything that would indicate that the bankrupt, in any sound sense of the phrase, had suffered or permitted those proceedings to be taken. Ordinarily, in the nature of such proceedings, they are in invitum and hostile. It is not to be presumed, in the absence of any averments or proof to the contrary,

that a debtor would consent to a suit charging as a foundation for the attachment that he was "fraudulently conveying, selling, and removing and disposing of his property with the intent to hinder, delay, and defraud his creditors," as is stated in this petition were the grounds of the attachment. At all events, it is not at all certain that an allegation, using only the language of the bankruptcy statute, "that he suffered or permitted, while insolvent, a creditor to obtain a preference through legal proceedings," is a sufficient pleading of the fact, without accompanying averments showing what the debtor did which constituted the suffering or permitting denounced by the statute. It is the facts the court should know, and not the conclusion which the pleader draws from them; and it is notice of the facts relied upon to which the alleged bankrupt is entitled, and not mere conclusions of fact, which the petitioning creditors may choose to entertain.

It was decided by the supreme court in the case of *Wilson v. Bank*, 17 Wall. 473, under the bankruptcy statute of 1867, which was more liberal to creditors and comprehensive on this subject than the bankruptcy statute of 1898, that the mere passive nonresistance by an insolvent debtor to the suit brought was not sufficient to establish the fact that he had "procured" or "suffered" his property to be taken on legal process. The language of the present statute is "suffered" or "permitted," which cannot, in my judgment, be interpreted as any more restrictive or prohibitive upon the alleged bankrupt than the words of the former statute construed by the supreme court in the above-cited case. "Procured" is a stronger word than "permitted," to be sure, but the latter word does not any more imply passiveness than the word "suffered," and, in the above-cited case, the supreme court construed "suffering" and "procuring" as meaning substantially the same thing. And in *Bank v. Warren*, 96 U. S. 539, the supreme court again say that "mere nonresistance of the debtor to judicial proceedings against him, when the debt is due and there is no defense to it, is not the suffering or giving a preference, under the bankruptcy act"; and in that case, as in this, there was not proof of a single fact or circumstance tending to show a concurrence or aid on the part of the debtor in obtaining the judgment or procuring the payment of the debt. In this case there is no averment in the pleadings of such inculpatory conduct.

There are other acts of bankruptcy charged in the petition which may be sufficient to support it, even if the one just construed is not, and they possibly may be sufficient to secure the adjudication asked for against the insolvent debtor; in which event the right of the trustee, under sections 60 and 67 of the bankruptcy statute of 1898, would also subsist and afford a sufficient remedy to recover the property, if the attachment may be avoided and set aside under the bankruptcy statute. But the question we have here is whether or not it is necessary, provisionally, to enjoin that suit, and arrest a distribution of the proceeds, in order to protect the rights of all the creditors under the bankruptcy administration, if an adjudication shall be had. And its solution depends, as before indicated, more upon the necessity for such a proceeding than upon the effect of the

bankruptcy statute upon the liens which have been procured by the attaching creditors in the proceedings of the state court.

If the necessity for it be doubtful, and it appears that the creditors, through their trustee when appointed, will have a sufficiently adequate and fairly hopeful remedy to recover the property, the injunction should not be granted. It must be remembered that this is not like the cases now being decided almost every day in the bankruptcy courts, in which it is held that, where a creditor has made a general assignment for the benefit of his creditors, and they have gone into the state courts for the purpose of administering that assignment, according to the insolvency laws of the states, the bankruptcy statute has superseded and supplanted the insolvency laws of the state and their administration in the state courts, and has, in its effect, transferred the exclusive administration of the assets of the bankrupt to the bankruptcy court. In such cases, it is always proper to enjoin the receiver or other administrator of the state court, and to compel him, by proper process, to transfer the property of the bankrupt to the bankruptcy trustee, when appointed, and to compel the creditors in the state proceedings to transfer their applications for their share of the estate to the bankruptcy court, according to the provisions in that behalf found in the bankruptcy statute. *In re Gutwillig*, 90 Fed. 475, 481; *In re Bruss-Ritter Co.*, Id. 651; *Lea v. West Co.*, 91 Fed. 237; *In re Sievers*, Id. 366, which, however, was not the case of an assignee or receiver holding property under the orders of the state court, but a voluntary assignee, proceeding himself to administer the trust.

This right to enjoin the receiver or assignee of the state-court proceeding to administer the property of the alleged bankrupt was sustained in the case of *Blake v. Francis-Valentine Co.*, 89 Fed. 691, in a suit in the state court not involving a general assignment for the benefit of creditors, but only a collusive attachment of the property for the purpose of giving a preference. Indeed, in that case, no involuntary petition in bankruptcy had been filed, and was only contemplated by the creditors, who filed a bill in the bankruptcy court, preliminary to their proposed proceedings in bankruptcy, to enjoin the sheriff from selling the attached property under the orders of the state court. Jurisdiction of the bankruptcy court to thus provisionally preserve the property until bankruptcy proceedings could be instituted, and a trustee appointed, was sustained by the court in that case. *In Re Brown*, 91 Fed. 358, proceedings in the state court were enjoined in a case where a receiver had been appointed in a suit to set aside a fraudulent conveyance of property, the fraudulent grantee having, however, in that case, voluntarily restored the title to the grantor against whom the petition in bankruptcy had been filed. The last two cited cases would indicate that the principle of transferring the administration of the assets from the state court, already in possession, to the bankruptcy court, extends to cases of attachment such as this, but there are obvious discriminations between the facts in those cases and those we have here.

In *Blake v. Francis-Valentine Co.*, *supra*, there were averments that would induce any court of equity having jurisdiction of the parties to do just what was done in that case, upon the general grounds of equitable relief shown by the facts. That the equity powers of the court of bankruptcy were resorted to is only incidental in reference to the jurisdiction of that court to do what was done. If any state court of equity, or, if the jurisdiction otherwise existing, if any federal court of equity, had had possession of the same bill and the same facts, the same decree made in that case would have been made by the courts of general equity jurisdiction. If such a bill had averred that the plaintiffs were for some reason obstructed or delayed in the filing of their involuntary petition in bankruptcy and procuring an adjudication thereof; that the defendants had entered into a fraudulent conspiracy and collusion to secure a prior custody and a speedy sale of the property through other judicial process; had proceeded to the point that they had obtained an order of sale, which was about to be executed; that such proceedings were in fraud of the bankruptcy statute, the parties intending thereby to secure an unlawful preference; and that the plaintiffs would be irreparably injured unless the defendants were stayed in the prosecution of their suit until the plaintiffs could exercise the right and secure the benefits given to them by that statute through proceedings in bankruptcy,—it does seem to me that any court of equity would have restrained the fraudulent conspiracy until the plaintiffs could resort to the bankruptcy court. It is the ordinary course of giving equitable relief against fraudulent conspiracies which, unless restrained, would result in irreparable injury. There is no such allegation of fraudulent combination and conspiracy in this case, and no such appeal to the general authority of a court of equity, but the case proceeds upon the simple notion that, by the act of bankruptcy itself and the filing of the petition in bankruptcy, all controversies and litigation about the bankrupt's property have been, *ipso facto*, transferred to the bankruptcy court.

The report in *Re Brown*, *supra*, is somewhat obscure as to the exact conditions in that case, but the fact appears that the conveyance which had been attacked as fraudulent by proceedings in the state court, during which a receiver had been appointed, was cured by a reconveyance of the property, by which reconveyance, the opinion states, it became a part of the bankrupt's estate, to be administered as such. It does not appear that, without that reconveyance, the bankruptcy court would have interfered.

I do not desire to be understood as holding that under no circumstances will the bankruptcy court interfere with the possession of the res by the state court, where, under attachment proceedings or other forms of litigation, the property has been seized by process from the state court. It depends altogether upon the circumstances of each case. As was said by Judge Waddill in *Lea v. West Co.*, *supra*:

"There are many matters in which the state and federal courts can proceed in harmony under the bankruptcy act, and which the bankruptcy court should

leave to the determination of the state court, and as far as possible it will be the policy of this court to do so. But, in a case like the present one, I do not see how the two courts can proceed harmoniously. The litigation in each court involves the administration of the entire estate of the bankrupt. One court or the other must proceed. * * * Indeed, in these cases, the question is more one of discretion than of jurisdiction."

While the bankruptcy statute has superseded the state insolvency laws and their administration of the bankrupt's property in the state courts, it has not abrogated the attachment laws of the state; and where diligent creditors have, in good faith, resorted to those laws, and the state court has taken custody of the property, and is proceeding to exercise its jurisdiction in that behalf, it does not follow that, necessarily, the commencement of bankruptcy proceedings arrests and defeats the jurisdiction of the state court to proceed with its administration of the particular property attached. Such cases are different from those above cited of a general assignment, in which the state court has possession of the property only through and by virtue of the act of bankruptcy itself, to wit, a general assignment for the benefit of creditors. Bankr. St. 1898, § 3, subsec. 4. The lien of the attachment may be avoided by the adjudication in bankruptcy, but, notwithstanding this, I think that ordinarily the creditors must be left to the remedies given to the trustee for avoiding and setting aside such liens.

I wish to repeat here what was said in *Re Kelly*, supra, that it is a mistaken view to suppose that the bankruptcy statute has, by its own force, gathered into the jurisdiction of the bankruptcy court, as such, all property held adversely to the bankrupt by third parties, but as to which the creditors claim that it belongs to them by reason of fraudulent preferences, fraudulent conveyances, and the like. It was well settled, under the bankruptcy statute of 1867, that the jurisdiction conferred upon the federal courts for the benefit of the assignee in bankruptcy was concurrent with, and did not divest the state courts of, suits of which they already had full cognizance. *Eyster v. Gaff*, 91 U. S. 521. The federal court has exclusive jurisdiction of proceedings in bankruptcy, strictly so called, and of the property of the bankrupt; but where the property is adversely claimed as against the bankrupt and his assignee or trustee in bankruptcy the jurisdiction of the state and federal courts is concurrent. Rev. St. §§ 711-716; *Claflin v. Houseman*, 93 U. S. 130. The assignee or trustee often may be forced, and ordinarily should go, into the state court, and become a party to suits there pending, for such relief as he requires to protect his interests. Pending the appointment of an assignee or trustee, and in cases of contested adjudication, it sometimes may be necessary to resort to the bankruptcy court to stay the proceedings in the state court until that contest is decided and a trustee appointed; but such injunctions depend upon the particular circumstances of each case, and, in my judgment, where it appears that the trustee, when appointed, will have an ample remedy to recover the property affected or its value, that comity which governs the federal and the state courts in their relation to each other should operate to withhold any injunction except in cases of imperative necessity. Through like comity, no

doubt, if not as a matter of strict right, upon proper application by the petitioning creditors in bankruptcy in a proper case, the state court would stay its own proceedings a reasonable time, until the bankruptcy petition could be heard, and a trustee appointed, who could come into that court to be made a party, and assert his rights in the premises, and it is only after a refusal to do this that the bankruptcy court ordinarily should interfere. But, even then, the refusal to stay the proceedings could be corrected by error or appeal as a federal right denied, and, to avoid unnecessary and unseemly conflict between courts of co-ordinate jurisdiction, but diverse authority, that would be the preferable remedy. The application for an injunction must be denied.

In re STOTTS.

(District Court, S. D. Iowa, Central Division. April 6, 1899.)

No. 514.

1. **BANKRUPTCY—COSTS OF ADMINISTRATION—FEES OF BANKRUPT'S ATTORNEY.**

In a case of voluntary bankruptcy, an attorney's fee for legal services rendered to the bankrupt himself is not entitled to priority of payment out of the estate; but an allowance may be made to the attorney of the bankrupt for services rendered in preserving the estate pending the appointment of a trustee.

2. **SAME—FEES OF ATTORNEY FOR TRUSTEE.**

A trustee in bankruptcy may employ counsel when the situation of the estate is such that he requires legal assistance; and the fees of such counsel, to a reasonable amount, for services properly and actually rendered to the trustee, may be allowed as part of the cost of administering the estate.

3. **SAME—ALLOWANCE BY REFEREE—NOTICE TO CREDITORS.**

The question of allowing counsel fees as part of the cost of administering a bankrupt's estate may be determined by the referee ex parte; notice to creditors of the hearing thereon is not a prerequisite to the validity of his action in the matter.

In Bankruptcy.

J. D. & R. G. Howard and Dowell & Parrish, for bankrupt.

WOOLSON, District Judge. While this case was pending before Referee F. M. Davenport, there was allowed as attorney's fees to counsel representing the bankrupt \$150, and also as attorney's fees to the same counsel representing the trustee \$125. After the resignation of Referee Davenport, said counsel presented to his successor, William R. Lee, a motion for an order on the trustee for payment of these allowances; no order for payment having been entered. The motion was denied by the referee, for the reason, as certified by him, that "the claims were allowed at an ex parte hearing, and that the creditors had no notice thereof or opportunity for objecting thereto." At the instance of said counsel, this matter has been certified for review by the referee. No objection to the allowances above stated has been filed by any creditor. I assume that the allowance of these attorney's fees was made under section 64, par. "b," of the present bankruptcy

statute. And, in so far as these allowances represent the ascertained value of the services rendered by counsel, I must assume the amounts to be correct. If correct, they should be paid, unless notice to creditors is a prerequisite, or the court finds, as the same are presented, that their payment is unjust, so as to require action against such payment.

In a decision lately handed down (*In re Beck*, *Ex parte O'Connell*, 92 Fed. 889) in the Eastern division of this district it was decided that no allowance would be made in voluntary cases for attorney's fees, in favor of counsel for the bankrupt, for services rendered for the bankrupt. But that in so far as such services, though nominally rendered for the bankrupt, were actually for the preservation of the estate, as, for instance, conserving the same pending the period between adjudication and first meeting of creditors, such fees might properly be allowed. It is now urged that the court will presume that the referee acted within this ruling, and affirm his action. But the order of allowance, as certified to this court, is not in accord with such presumption. Besides, on the oral presentation of this matter under review, the fact was developed that the claim of attorney's fees, as presented to the referee, went far beyond services for conserving the estate, although counsel affirmed a large part of such services were for the purpose and with the result of conserving the estate. From the record, as certified up, I am unable to determine what, if any, of such services are allowable, within the ruling announced in the *Beck Case*, above cited.

So far as my attention has been called to the adjudicated cases under former statutes and to the provisions of the present bankruptcy law, the trustee may properly be allowed counsel, when the situation requires such assistance, and fees of such counsel are properly allowed as part of the expense of the bankruptcy proceeding. In the absence of objection filed thereto, I must assume that the action of the referee was correct in allowing counsel fees for the trustee; that is, that the services were properly and actually rendered to the trustee, and are of the reasonable value found by the referee.

The question remains whether notice to the creditors was a prerequisite to this allowance by the referee. The section of the statute (section 64, par. "b") as to debts having priority of payment does not expressly require notice to the creditors before cost of administration can be determined and allowed. In the section (section 58, par. "a") which states in what matters notice to creditors must be given, no requirement appears for such notice when costs of administration are to be settled and allowed; and my attention has not been directed to any other provision of the statute, nor of the general rules, making such notices obligatory to the settling of such costs. Is there any good reason otherwise requiring such notice? It is assumed that creditors whose claims are filed with the referee will inform themselves of the general proceedings in the estate sufficiently, at least, to advise them of its general status, and file their objections, and, if necessary, take the proper steps for review of whatever orders and proceedings they may wish reviewed. They are thus given abundant opportunity for guarding against improper allowances. If the referee shall deem it proper, whether because of the peculiarity of the claim

for costs or expenses, or for any other reason by him deemed sufficient, I see no objection to his fixing a time for the hearing and notifying the creditors that at that time he will pass on the claim. But there occurs to me no good reason why the costs and expenses of administration must be passed upon by a creditors' meeting, before he shall pass on the same. If at any time before the closing of the estate this court shall find that excessive attorney's fees have been allowed and paid, this court doubtless has the power to take whatever steps are found necessary to correct this improper allowance and payment. These attorneys are on the roll of this court and subject to any proper order this court may make.

I am of the opinion that notice to creditors is not required before the referee can settle proper attorney's fees. The attorneys in whose favor were allowed attorney's fees in the pending case have asked that this court refer back to the referee the matter herein certified for review. Under the circumstances disclosed, this request appears to be reasonable. The pending matter is therefore referred back to Referee Lee, with directions to take such further action relating thereto as may be found right and just.

In re HIXON.

(District Court, S. D. Iowa, Central Division. April 6, 1899.)

No. 502.

1. **BANKRUPTCY—DISCHARGE—OPPOSITION.**

The bankrupt's application for discharge will not be refused unless opposing creditors allege, and sustain the burden of proving, facts sufficient, under the act, to defeat the application. The formal prerequisites to a discharge having been complied with, the judge will not, of his own motion, seek out grounds for refusing to discharge the bankrupt.

2. **SAME—SPECIFICATIONS IN OPPOSITION.**

Creditors opposing the bankrupt's application for discharge must set forth the particular and specific facts on which their opposition is based. Specifications alleging that the bankrupt has "concealed a part of his effects from the court," and has, "in contemplation of becoming bankrupt, made payments, transfers, and assignments of his property for the purpose of preferring a creditor," are too vague, general, and indefinite to prevent the granting of a discharge.

In Bankruptcy. On application of bankrupt for discharge.
Binford & Snelling, for bankrupt.

WOOLSON, District Judge. Certain creditors have filed herein what they term "specifications" of "the grounds of opposition" to granting discharge herein. The files show that all the merely modal prerequisites to granting discharge have been fulfilled. Unless these "specifications" in opposition, etc., shall prevent, the bankrupt is entitled to his discharge. Section 14, par. b, provides that "the judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest," etc. General order 33 provides, "A creditor opposing the application of a bankrupt for his discharge, * * * shall enter his appearance in

opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition, within ten days thereafter," etc. Rule 12 of the bankruptcy rules provided for this district further simplifies this matter by providing that such appearance and grounds of opposition shall be filed with the referee having the bankruptcy case in charge. Abundant opportunity is given for the examination, under oath, of the bankrupt at the first meeting of creditors, and afterwards at the time by the referee fixed for filing written appearance of creditors (paragraph 1 of rule 12), thus enabling the creditor to secure the opportunity of a second examination of the bankrupt in the light of such facts as the creditor may have learned after said first meeting. No doubt, upon a proper showing, the referee would provide opportunity for examination of the bankrupt between these two meetings. Thus the creditor has at his command abundant opportunity to ascertain particular and specific facts on which to base whatever opposition he desires to make to the discharge of the bankrupt. If, on such examination, the sworn testimony of the bankrupt discloses facts whose existence would prevent such discharge, the creditor is afforded ready opportunity to specify and present same. If, however, such sworn testimony is claimed to be materially false, and the creditor can prove the truth, then such creditor can readily specify the particulars wherein such false oath is alleged, so that court and bankrupt may easily comprehend same. The same general suggestions are correct as to the other grounds whose proven existence would defeat discharge. But it is incumbent on the creditor to assert and prove the existence of facts sufficient, under the statute, to defeat discharge. On the creditor is the burden of proof. "The judge shall * * * discharge the applicant, unless," etc. The judge will not of his own motion seek out grounds for refusing discharge, where the essential statutory prerequisites in the bankruptcy proceedings have been met. And since abundant opportunity is thus afforded the creditor for particularly and definitely ascertaining the exact grounds upon which a discharge should be refused, if such grounds exist, no injustice is done to the creditor by requiring that for which the statute, general orders, and rules provide, viz. "specification" of such grounds. This is due to the bankrupt, that he may prepare to meet such grounds. It is due, also, to the court, that the court may have a defined limit within which evidence and argument may be confined. The statute (section 14) states in most general terms the "grounds" for refusing discharge. Plainly, this was necessary, since, with the general boundaries so clearly stated, we could the more accurately and readily determine whether a specific state of facts was included therein. Equally manifest is it that a part of the duty of an opposing creditor is to so clearly and specifically state the facts constituting the grounds of his opposition that the court may know whether such grounds are within the terms of the statute. The grounds of opposition, as specified in the pending case, are stated substantially in the words of the statute, viz.: He has "concealed a part of his effects from the court. He has, in contemplation of becoming a bankrupt, made payments, transfers, and assignments of his property for the purpose of preferring a creditor

having a claim against him, and to prevent same coming into the hands of the trustee." Occasions may arise where the opposing creditor cannot specify with complete exactness the grounds he urges; that is, in some particulars he may not have succeeded, after diligent effort, in ascertaining all the details. But, if he expects to prove his alleged grounds, he must have knowledge of that which he expects to prove, and can to that extent specify. Of what avail, as a part of pending proceedings, is it that the bankrupt is charged with having "concealed a part of his effects," etc., or of having "made payments, transfers, and assignments of his property with the purpose." etc.? Such charges inform neither the court nor bankrupt of the grounds—the facts—which are charged. Indeed, these charges cannot, in any proper sense, be termed "specifications," but are plainly and grossly generalizations. Counsel, in drawing and filing same, must have known, upon a moment's reflection, that a trial would not be had thereon, and that it was impossible for the judge to refer the same to the referee, to take testimony thereon. He must have known that, before issue could be taken thereon, an amendment must be made which should specify the grounds intended to be urged. On the face of the papers, it would seem that these "specifications" must have been entered either to stand to the bankrupt as a threat of further trouble, unless in some way the claims of these creditors were met, or for the purpose merely of causing postponement and delay in the granting of the discharge,—so certain is it that these miscalled "specifications" do not specify. I am not advised further than by the papers themselves. The files show that all the modal prerequisites to discharge have been fully observed, and that, unless the opposition of these creditors shall prevent discharge, such discharge should now be granted.

The practice of the bankruptcy courts, as heretofore followed in the matter above under consideration, appears to have been substantially uniform.

Black, in his annotated volume on the present Bankruptcy Law, states the following (page 80):

Allegations in opposition to a discharge are not sufficient when they simply follow the words of the statute; they must be as exact as the specifications in an indictment; and no intendment will be made in favor of the pleader. *In re Butterfield*, 5 Bliss. 120, Fed. Cas. No. 2,247; *In re Hill*, 2 Ben. 136, Fed. Cas. No. 6,482; *In re Freeman*, 4 Ben. 245, Fed. Cas. No. 5,082.

Collier, in his treatise on Bankruptcy, declares (page 138) that:

While the objections are not to be pleaded with the strictness of common-law pleading, yet it is necessary that the facts be alleged, and that such allegations be distinct, specific, and definite, so as to clearly inform the bankrupt what he is to disprove. If they are vague and general, the court will dismiss them, or compel the objecting party to be more definite. [Citing a number of cases.]

In re Graves, 24 Fed. 550, presented to Judge Coxe the point under consideration. In that case the "specification" he was considering was in the exact language of the statute,—in substance, that the bankrupt, being a merchant, "had not kept proper books of account." The learned judge says:

The authorities appear to be numerous and uniform that, under a broad, indefinite allegation like the present, the creditor may prove that the bank-

rupt kept no books at all, or that he failed to keep any one of the books necessary for the transaction of the business in question. Having failed in this, however, he cannot enter into an examination of the books themselves, for the purpose of showing that they were carelessly kept, or kept on a wrong principle. If such an issue is to be raised, the bankrupt must be advised of it by distinct, specific, and definite statements of pleading. In *Condict's Case*, 19 N. B. R. 142, Fed. Cas. No. 3,094, the court says: "It has been the uniform practice under the bankrupt act to consider all specifications too vague and general which charge the offense in the words of the act. The particulars in which the bankrupt has offended should be so set forth that he may be apprised of the precise matters wherein he is alleged to have transgressed." In *Frey's Case*, 9 Fed. 376, the court says: "The objection being, therefore, to the manner in which the books are kept, and to imperfections or omissions therein, general objections, like those above stated, are not sufficient. The particular irregularities or omissions must be pointed out in the specifications, to entitle them to be considered." [And numerous cases are cited.]

The holding of Judge Coxe appears to be very favorable to the objecting creditor, in that it would permit an issue to be raised wherein the omission alleged is not specified. No more favorable holding has been pointed out to me. But even under that holding the specifications in the pending case must be held insufficient, as being too vague, uncertain, indefinite, and as not specifying.

At the close of the extract from Collier appears the suggestion that the judge may compel the objecting party to be more definite. Doubtless, this refers to the case where the objecting creditor has attempted to specify, but has failed to push his specification sufficiently far into detail. Manifestly, the court would, in such a case, where the good faith in the attempt of the creditor is manifest, permit amendment. But such amendment ought to be permitted only where there is manifest an attempt of the creditor to specify. In such a case the court may properly grant opportunity for the presentation of the specific facts which the objecting creditor claims to exist.

The conclusion is that the grounds, as alleged, do not justify an investigation thereof by the judge, and are not sufficient to arrest the granting of the discharge for which application is made. The objections are overruled, and the discharge is granted.

In re WISE (fifteen cases).

(Circuit Court, N. D. California. December 10, 1898.)

Nos. 11,984-11,998.

1. CUSTOMS DUTIES—CLASSIFICATION—"ENUMERATED" ARTICLES.

To place an article among those designated as "enumerated," so that it does not come within the operation of the similitude clause of a customs law, it is not necessary that it should be specifically mentioned.

2. SAME—CHINESE SHOES.

Paragraph 456 of the tariff act of 1890, covering "boots and shoes made of leather," is applicable, in the absence of any restrictive words, to all shoes made of leather, notwithstanding the fact that other materials are used in greater quantity; and Chinese shoes manufactured from various materials, including leather, cotton, silk, thread, and felt, but of which leather is the component material of chief value, are dutiable under such paragraph, and not under paragraph 461, as articles, of which leather is the component part of chief value, not specially provided for.

This is an application by the United States for the review of a decision of the board of general appraisers as to the classification of certain merchandise imported by Chee Chong & Co.

Samuel Knight, Asst. U. S. Atty., for Collector Wise.

Page, McCutchen & Eells, for importers.

HAWLEY, District Judge. The merchandise in question consists of what is generally known as "Chinese shoes." The collector classified the merchandise as cotton wearing apparel, of which cotton was the component material of chief value; and duty thereon was exacted at 50 per cent. ad valorem, under paragraph 349 of the McKinley tariff act of October 1, 1890. The importers duly protested against the action of the collector to the board of general appraisers at New York, and in their protest stated:

"The grounds of our objections are that said shoes are composed of several materials, of which leather is the component material of chief value. We claim that they are entitled to entry at 25 per cent. ad valorem, as shoes of leather, under paragraph 456, Act Oct. 1, 1890, or at 35 per cent. ad valorem, under paragraph 461 of the same act."

Included in the protest were several cases of merchandise, which the board of appraisers found consisted of "cotton," and others of "silk," as the "component material of chief value"; and as to these the appraisers affirmed the decision of the collector. No question is involved in relation to the duty on such merchandise. The respective parties have stipulated "that, in all cases where the board of appraisers have sustained the action of the collector herein, such decisions shall stand unaffected hereby." The appraisers decided "that the shoes, of which leather is a component material of chief value, are dutiable at 25 per cent., under paragraph 456." Is this decision correct? Are the shoes dutiable under paragraph 456, as contended for by the importers, or are they dutiable, as contended for by the government, under paragraph 461, or, if not specially provided for in this act, are they dutiable under this section by virtue of the "similitude clause" of section 5 of the tariff act? These provisions of the act, in so far as they are material to the question herein involved, read as follows:

"(456) * * * Boots and shoes made of leather, 25 per centum ad valorem."

"(461) Manufactures of leather, fur * * * or of which these substances or either of them is the component material of chief value, all of the above not specially provided for in this act, thirty-five per centum ad valorem."

"Sec. 5. * * * And on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value; and the words 'component material of chief value' wherever used in this act, shall be held to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article. If two or more rates of duty shall be applicable to any imported article it shall pay duty at the highest of such rates."

No evidence has been presented that the shoes in question are commercially known as "shoes made of leather." There is no evi-

dence as to their particular character or designation, except an exhibition of the shoes themselves. The respective parties have, however, stipulated, for the purpose of this case, "that it shall be considered as proven herein that the merchandise involved in these suits are Chinese shoes, manufactured from various materials, such as leather, cotton, silk, thread, and felt, of which shoes, leather is the component material of chief value."

The similitude clause applies only to nonenumerated articles. *Arthur v. Sussfield*, 96 U. S. 128. I am of opinion that the similitude clause has no application, and that the article is an enumerated article, within the meaning either of paragraph 456 or paragraph 461 of the tariff act. The law is well settled that to place an article among those designated as "enumerated," so as to take it out of the operation of the similitude clause of the customs revenue laws, it is not necessary that it should be specifically mentioned. *Arthur's Ex'rs v. Butterfield*, 125 U. S. 71, 76, 8 Sup. Ct. 714; *Mason v. Robertson*, 139 U. S. 624, 626, 11 Sup. Ct. 668; *Liebenroth v. Robertson*, 144 U. S. 35, 40, 12 Sup. Ct. 607, and authorities there cited.

It is argued on behalf of the collector that, if congress meant to include Chinese shoes in paragraph 456, it would have used language more appropriate therefor,—as, for instance, by inserting the phrase "or of which leather is a component part," or "of which leather is the component material of chief value," or "made wholly or in part of leather." There are doubtless many cases where such reasons could be, and have been, used; but I fail to see any great force in the argument as applied to the present case, because the same argument could be as effectively urged as a reason why paragraph 461 does not apply, in that it does not state that its provisions should apply to "shoes not made principally of leather," as well as to other articles, not hereinbefore specifically enumerated, of which leather "is the component material of chief value." It may be that there is no good reason why congress should not, as it readily could, have used language that would more clearly have expressed the intention. But when such words are left out of a statute, either by oversight, design, or mistake, the courts, as a general rule, have no power to supply the omission, but are bound to take the statute as congress made it, and interpret it in the light afforded by the language used. As was said by Mr. Justice Story in *Smith v. Rines*, 2 Sumn. 338, Fed. Cas. No. 13,100, "It is not for courts of justice, *proprio Marte*, to provide for all the defects or mischiefs of imperfect legislation." An examination of the tariff act shows that in certain paragraphs there are certain articles named, descriptive in their general character, and then paragraphs containing other descriptions which might, if they stood alone, be sufficient to cover the same articles that are in other paragraphs either generally or specifically described. There are many decisions which refer to this condition of the tariff act. *Arthur v. Morrison*, 96 U. S. 108; *Same v. Unkart*, Id. 118; *Same v. Stephani*, Id. 125; *Same v. Sussfield*, Id. 128; *Solomon v. Arthur*, 102 U. S. 208, 212. There is no inflexible rule in the interpretation of statutes. Courts, in attempting to construe statutes, are often "born unto trouble as the sparks fly upwards." It has been said of the statute of

frauds of England, which was at the time of its adoption considered perfect in its parts, and has been since adopted in most, if not all, the states of the Union, that it took more decisions of the courts than there are letters in the statute to determine what it really meant. In fact, there is still some doubt existing in the minds of many jurists and authors as to whether it really has been, or ever will be, made perfectly clear. Lawson, in his *Leading Cases Simplified* (page 56), says:

"As was to be expected, the courts were soon called upon to interpret the different provisions of this statute. In fact they have kept at it for 200 years, and are by no means through yet. Indeed, one may say that they have just got a good start."

Our revenue, tariff laws, and customs duties are not, however, allowed to remain long enough upon the statutes to enable courts to "get a good start" at their interpretation. They are, by the necessities of the times, condition of the country, and change of administrations, being constantly changed. Whole clauses are removed, new classifications made, and new phrases and sentences inserted in many of the paragraphs. This diversion has been indulged in simply to faintly illustrate the innumerable doubts and differences of opinion constantly arising between the collectors and importers in relation to the customs duties imposed by the tariff act. This state of things is unavoidable.

The fact is that an act of congress must be construed with special reference to its objects and purposes, according to the true intent and meaning of its terms; and, when the legislative intent is ascertained, that, and only that, is to be our guide in interpreting it. In the very nature of the subject of imposing duties on imported articles, it would be exceedingly difficult, if not impossible, to make a specific descriptive designation of each article that might be thereafter imported. Chinese shoes of the same or similar character as are in issue in this case have been imported into this country for more than 30 years. Congress, however, has never deemed them of sufficient importance to give them a specific designation under the head or name of "Chinese shoes." My attention has been called to but one case (that of *Swayne v. Hager*, 37 Fed. 780) where the subject is discussed. But that case sheds but little, if any, light upon the matter presented in this case. There the collector classified the shoes as "wearing apparel," under the fourteenth paragraph of Schedule K of the act of March 3, 1883 (22 Stat. 509); and the importers claimed they came under the seventh paragraph of the same schedule, "all manufactures of cotton not specially enumerated or provided for in this act." The court found that cotton constituted the most valuable part of the material, and sustained the claim of the importers. The paragraphs in the McKinley act are different. Under paragraph 456 we have "boots and shoes made of leather"; and the stipulation is that the shoes in controversy are manufactured from various materials, such as leather, cotton, silk, thread, and felt, of which leather is a component material of chief value. From an inspection of the shoes, it might be said that they are not, strictly speaking, leather shoes; but they are shoes made in part, at least, of leather, and leather is a component material of chief

value. When congress used the term "shoes made of leather," it could not have intended, as suggested by counsel, that it meant only "shoes which are entirely made of leather." Such a restricted meaning cannot, of course, be accepted by the courts. The term "shoes made of leather" is descriptive, rather than denominative. It refers not to any particular class of shoes, but to all kinds of shoes made of leather. There are many different kinds of shoes made of leather which are composed of as great a variety of materials as the Chinese shoes. Cotton, felt, thread, and iron or steel nails are found in all. In some, elastic, wood, paper, buttons, and bone are also found. And in some of these shoes it may, perhaps, with some degree of accuracy, be said that the articles therein found are no more disproportionate, in value, at least, to the leather, than the articles found in the Chinese shoes. If, therefore, leather is the predominant article of greatest value, or a component part of chief value, I see no substantial reason why that test should not be applied, rather than the one claimed on behalf of the collector,—that it should be the article forming the greatest bulk, or covering the most space. The general description of "shoes made of leather," in section 456, for the reason stated, seems to me applicable, in the absence of any restrictive words, to all shoes made of leather, notwithstanding the fact that other materials are used, of a greater quantity or bulk. I am of opinion that the general description should be given controlling effect.

Of the cases cited by counsel, the one bearing the closest analogy to the case in hand is *Robertson v. Glendenning*, 132 U. S 158, 10 Sup. Ct. 44. There the articles were embroidered linen handkerchiefs. The question was whether the duty to be paid came under the eighth paragraph of Schedule J of the act of 1883, which covers "handkerchiefs," and also "other manufactures of flax, jute, or hemp, or of which flax, jute, or hemp shall be the component part of chief value, 35 per cent. ad valorem," or under the eleventh paragraph of the same schedule, which specified "flax or linen laces and insertings, embroidery, or manufactures of linen, if embroidered or tambooured and not specially enumerated or provided for in this act, 30 per cent. ad valorem." From the samples introduced in evidence, it appeared that the body of the cloth was linen cambric made of flax, and known in trade as "embroidered handkerchiefs"; that the embroidery was a substantial part of the handkerchief, and was done with cotton. The contention of the government was that the provisions of the statute should be construed as if they read, "On linen handkerchiefs 35 per cent. ad valorem, but if embroidered 30 per cent. ad valorem." The court declined to accept this construction, and held that where an article is designated by a specific name, and a duty imposed upon it by such name, general terms in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it. See, also, *Arthur v. Lahey*, 96 U. S. 112, and authorities there cited; *U. S. v. Wolff*, 69 Fed. 327. The decision of the board of appraisers is affirmed.

UNITED STATES v. SCHROEDER et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 58.

CUSTOMS DUTIES—TOBACCO.

Tariff Act Oct. 1, 1890 (26 Stat. 567), having no provision for "tobacco, unmanufactured, not specially enumerated or provided for," the portions of leaf tobacco which break off in handling the tobacco before it is stemmed, or in the process of shipping, and are swept up, and are and can be used only for cigarettes and the fillers of the cheaper grades of cigars, and are not covered by any of the paragraphs of the tobacco schedule, may fairly be classified under paragraph 472 as waste.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers which sustained a decision of the collector of the port of New York classifying a certain importation of tobacco for customs duty. 87 Fed. 201. The importation consists of those portions of the leaf tobacco which break off in handling the tobacco before it is stemmed, or in the process of stripping.

Henry C. Platt, for appellant.

Wm. B. Hill, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The local appraiser who examined the importation reported it "as assimilating to, and as a matter of fact being, a filler tobacco"; and the collector assessed duty thereon under paragraph 243 of the act of October 1, 1890. 26 Stat. 567. The first paragraph in the tobacco schedule (242) provides for "leaf tobacco, suitable for cigar wrappers." No one contends that the importation is within the provisions of that paragraph. Paragraph 243 reads as follows: "(243) All other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound; if stemmed, fifty cents per pound." Paragraph 244 reads: "(244) Tobacco, manufactured, of all descriptions, not specially enumerated or provided for in this act, forty cents per pound." The remaining paragraphs of the schedule are 245, covering snuff of all descriptions, and 246, covering cigars, cigarettes, and cheroots. Comparing this schedule with the tobacco schedule in the next preceding tariff act (Acts 1883, c. 121, 22 Stat. 502) it appears that congress has omitted a provision for "tobacco, unmanufactured, not specially enumerated or provided for," which would seem to cover the merchandise in question. This provision of the earlier act being omitted, the question to be determined is, under which one of the provisions of the act of 1890 is this scrap filler tobacco to be classified?

It may well be that, as found by the local appraiser, it bears a sufficient similitude to the leaf tobacco of paragraph 243 to warrant its classification thereunder; but the section of the tariff act

directing classification according to similitude applies only to non-enumerated articles. The board of general appraisers affirmed the decision of the collector, stating in its opinion that such action was in accordance with a decision of the circuit court of appeals, Seventh circuit (*Sheldon v. U. S.*, 5 C. C. A. 282, 55 Fed. 818). In the case cited, however, the collector had classified the importation not as "tobacco in leaf, unmanufactured" (paragraph 243), but as "tobacco, manufactured of all descriptions not specially enumerated," etc., under paragraph 244. The court sustained this classification. The *Sheldon Case*, therefore, is no authority for the proposition that an article such as this is to be classified as "all other tobacco in leaf, unmanufactured" (paragraph 243); nor, indeed, is it authority even for the classification it sustained. The supreme court had occasion, in a later decision (*Seeberger v. Castro*, 153 U. S. 32, 14 Sup. Ct. 766), which cited the *Sheldon Case*, to consider the question whether such tobacco is "manufactured," in the sense of the word as used in the tariff act. The particular act then under consideration was the tariff of 1883, but the language of the paragraph (249) is the same,—“tobacco manufactured, of all descriptions, not specially enumerated,” etc. The tobacco before the supreme court was “scraps, * * * clippings from the ends of cigars, and pieces broken from the tobacco of which cigars are manufactured, in the process of such manufacture, and not fit for any use in the condition in which the same are imported, and that their only use is to be manufactured into cigarettes and smoking tobacco.” The court held that such “clippings are the mere waste resulting from a process of manufacture, and not in themselves manufactured articles.” It did not classify these scraps for duty under paragraph 493 of the act of 1883, as “waste, all not specially enumerated”; finding a much more specific provision in the tobacco schedule, viz. “tobacco, unmanufactured, not specially enumerated,” etc.,—a provision, be it noted, which is not found in the act of 1890 now under consideration. Manifestly the present importation cannot be classified as “tobacco manufactured,” and, indeed, neither the collector nor the importer contends that it should be so classified.

The importer contends that the tobacco is dutiable under paragraph 472: “Waste, not specially provided for in this act ten per centum ad valorem.” The following summary of the evidence, which was entirely uncontradicted,—the government calling no witness,—indicates the characteristics of the importation in controversy: The clippings and cuttings of cigars are known to the trade as “clippings.” “Scrap tobacco,” however (the trade-name of the article here imported), constitutes a class of its own; coming to this country in bales of a peculiar size, differing from those of wrapper or filler tobacco. It is the part that falls when stripping the tobacco to prepare the leaf to go into the cigar. In the process of manufacturing cigars, they take tobacco in the leaf, put it first on racks to dry, then in barrels to sweat, and then put it on the cigar maker’s table. In all this handling,—racking, barreling, taking out and putting on the table,—there is always more or less breakage of the tobacco leaf; and the particles which fall in handling, and those which

are broken from the leaf in the process of stemming, make this scrap tobacco. They drop to the floor, and are swept up. It is worth about one-quarter the value of the tobacco leaf from which it comes. The breaking is not intentional. In the rough handling of the leaf in tearing off the stem, pieces fall to the floor, which the workman does not stop to pick up, but which are subsequently collected from the floor as scraps. It is principally used for cigarettes and the cheaper grades of cigars,—the cheaper grade of a Havana filler cigar,—and can only be used for fillers. The term "leaf tobacco," in the trade, is applied to anything that is on the stem, or in its original form with the stem taken out. These "filler scraps" seem not to be within the ordinary meaning of the phrase "tobacco in leaf," and there is nothing to indicate that trade usage so classifies them. They are therefore not covered by any of the paragraphs of the tobacco schedule, but may fairly be classified as waste,—spoiled, superfluous, or rejected material, which is of the same kind as the material utilized for the intended purpose. *Standard Varnish Works v. U. S.*, 8 C. C. A. 178, 59 Fed. 456; *U. S. v. Dean Linseed Oil Co.*, 31 C. C. A. 51, 87 Fed. 453. The decision of the circuit court is affirmed.

HIGH v. COYNE, Tax Collector.

(Circuit Court, N. D. Illinois. February 28, 1899.)

No. 25,091.

INTERNAL REVENUE—WAR REVENUE ACT OF 1896—CONSTITUTIONALITY OF SUCCESSION TAX.

Under the rules of construction laid down by the supreme court in analogous cases, the succession tax or duty imposed by the war revenue act of June 13, 1898 (sections 29–31), cannot be held unconstitutional on the ground that it is a direct tax, nor for want of uniformity because it exempts from its operation all legacies under the value of \$10,000, nor as an exercise of a power which belongs exclusively to the states.

On Demurrer to Bill.

Pence, Carpenter & High, for complainant.

S. H. Bethea, U. S. Dist. Atty., for defendant.

SEAMAN, District Judge. The bill is filed to enjoin the imposition of the succession tax or duty which is provided by sections 29, 30, and 31 of the act of congress approved June 13, 1898, and is predicated solely upon the alleged unconstitutionality of these provisions. The contention is that the tax or duty is opposed to the constitution upon the following grounds: (1) That it constitutes a direct tax upon the legacies in question, both in effect and by the express terms of the act; (2) that it is not uniform, for the reason that it exempts from its operation all legacies under the value of \$10,000; and (3) that the right of inheritance is a privilege or franchise, within the exclusive power of the states to grant and regulate, and not subject to abridgement or taxation by the general government. Unless one or the other of these propositions can be upheld, it is manifest that the bill states no ground for relief, and the demurrer must be sus-

tained. The questions are interesting, and the ability and thoroughness with which they have been presented would justify a review of the authorities cited, and an extended statement of the grounds upon which my conclusions are based, aside from the doctrine of stare decisis; but with the pressure of other duties, and the belief that there will be a review by the supreme court, I am satisfied that an early decision is more desirable for the parties than an opinion which would necessarily call for delay. It is the duty of the courts to sustain all enactments by the legislative branch of the government, either national or state, unless they clearly transcend the lawmaking power; and no such enactment must be held for naught because of doubt, or for any reason short of absolute conviction. Another rule must be premised as controlling the circuit courts at least,—that individual convictions must yield when the constitutionality has been determined by the court of final resort in a case which is applicable. I have examined with care the line of decisions by the supreme court upon questions of taxation in which the constitutional provisions involved in this case were interpreted, and my conclusions, briefly stated, are as follows:

1. Prior to the income tax decisions in the Pollock Cases, 157 U. S. 429, 15 Sup. Ct. 673, and 158 U. S. 601, 15 Sup. Ct. 912, the opinions of the supreme court tended to narrow the definition of direct taxes which were inhibited by the constitution to capitation or poll taxes and taxes on land. By the Pollock Case that definition was extended to include personalty and incomes derived from investment in real estate or personal property. It is unnecessary to review the interpretations which are there considered, as it seems manifest that the prevailing opinion by the chief justice carefully preserves the distinction under which a duty or tax of the character imposed by this act is upheld as one upon the privilege of succession, or upon devolution of property, of the nature of excise. Certainly, the decision in *Scholey v. Rew*, 23 Wall. 331, by which a provision was sustained quite identical in terms, so far as material to this point, was neither overruled nor questioned in the Pollock decision, but stands unimpaired as a rule of decision which must govern this court, notwithstanding the reference in the opinion to the former income tax as of analogous nature. The view thus indicated of the distinction in an inheritance or succession tax is well fortified by the opinion in *U. S. v. Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, which sustains a tax of that species charged under a statute of the state of New York against a legacy in favor of the United States bequeathed by a citizen of that state. As there held: "The tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it; and it is not until it has yielded its contribution to the state that it becomes the property of the legatee." So, in *Magoun v. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, the same interpretation is upheld.

2. As an original question, the objection of want of uniformity through the important exemption feature of this statute would impress me as one of great force; but in consideration of the fact that the same question was directly presented in the income tax cases, and was left undecided, because of an equal division of the members of the

court, and in the light of rulings under state statutes where the objection would seem to be equally open under certain of their constitutions, I find no warrant for holding that the provision is undoubtedly beyond the power of congress.

8. Upon the third proposition I cannot regard the duty as an interference with the rights of the states, although the doctrine, frequently pronounced, that the right to tax is the right to destroy, lends plausibility to that contention. I am therefore of the opinion that the demurrer must be sustained upon authority.

BERKOWITZ v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 10, 1899.)

No. 27, September Term.

1. CRIMINAL PLEADING—AUTREFOIS ACQUIT.

A sworn statement by a defendant that he was on a certain date arraigned and acquitted on an indictment specified in the statement, in the same court in which the second trial occurs, and that the "offence to which he is now called upon to defend the facts and circumstances is * * * the same offence of which he was heretofore acquitted" is properly to be treated as a plea of former acquittal.

2. SAME—FORMER JEOPARDY—MISDEMEANORS.

The fifth amendment of the Constitution of the United States providing that no person shall be subject for the same offence to be twice put in jeopardy of life or limb applies to misdemeanors as well as treason and felony.

3. CONSPIRACY AGAINST THE UNITED STATES—MISDEMEANOR.

As at common law a conspiracy to commit a misdemeanor or felony was only a misdemeanor, so conspiracy under Rev. St. § 5440, not being declared a felony, is also merely a misdemeanor.

4. CRIMINAL LAW—MERGER OF OFFENCES.

The doctrine of merger of offences does not apply as between misdemeanors, and hence a misdemeanor which is the object of a conspiracy is not merged in the latter offence, nor is the offence of conspiracy merged in such consummated misdemeanor.

5. FALSE NATURALIZATION CERTIFICATES—UTTERING—MISDEMEANOR.

Rev. St. § 5424, providing that any person who utters, sells, etc., any false naturalization certificate shall be punished, etc., not having declared such offence a felony, and having repealed the former acts making it such, the offence was reduced to a misdemeanor.

6. SAME—FORMER ACQUITTAL.

An indictment under Rev. St. § 5440, charging a defendant with conspiring to utter as true false naturalization certificates in violation of Id. § 5424, charges an offence different from that under the latter section, and hence an acquittal on the indictment for such conspiracy is not a bar to a subsequent prosecution for the offence of uttering, etc.

Acheson, Circuit Judge, dissenting.

(Syllabus by the Court.)

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

W. W. Ker, for plaintiff in error.

James M. Beck and Francis Fisher Kane, for the United States.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. The plaintiff in error and Richard W. Merrick were indicted in the court below under section 5440 of the revised statutes as amended by the act of May 17, 1879, for unlawfully conspiring together to utter as true certain false certificates of naturalization to five persons respectively named in the several counts of the indictment. The indictment contained ten counts, and the conspiracy charged was treated in the first five counts as one to commit an offence against the United States, and in the remaining counts as one to defraud the United States. On the above mentioned indictment, being No. 19 of the February Term, 1898, the defendant, having pleaded not guilty went to trial and was acquitted. Subsequently an indictment under section 5424 of the revised statutes, containing fifteen counts, was found in the court below against the defendant, being No. 16 of the May Term, 1898, charging him in the first five counts with unlawfully selling, in five other counts with unlawfully disposing of, and in the remaining counts with unlawfully uttering as true, certain false certificates of naturalization to five persons respectively named in the several counts of each class; all of these persons respectively bearing the names of the persons mentioned in the former indictment for conspiracy as those to whom false certificates of naturalization were uttered, and all the alleged false certificates mentioned in the last indictment being in words, letters and figures the same as those set forth in the first. The defendant upon or immediately before his arraignment on the last indictment presented to the court and caused to be filed a verified allegation or plea, as follows:

United States of America	}	May Sessions, 1898.
vs.		
Isidor Berkowitz.	}	No. 16.

Isidor Berkowitz the above named being duly sworn according to law doth depose and say: That on the 23d day of February, A. D. 1898, he was arraigned and acquitted on a bill of indictment No. 19 February Sessions, 1898. And that the offence to which he is now called upon to defend the facts and circumstances is substantially and in fact the same offence of which he was heretofore acquitted as aforesaid, and therefore prays judgment of the Honorable Court.

Isidor Berkowitz.

Sworn and subscribed to before me this 17th day of May, A. D. 1898.

Charles S. Lincoln,

Clerk District Court, United States.

It does not appear from the record that any issue was taken upon the matters of fact set forth in the allegation or plea, or that any demurrer thereto was filed; and it is admitted by counsel on both sides that no such issue was taken and that no demurrer was filed. It does appear, however, from the record that "arguments having been heard and due consideration having been given thereto, the allegation or plea of the defendant" was overruled by the court. No exception was taken by the defendant to the action of the court in this regard. Thereupon the defendant pleaded not guilty and went to trial. A general verdict of guilty was rendered, and he was sentenced to fine and imprisonment at hard labor. To reverse this judgment the present writ of error was taken.

The first and third assignments of error present the only questions before us for determination. They allege error in "overruling the de-

defendant's plea of 'autrefois acquit,' and in 'not permitting the defendant's plea of 'autrefois acquit' to be determined by a jury." We find no error on the latter point. The sworn allegation of the defendant, while informal, may fairly be considered a plea of former acquittal. It was so considered by the court below. It alleges that the defendant "was arraigned and acquitted on a bill of indictment, No. 19, February Sessions, 1898." That indictment having been found in the court below, it was unnecessary to refer to it in the plea more particularly. The same force must be given to the plea as if it contained a copy or a particular recital of the former indictment. The plea further alleges in effect identity of offences charged in the two indictments, and identity of certificates of naturalization and of persons alleged to have received the same. Although no demurrer to the plea was filed, the objection orally made on the part of the government to its sufficiency had the effect of a general demurrer, and the arguments, which ensued without objection on the part of the defendant as to the mode of procedure, were equivalent to a joinder in demurrer. The substantial facts alleged in the plea were thereby admitted to be true. The allegation of identity of offences charged in the two indictments, in so far as it involved matter of law, was not admitted to be true by the demurrer, such matter being solely for the consideration of the court. The counts in the former indictment were confined to alleged conspiracy to utter as true false certificates of naturalization. In the present indictment the defendant is charged in the first class of counts with unlawfully selling, in the second class with unlawfully disposing of, and in the third class with unlawfully uttering as true such false certificates. Assuming for the purposes of this case that a former acquittal or conviction of a person on a charge of unlawfully uttering as true false certificates of naturalization to certain persons would, if properly pleaded, operate as a bar to a subsequent prosecution of the former defendant for unlawfully selling or disposing of the same certificates to the same persons in the same transaction in which the uttering occurred, we are brought to the main question.

The fifth amendment of the constitution declares "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." This constitutional guaranty by a liberal construction is held to apply to misdemeanors as well as to treason and felony. Has the defendant been twice put in jeopardy for the same offence? Section 5424 of the revised statutes, under which he was convicted, provides, among other things, that every person who utters, sells, disposes of, or issues as true or genuine any false certificate of naturalization "shall be punished by imprisonment at hard labor not less than one year, nor more than five years, or by a fine of not less than three hundred dollars nor more than one thousand dollars, or by both such fine and imprisonment." Section 5440 as amended, the trial of the defendant under which resulted in his acquittal, is as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the

conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

The words "any act to effect the object of the conspiracy" apply as well to an act which of itself fully accomplishes that object as to an act merely in furtherance of it. Offences under the above two sections are punishable with imprisonment for more than one year in a state prison or penitentiary and are, therefore, infamous crimes within the meaning of the constitutional provision that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," &c. It is owing to the infamy of the punishment that this safeguard is extended to one accused of such an offence. But it by no means follows that every infamous crime is a felony. In *Bannon v. U. S.*, 156 U. S. 464, 15 Sup. Ct. 467, the court said:

"Neither does it necessarily follow that because the punishment affixed to an offence is infamous, the offence itself is thereby raised to the grade of felony. The word 'felony' was used at common law to denote offences which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded according to the degree of guilt. * * * If such imprisonment were made the sole test of felonies, it would necessarily follow that a great many offences of minor importance, such as selling distilled liquors without payment of the special tax, and other analogous offences under the internal and customs revenue laws, would be treated as felonies, and the persons guilty of such offences stigmatized as felons. * * * By statute in some of the States, the word 'felony' is defined to mean offences for which the offender, on conviction, may be punished by death or imprisonment in the state prison or penitentiary; but in the absence of such statute the word is used to designate such serious offences as were formerly punishable by death or by forfeiture of the lands or goods of the offender."

At common law a conspiracy to commit a misdemeanor or a felony was only a misdemeanor. So conspiracy under section 5440, not being declared felony, is also merely a misdemeanor. Is the uttering as true a false certificate of naturalization under section 5424 a misdemeanor, or a felony? The doctrine of merger is not applicable as between misdemeanors. A conspiracy to commit a misdemeanor is not merged in the misdemeanor when committed. Hence it follows that where the offence which is the object of the conspiracy amounts only to a misdemeanor against the United States there is no merger in it of the offence of conspiracy, nor is there a merger of the offence constituting such object in the offence of conspiracy. There is much contrariety of opinion on the question whether, in the absence of a statute, a conspiracy to commit a felony is merged in the consummated felony. 2 Whart. Cr. Law (8th Ed.) § 1344; 1 Bish. New Cr. Law (8th Ed.) § 814; 2 McClain, Cr. Law, § 979. It is, however, unnecessary to decide this point. It may be observed in passing that, if the uttering of false certificates of naturalization were a felony, and if the commission of that felony would merge a conspiracy to commit it, the former indictment against the defendant should have charged, not a conspiracy, but its consummated object, and the defendant could not properly have been convicted on the indictment for conspiracy. The offence of uttering as true false certificates of naturalization in the United States is purely of stat-

utory origin. It has never involved the consequences incident to felony at common law. It has never been made felony except by express legislative declaration to that effect, and, whenever it has been so declared, it has been felony, not by reason of the essential nature of the offence, but solely by virtue of such express declaration. Without such declaration it would be only a misdemeanor. Section 13 of the act of March 3, 1813, for "the regulation of seamen on board the public and private vessels of the United States" (2 Stat. 809), provided, among other things, that any person who should "pass, utter, or use as true, any false, forged or counterfeited certificate of citizenship" should be "deemed and adjudged guilty of felony," &c. So, section 2 of the act of July 14, 1870, "to amend the naturalization laws and to punish crimes against the same, and for other purposes" (16 Stat. 254), provided, among other things, that any person who should "utter, sell, dispose of, or use as true or genuine," any false certificate of naturalization should be "deemed and adjudged guilty of felony," &c. By the act of June 22, 1874, "to revise and consolidate the statutes of the United States, in force on the first day of December, anno Domini, one thousand eight hundred and seventy-three," it was provided, with respect to statutes general and permanent in their nature, that "all acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." Rev. St. § 5596. Section 5424, while clearly defining the offences thereby made punishable, does not declare them felonies. The one thing which could have made them felonies is omitted from the section, namely, an express declaration to that effect. To assume that such omission was accidental is inadmissible, especially in view of the fact that the phraseology of section 5424 varies from that employed in section 2 of the act of July 14, 1870, indicating careful revision. While it is true that reference may be had to earlier enactments to throw light upon the legislative intent where obscure or doubtful words or phrases occur in the revised statutes, such reference is not permissible where no such doubt or obscurity exists. The omission from section 5424 of any declaration of felony shows a legislative intention that the offences therein enumerated should not be deemed felonies. *U. S. v. Coppersmith*, 4 Fed. 198. If not felonies, they are only misdemeanors. Indeed, it would not have required an express repeal to produce the same result. In *Tracy v. Tuffy*, 134 U. S. 206, 10 Sup. Ct. 527, the court said:

"While it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules with respect to that subject that are to govern."

And in *Ellis v. Paige*, 1 Pick. 43, the supreme court of Massachusetts used the following apt language:

"It is a well settled rule that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be re-

vived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible."

The offence of uttering, selling or disposing of false certificates of naturalization in violation of section 5424 being only a misdemeanor, there could be no merger as between it and a conspiracy of which it was the object.

The act to effect the object of the conspiracy is no part of the offence under section 5440. If there be a conspiracy to commit an offence against the United States or to defraud the United States, the offence under that section is complete, although no successful prosecution can be had without proof of an act in aid, furtherance, or accomplishment of the object of the conspiracy. The unlawful confederacy constitutes the offence. In *U. S. v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, the court, in dealing with an indictment charging conspiracy under section 5440 to violate the provisions of section 5204 and 5209 relating to national banks, said:

"The offence charged in the counts of this indictment is a conspiracy. This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute."

In *Dealy v. U. S.*, 152 U. S. 539, 14 Sup. Ct. 680, where the indictment charged conspiracy under section 5440 to defraud the United States of lands by means of false entries under the homestead laws, the court quoted with approval the above passage from the opinion in *U. S. v. Britton* and said:

"The gist of the offence is the conspiracy. * * * Hence if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and a subsequent overt act in pursuance thereof may have been done anywhere."

Section 1035 of the revised statutes provides that "in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment," &c. An uttering by the defendant of false certificates of naturalization was, as we have seen, no part of the offence of conspiracy charged against him in the former indictment, nor was it necessarily included in that offence. The act to effect the object of the conspiracy need not be the act of all the conspirators, but of any one or more of them. A conviction of one on a charge of conspiracy to utter a false certificate of naturalization does not show that he uttered such certificate. It may have been uttered solely by a co-conspirator. So an acquittal of one on such a charge is not in the least inconsistent with his having uttered such a certificate. There may have been a failure to prove a conspiracy. The evidence on which he was convicted or acquitted on a charge of conspiracy may be wholly immaterial in a subsequent prosecution for uttering such a certificate, as not tending either to support a conviction or to secure an acquittal. If all the facts necessary to support the pres-

ent indictment had been proved on the former trial they would not have warranted a conviction of the defendant under the former indictment of the offence of uttering false certificates of naturalization. Each count in that indictment charged conspiracy, which is an offence separate and distinct from that here alleged and subject to a different punishment. To hold that the defendant could have been convicted under the former indictment of the offence with which he is charged in this case would be to decide either that the former indictment did not allege conspiracy, but only the uttering of false certificates of naturalization, or that, in contravention of the rules of criminal procedure, a conviction could properly be had under a count embracing two separate and distinct offences differently punishable. If conspiracy had been insufficiently charged in the former indictment, a question might have arisen which it is unnecessary here to consider. We do not find any ambiguity or uncertainty in the former indictment as to the nature of the offence charged. Each count expressly set forth a conspiracy to utter a false certificate of naturalization, contained a copy of it, and alleged that such certificate was uttered "to carry out and effect the object of said conspiracy." Nowhere in that indictment was the uttering of a false certificate alleged as an independent offence. The defendant had a constitutional right "to be informed of the nature and cause of the accusation," and this right he enjoyed. He could not on his former trial have been convicted of the offence with which he is here charged without a practical nullification of that constitutional guaranty. As he could not have been so convicted, he has not for the offence of uttering false certificates of naturalization twice been put in jeopardy. There was, therefore, no error in overruling the plea of former acquittal. The judgment below is affirmed.

ACHESON, Circuit Judge. I dissent from the judgment of affirmance in this case. I differ fundamentally from the majority of the court in respect to the scope of the first indictment. My views I can the better explain by quoting in extenso the first count of the former indictment. This count will answer for all the other counts of that indictment here involved, for they are all alike save as to the name of the person represented as having been naturalized, and to whom it is charged a false certificate of naturalization was uttered.

"In the District Court of the United States for the Eastern District of Pennsylvania: February Sessions, 1898, No. 19.

Eastern District of Pennsylvania—ss.:

"The grand inquest of the United States of America, inquiring in and for the Eastern district of Pennsylvania, upon their respective oaths and affirmations, respectively, do present that heretofore, to wit, upon the 1st day of June in the year of our Lord 1897, one Isidor Berkowitz and one Richard W. Merrick, both late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, did knowingly, willfully, and unlawfully conspire together for the purpose of committing an offense against the United States, to wit, to utter as true a certain false certificate of naturalization, purporting that one Joseph Mochnacs was admitted to become a citizen of the United States by the circuit court of the United States in and for the Eastern district of Pennsylvania, at a session of the said court holden at the city of Philadelphia, in the district aforesaid, on, to wit, the 11th day of October, A. D.

1897, and which said certificate is in words and figures and manner and form as follows, to wit:

"United States of America, Eastern District of Pennsylvania.

"Be it remembered, that at a circuit court of the United States holden at Philadelphia, in and for the Eastern district of Pennsylvania, in the Third circuit, on the eleventh day of October in the year of our Lord one thousand eight hundred and ninety-seven, Joseph Mohnacs, a native of Russia, exhibited a petition praying to be admitted to become a citizen of the United States; and it appearing to the said court that he had declared on oath before the clerk of the circuit court of the United States, Eastern district of Pennsylvania, on the twenty-sixth day of June, A. D. 1895, that it was bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatsoever, and particularly to the czar of Russia, of whom he was at that time a subject, and that the said Joseph Mohnacs having on his solemn oath declared, and also made proof thereof, agreeably to law, to the satisfaction of the court, that he has resided one year and upwards within the state of Pennsylvania, and within the United States of America five years and upwards, immediately preceding his application, and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same, and having also declared on his solemn oath before the said court that he would support the constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatsoever, and particularly to the czar of Russia, of whom he was before a subject; and thereupon the court admitted the said Joseph Mohnacs to become a citizen of the United States, and ordered all proceedings aforesaid to be recorded by the clerk of the said court, which was done accordingly. In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this eleventh day of October, A. D. 1897, and in the one hundred and twenty-second year of the independence of the United States.

Rich. W. Merrick,

"Pro Clerk of Circuit Court, United States.

"[Seal U. S. Circuit Court, E. D. Penna.]

"And to carry out and effect the object of said conspiracy, they, the said Isidor Berkowitz and the said Richard W. Merrick, did on, to wit, the said 11th day of October, A. D. 1897, utter as true the said false certificate of naturalization unto one Joseph Mohnacs, and which said false certificate of naturalization was then and there false, in that the said circuit court of the United States in and for the district aforesaid did not upon the said 11th day of October, A. D. 1897, nor upon any other day or date, admit, or authorize the admission of, the said Joseph Mohnacs to become a citizen of the United States, nor did said circuit court authorize the utterance of the said certificate of naturalization, as they, the said Isidor Berkowitz and Richard W. Merrick, and each of them, on all of the days and dates above mentioned, well knew,—contrary to the form of the act of congress in such cases made and provided, and against the peace and dignity of the United States of America."

The conclusion of the majority of the court rests upon the assumption that the former indictment was simply for a conspiracy to commit an offense against the United States, namely, a conspiracy to utter as true a false certificate of naturalization. Is this a true conception of that indictment? To determine the question aright, let us analyze the above-recited count. It begins, indeed, with an allegation that the defendants conspired to utter as true a false certificate of naturalization; next it sets forth at length the false certificate; and then it avers that the defendants did utter as true the said false certificate of naturalization, knowing it to be false, contrary to the form of the act of congress in such cases made and

provided. The count, in its charging part, contains a complete description of the offense of uttering a false certificate of naturalization, denounced by, and punishable under, section 5424 of the Revised Statutes of the United States. The averment here made of the commission by the defendants of the offense of uttering the false certificate of naturalization is direct and positive, and very specific. The accusation of uttering the false certificate, as here laid, is a complete charge in itself. In substance, and almost in exact form, it is the same charge made against the defendant in the second indictment. It seems to me to be a matter of no moment that the charge of uttering, as laid in the first indictment, is preceded by the words "to carry out and effect the object of said conspiracy." This is no more than saying that pursuant to, and in accomplishment of, the previous agreement between the defendants to commit the offense, they actually did commit it.

I cannot assent to the suggestion that the first indictment was drawn exclusively under section 5440 of the Revised Statutes, as amended by the act of May 17, 1879 (21 Stat. 4):

"If two or more persons conspire together either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable. * * *"

It will be perceived that, to consummate the statutory offense of conspiracy, some act must be done by one or more of the confederates to effect the object of the conspiracy. Now, here the making of the false certificate of naturalization was such an act, and might have been so pleaded as completing the alleged conspiracy; but this was not done, or at least not formally done. Instead of this, the indictment averred that the defendants had accomplished the object of the conspiracy; that is, had uttered the false certificate. In other words, there was a substantive charge that both the defendants had actually perpetrated the principal offense. All that preceded this definite charge was matter of inducement. *Rex v. Spragg*, 2 Burrows, 993. At any rate, if there was a good charge of conspiracy under section 5440, there was also a well-laid charge of uttering a false certificate of naturalization under section 5424. The joinder of the two charges in one indictment clearly is allowable. 2 Whart. Cr. Law, § 2338; *U. S. v. Hirsch*, 100 U. S. 33. The government cannot, after trial and verdict, be heard to say that the joinder of the two charges in the same count was irregular or erroneous. The defendant alone could raise such objection. Vide section 1025, Rev. St. Moreover, it is no uncommon thing to join in one count two related but distinct offenses. 1 Whart. Cr. Law (8th Ed.) § 383(2) et seq.; *Com. v. Tuck*, 20 Pick. 356, 361. Thus, a person may be charged in the same count with having burglariously entered a dwelling house with intent to steal, and also with having stolen after entry, and he may be acquitted of the burglary and convicted of the larceny simply. *Id.* And, if acquitted generally, he may plead his acquittal in bar of an indictment for the larceny. 1 Whart. Cr. Law, § 560(t). In *Wright, Cr. Const.* (Carson's Ed.) 192, it is laid down that if, in a count charging conspiracy, an overt act is stated and pleaded as a constituent mis-

demeanor, upon conviction judgment may be given for the constituent misdemeanor. For this doctrine there is abundant authority. *Rex v. Spragg*, 2 Burrows, 993, 999; *King v. Reg.*, 7 Adol. & El. (N. S.) 808. In these cases it was declared that if, in an indictment for a conspiracy, the conspiracy is insufficiently laid, nevertheless, if the rest of the indictment contains a good charge of a misdemeanor, judgment will be rendered against the defendant for the misdemeanor. In *Wright v. Reg.*, 14 Q. B. 148, 168, Lord Denman, C. J., said:

"I am of opinion that the first six counts may be sustained. The statement of the means used for effecting the object of the conspiracy is so interwoven with the charge of conspiracy as to show upon the face of these counts an unlawful conspiracy. But, if that were not so, the overt acts show an indictable misdemeanor, upon which the court will pronounce judgment."

In *Com. v. Delany*, 1 Grant, Cas. 224, 225, Chief Justice Lewis, speaking for the supreme court of Pennsylvania, said that while the conspiracy charged in an indictment might merge in the consummation of the overt act set forth, where the act accomplished is a felony, yet, even in that case "there is reason to believe that the averments of the conspiracy may be disregarded as surplusage and the defendant put upon trial for the consummated crime set forth."

In framing the first indictment here, the government saw fit to insert in each count thereof an independent charge of the actual commission by the defendants of the offense of uttering as true the described false certificate of naturalization. Then, as it had a right to do, the government elected to try the defendant Berkowitz separately. Of course, he could not have been convicted of a previous conspiracy to commit the main offense, without evidence implicating both the defendants in such conspiracy. But it is equally clear that, for the consummated offense of uttering as true the false certificate, he could have been convicted and sentenced upon proof affecting himself only. 1 Whart. Cr. Law, §§ 434, 435. Therefore his acquittal barred a subsequent indictment against him for the same offense. It has not been seriously maintained by the learned United States district attorney that one who has been indicted for the offense of uttering as true a described false certificate of naturalization to a named person, and has been tried and acquitted, can afterwards, with respect to that same transaction, be indicted for selling or disposing of that same certificate to that same person. It is enough here to say that the selling or disposing of such a certificate implies an uttering of it. I am of opinion that the district court erred in overruling the defendant's plea of former acquittal. I would reverse the judgment.

ADAMS & WESTLAKE CO. et al. v. E. T. BURROWES CO.

(Circuit Court, D. Maine. March 22, 1899.)

No. 486.

1. PATENTS—WINDOW OR CURTAIN FIXTURES.

The Crisssen patent, No. 513,307, for window or curtain fixtures, covers a combination of novelty and utility, and is valid.

2. SAME.

Westinghouse v. Boyden Co., 170 U. S. 537, 558, 18 Sup. Ct. 707, applied with reference to the words, "substantially as and for the purpose set forth," contained in the claim in issue in this suit.

This was a suit in equity by the Adams & Westlake Company and others against the E. T. Burrowes Company for the alleged infringement of letters patent No. 513,307, issued to George H. Crisssen January 23, 1894, for window or curtain fixtures.

Frederick P. Fish, George H. Howard, and S. W. Bates, for complainants.

Elmer P. Howe, L. S. Bacon, and Symonds, Snow & Cook, for defendant.

PUTNAM, Circuit Judge. According to the specifications of the patent in suit, the invention in issue relates to applying diagonal squaring bands or cords to "window and curtain fixtures" in such manner that the "window or curtain" may be raised or lowered within the limits of the window-frame, with its "cross bar or bars" always horizontal, and so as to "remain at any height to which it may be moved." The claims, however, make no mention of a window, as distinguished from a curtain, and they use the word "window" only as a part of the compound word "window-frame." It is apparent that the inventor had more especially in mind curtains in use on open railway cars,—especially those of street lines. There are three claims, of which the first is as follows:

"(1) The combination of a window frame and curtain with a tube carried by the curtain and two cords, each connected to diagonally opposite corners of the window frame, and passing through the said tube and crossing the other cord, substantially as and for the purpose set forth."

Only one question of law is involved in the case. The curtain shown in the drawings attached to the letters patent is identified in the specification by the usual letter of the alphabet, and described as wound on a constantly acting spring roller, which roller is likewise identified by another letter of the alphabet. In this way, the words at the close of the claim, "substantially as and for the purpose set forth," connect themselves directly and expressly with a curtain wound on the spring roller described in the specification, and well known in the arts. It is maintained on the part of the complainants that the curtain named in the claim as an element of the combination must therefore be taken to be mounted on a constantly acting spring roller, precisely as though its detailed description had been, in terms, given therein. On the other hand, the respondent maintains that the claim must be considered as

covering every curtain, and that, therefore, as diagonal squaring bands were ancient in the art, the claim is too broad to be sustained. In meeting this question, it is not necessary to resort to any of those peculiar and somewhat artificial rules of construction which are sometimes assumed to be appropriate with reference to letters patents issued to inventors. The fundamental rules applicable to ordinary instruments solve the case. Here we have express phraseology, commencing with the closing words of the claim, connected through the specifications with the drawings, and therefore as effectual as though everything contained in the specification and drawings were set out in the claim. On the general and natural rules of construction, it is impossible to reject what is thus expressly inserted. The respondent relies on the fact that the specification contains the following language:

"In the drawings I have shown my invention as applied to a window-curtain, but it should be understood that my improvement is equally applicable to window-sashes, window-screens, &c."

Inasmuch as this portion of the specification expressly names window-sashes and window-screens, and another part, to which we have already referred, groups windows with curtains, the respondent maintains that the patent relates as well to window-sashes and window-screens as to curtains; that, in the practical arts, sashes and screens are not mounted on spring rollers, and that, therefore, the spring roller is necessarily eliminated from any construction which can be given the patent. There are several ways of meeting this proposition, even if the supposed facts on which it rests could all be established. One is that the expressions referred to are only of that class of additions sometimes made to specifications by patentees through an anxiety to cover adaptations not already a part of the practical arts, but which by possibility may become so. Another is that the specification was drawn more broadly than it was afterwards discovered the invention required, and the claims were put in proper form, without amending the specification in all its parts, to correctly fit them. But, however this may be, these references to windows, window-sashes, and window-screens are purely incidental and subordinate, and therefore they cannot control the express terms of the claim, in connection with the details of the specification and drawings to which we have referred. This is one of the common cases where clear language must prevail over doubts which may be incidentally raised.

The respondent relies on *McCarty v. Railroad Co.*, 160 U. S. 110, 116, 16 Sup. Ct. 240; but that case concerned an element which was not mentioned in any form in the claim, and involved the rule of construction applied by the circuit court of appeals for this circuit in *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. 757, 762, and in *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, 970, rather than that applicable to the case at bar. Our use of the latter is clearly approved in *Westinghouse v. Boyden Co.*, 170 U. S. 537, 558, 18 Sup. Ct. 707. Even if *McCarty v. Railroad Co.* were not in harmony with the rule which we make use of, it must be held to have been superseded by the later case.

Accepting, then, the interpretation which the complainants put on the patent, to the effect that the curtain of the claim is one mounted as described in detail in the specification, the only debatable questions which remain are involved in the application to the proofs in the record of the rules in regard to patentable invention and anticipation found in *Packard v. Lacing-Stud Co.*, 16 C. C. A. 639, 70 Fed. 66, 68, and *National Cash-Register Co. v. Boston Cash Indicator & Recorder Co.*, 156 U. S. 502, 515, 15 Sup. Ct. 434, cited and applied by the circuit court of appeals for this circuit in *Heap v. Mills*, 27 C. C. A. 316, 82 Fed. 449, 453, 456. There can be no reasonable doubt of the novelty of the precise combination covered by the complainants' patent, or of its utility; and, as to the questions of invention and anticipation, it seems to us that, according to the trend of the decisions in this circuit, the proofs in this record, as applied to the rules stated in the cases cited, sufficiently support the complainants. As the proofs are of the same classes which are frequently discussed in suits on patents, and as we assume that, in view of the importance of the interests involved, they will be reviewed on appeal, we deem it of no advantage to undertake to analyze them in this opinion.

Some reference has been made to the differences in the letter of the three claims. We do not, however, understand that the respondent considers that it would obtain any advantage by relying on these differences; and, under the decisions of the circuit court of appeals in this circuit, we are satisfied it would be of no avail, in this case, to discriminate between them. The respondent also submitted a proposition to the effect that the complainants' device is a mere aggregation. We understand, however, that this proposition was submitted only on the theory that we sustained the respondent's construction of the patent. Certainly, on the construction which we give the patent, there is no support whatever to the proposition that it covers only an aggregation, as that word is properly understood. Let there be a decree, in accordance with rule 21, for an accounting and an injunction on all the claims of the patent, the question of costs being reserved until the final decree.

PALMER v. CURNEN et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 69.

PATENTS—VALIDITY AND INFRINGEMENT—HAMMOCKS.

The Palmer patent, No. 272,311, is void, as to claims 4 and 8, for want of novelty, unless they are construed as limited to a combination in which the suspension devices are the stirrups described in the specification, and in which the stretcher is provided with them as the means for attaching the suspension cords; and, if so limited, *held*, that they were not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by Isaac E. Palmer against Cornelius C. Curnen and Edmund Steiner for alleged infringement of letters

patent No. 272,311, granted February 13, 1883, to the complainant, for improvements in hammocks. The circuit court held that, even if the patent was valid as to the claims in issue (Nos. 4 and 8), they were not infringed by defendants' devices. 84 Fed. 829. From this decision the complainant appealed.

Edwin H. Brown, for appellant.

Curtis T. Benedict, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The court below was of the opinion that claims 4 and 8 of the patent in suit, unless limited to the specific devices described in the specification, were void for want of novelty, and, if so limited, were not infringed by the hammocks of the defendants. The appellant, while acquiescing in that decision so far as it relates to claim 8, insists that as to claim 4 it was erroneous. Claim 4 is as follows:

"The combination, with a hammock, a stretcher or bar arranged beyond the end thereof, and a suspension stirrup or device, of suspension cords converging from the hammock towards the stretcher, and attached to the stretcher at two or more points, and suspension cords converging from the stretcher towards the stirrup or suspension device, and attached to said device, substantially as described."

Every element of this claim, broadly considered, was old, severally and in combination. This sufficiently appears by the patent granted Vincent P. Travers, November 18, 1879. That patent describes a hammock hung upon cords which run from the body of the hammock to a notched bar or stretcher, arranged beyond the end thereof, from whence they converge to a suspension device. The notches in the stretcher are provided to space and hold the cords, and when, as the patent states may be done, two or more cords are put into the same notch, the cords converge from the hammock to the stretcher, as well as from the stretcher to the suspension device. The hammock of the patent in suit is made of any suitable material. The stretcher is arranged transversely to the hammock body, and at a little distance therefrom, and is provided with at least two suspension devices, one secured at each end. The suspension devices are of stirrup form, and consist of a bar of metal with arms extending from opposite ends towards one another, to a point where they can be opened and closed. Besides the stirrups which are secured to the stretcher, there is another and similar one arranged at a distance from the stretcher, and opposite the center thereof, from which the whole hammock is hung. The suspension cords converge from the hammock body to the stretcher, and are attached to it, and grouped by the stirrups; those on one side of the center of the hammock body converging towards one stirrup, and those on the other side towards the other stirrup. A group of suspension cords also converges from each stirrup on the stretcher to the suspension stirrup. The converging of the cords from the hammock body to the stretcher and from the stretcher to the suspension stirrup effects what the specification terms a "triangular suspension." But the specification also points

out that the stretcher may be provided with any number of stirrups, and the suspension cords arranged in any number of groups; and it is obvious that, when this is done extensively, the triangular suspension practically disappears from the hammock. The claim specifies only those parts which co-operate to effect the triangular suspension. But it cannot include equivalents for these parts, because the hammock of the Travers patent contains equivalent parts which perform the same function in combination. When three or more of the central cords of that hammock are put into the exterior notches of the stretcher, the feature of triangular suspension is introduced, though in a crude and less artistic manner than in the hammock of the complainant's patent. We are of the opinion that the claim is void for want of novelty, unless it can be saved by limiting it to a combination in which the suspension devices are the stirrups of the specification, and in which the stretcher is provided with them as the means for attaching the suspension cords. As the hammock of the defendants does not contain these devices, they are not infringements of the claim. The decree is affirmed, with costs.

SMITH v. MAXWELL.

(Circuit Court, N. D. New York. April 12, 1899.)

1. PATENTS—INVENTION—UNITING OLD DEVICES.

In over-check guides for bridles, a closed loop with a friction roller was old, and an open loop without the roller was also old. *Held*, that there was no invention in merely uniting these two devices, so as to form an open loop with a friction roller.

2. SAME—LOOPS FOR BRIDLES.

The Smith patent, No. 315,672, for an improvement in loops for bridles, is void for want of invention.

This was a suit in equity by George L. Smith, individually and as administrator, etc., against Harry B. Maxwell, for alleged infringement of a patent for improvement in bridles.

J. C. Clayton, for complainant.

Milton E. Robinson, for defendant.

COXE, District Judge. This is an equity action founded upon letters patent, No. 315,672, granted April 14, 1885, to George L. Smith for an improvement in loops for bridles. The patentee states that prior to the alleged invention over-check guides for bridles had been "formed with inwardly turned ends separated sufficiently to permit the rein to be inserted edgewise between them, yet not enough to permit the accidental escape of the rein, and closed loops have been provided with a closed loose sleeve or roller. These features, separately considered, are not therefore claimed by me."

The claim is as follows:

"The herein-described guide for check-reins, etc., consisting of uprights A A, having ends b b bent laterally toward each other, connecting-bar B, and loose sleeve or roller C."

On the face of the patent, therefore, what the patentee did was to unite two old features; that is, he united the open loop and the roller of the prior art.

Turning to the record the statements of the patent are verified and all the features of the patented device are shown in the patents to Dennis, Le Blond and Strong, respectively, the first named showing the roller in a closed loop and the other two the open loop without the roller. Any one who places the Dennis roller in the Strong or Le Blond guides, or who makes the Strong or Le Blond opening in the Dennis guide will produce the patented structure. The device is an exceedingly simple one and in view of the fact that both features clearly appear in the prior art it is thought that no patentable novelty can be predicated of their union. Bearing in mind what was well known before it was nothing but the work of the ordinary mechanic to place an antifriction roller in the old guide when greater freedom of movement was required.

The bill is dismissed.

MOORE v. MARNELL.

(Circuit Court, N. D. New York. April 7, 1899.)

PATENTS—INVENTION AND INFRINGEMENT—APPARATUS FOR DIGGING TRENCHES.

The Moore patent, No. 524,502, for improvements in hoisting and conveying apparatus used in digging sewer trenches, construed, and *held* to show patentable invention, and also *held* infringed.

This was a suit in equity by Thomas F. Moore against Thomas Marnell for alleged infringement of a patent for improvements in apparatus used in digging sewer trenches.

George W. Hey, for complainant.

M. L. McCarthy, for defendant.

COXE, District Judge. This is an equity suit for infringement of letters patent, No. 524,502, granted to the complainant August 14, 1894, for improvements in hoisting and conveying apparatus employed in digging sewer trenches. The first claim only is involved. It is as follows:

"1. In a hoisting and conveying apparatus, the combination with tracks arranged lengthwise of the trench to be excavated, of a conveyer car running upon said tracks and provided with an open base frame and an open raised frame, forming an aperture for the passage of the hoisting bucket, a platform arranged on said raised frame adjacent to said aperture, and guide wheels mounted on the raised frame above said platform, and hoisting and draft cables running over said guide wheels respectively, whereby such cables are supported clear of the operator standing upon said platform, substantially as set forth."

The defenses are the usual ones, anticipation, lack of invention and noninfringement.

It is thought that the claim covers ingenious congeries, constituting a distinct improvement over anything in the prior art. The machine of the patent expedites the work of digging trenches in crowded cities without closing the streets or seriously interrupting

traffic. Only one section of the trench need be kept open, the rear of the trench being filled in proportion as the front is excavated. The machine has been received with approbation by those engaged in trench-excavating and has quite generally superseded the old methods. In view of all this the court is of the opinion that it would be an injustice to Mr. Moore to classify his achievement as one within the sphere of the skilled workman only. The defendant's machine is the exact counterpart of the machine of the patent, except that his platform is not located precisely as shown in the drawings. The position of the platform is not of the essence of the invention. The claim provides for "a platform arranged on said raised frame adjacent to said aperture." The defendant has such a platform enabling the operator while standing thereon to do all the necessary work. The complainant is entitled to a decree.

CARLSON v. UNITED NEW YORK SANDY HOOK PILOTS' ASS'N et al.

(District Court, S. D. New York. April 7, 1899.)

MASTER AND SERVANT—FELLOW SERVANTS—NEGLIGENT KILLING OF SEAMAN.

A steam pilot boat approached an outgoing steamship for the purpose of taking off her pilot, which was to be done by holding the pilot boat as near as safe and practicable, to the steamer while a small boat was lowered and rowed to the steamer, returning with the pilot. *Held*, that a mate of the pilot boat, who had charge of her navigation, was a fellow servant of the men lowering the small boat and the seamen therein, each being at the time engaged in executing a part of a common undertaking in which each took the risk of the others' negligence, and that the owners could not be held liable for the death of the seamen in the small boat, though caused by the negligent navigation of the pilot boat by the mate after the smaller boat had been lowered alongside.

In Admiralty. Death claim. Pilot boat.

Wheeler & Cortis, for libellant.

J. Culbert Palmer and Harrington Putnam, for respondents.

BROWN, District Judge. The above libel was filed by the administrator of Theodore Carlson, a seaman on the steam pilot boat New York, whose death is alleged to have been caused by the negligence of the mate of the New York in reversing the propeller, in consequence of which the yawl, in which the seaman had just launched, was caught and the two seamen in her killed. The accident occurred at about 10:30 p. m. of November 12, 1897, outside of Sandy Hook, and a little to the eastward of the easterly end of Gedney Channel.

The steam pilot boat New York was 177 feet long, and built expressly for the pilotage service. She was owned by the United New York Sandy Hook Pilots' Association and the United New Jersey Sandy Hook Pilots' Association, which were corporations organized under the state acts of New York and New Jersey, upon the reorganization of the pilotage service in 1895, for the purpose of taking the title to all the pilot boats used in the service; and the New York was built by those corporations afterwards for the same service. These corporations exercised no control over the management or

running of the pilot boats, or of the New York. The boats were turned over for use and management to the pilots, who were shareholders in the corporations, and who formed incorporated pilots' associations, the presidents of which are co-defendants in the above libel.

At the time of this accident the New York was stationed, as usual, near the easterly end of Gedney Channel for the purpose of supplying pilots to such incoming vessels as had been missed further outside, and also for the purpose of taking off pilots from outward bound vessels. Receiving a signal from the outward bound steamer Massachusetts that a pilot was to be discharged, the New York, which was then somewhat to the northward of the outlet of Gedney Channel and heading northeast, was turned around through the westward and southward, under a starboard wheel, until she came nearly astern of the Massachusetts and followed her up until she was about 150 feet distant from her and on her starboard side, whereupon the starboard yawl was ordered to be launched and manned by two men, Carlson and Ayres, who were to row to the Massachusetts and receive the pilot. After the two men had got aboard, the port yawl was lowered by means of a falls and a hook which hooked into a sling holding the yawl, by which it was speedily lowered into the water on the port side of the New York. At that time, according to the testimony, the New York was moving ahead very slowly, the engine being stopped; and about a minute, as was supposed, after the yawl had been unhooked, the propeller was reversed and about 30 revolutions made backward in order to avoid too near an approach to the Massachusetts in the strong westerly wind. A few moments afterwards it was noticed that the yawl could not be seen approaching the steamer even by the use of the search light, and on examination a broken oar and some pieces of wreckage were found a little astern of the New York, and the next day the bodies of the two men were found mutilated upon the shore. These circumstances leave no reasonable doubt that the men lost their lives from the fact that the yawl in some way was struck by the propeller blades while reversing; why or how the yawl came to be there or what neglect or inaction, if any, of the men on board contributed to this result, is wholly unexplained, and is left to mere surmise.

The evidence shows that it was customary after the yawl was unhooked and "was in position to take care of itself" for a signal "all right," or "all gone," or "all free," to be given to the man in the pilot house to indicate that the yawl was clear, and that the steamer could be navigated in any way desired. The mate testifies that he received the usual signal on this occasion, and that he waited about a minute before reversing. The witness Christensen, one of the sailors who assisted in lowering the yawl, testified that the usual hail "all right" or "all gone" was not given. Waldie, the boat keeper, and who operated the winch in lowering away, says: "I told the mate the yawl was gone and we had used the port yawl." Heath, who was one of the pilots on board watching for outward bound vessels, and who was in the pilot house at the time of the accident, says Mr. Waldie came forward and said: "All right, we have used the port yawl." Christensen also states that Waldie made the report

that the port yawl had been used instead of the starboard yawl, as first ordered. I am not warranted on this evidence in rejecting the statements of the three witnesses that the words "all right" or "all gone" were used in the report to the mate in the pilot house, in accordance with the usual custom, from which he would rightly understand that he was free to navigate the steamer as desired.

It is urged that these three witnesses have an interest in the result which should deprive their testimony of credit. The only testimony opposed, however, is that of Christensen, and upon the single point only that he did not hear the signal given "all right" or "all gone." But inasmuch as he says that a report was made by Waldie in regard to the use of the port yawl, it is hardly natural to suppose that this report would be made at a different time, or separately, or unaccompanied by the usual signal as to the clearing of the yawl. It was not of such importance as to lead naturally to a separate report. The evidence of several other witnesses, moreover, so far inculcates Christensen that he can scarcely be said to be a less interested witness, though in a different way. Christensen held the stern painter of the yawl at the time it was lowered. Three witnesses testify that it was the custom and the special duty of the person holding the stern painter, to hold on to it after the yawl was launched and to move forward so as to slew the bow of the yawl outwards and away from the steamer in order to let the oarsmen pull off at once. The mate testifies that this was very essential. On this occasion Christensen says that he threw the stern painter into the yawl as soon as she was launched, and before the bow painter had been cast aboard. This neglect by Christensen of the customary duty to aid in slewing the bow out at once so that the men could pull away, was undoubtedly one of the causes of the accident. The wind being strong from nearly astern, but a little on the port quarter, would naturally delay the yawl's heading outwards, both by blowing the bow towards the steamer's side, as well as blowing the yawl forward alongside the steamer, so that the steamer, moving slowly forward, would draw ahead of the yawl more slowly than usual. Christensen says that he saw the men sitting down in the boat after unhooking, but did not see them push off, or have the oars in their hands, or endeavor to push off; that was a few feet aft of the launching place and it was the last that was seen of them. This would indicate that the men counted on drifting astern, past the propeller, before attempting to row, and that they made no endeavor to get away from the side of the New York as they were expected to do.

Upon the testimony of Heath and Waldie, and of Ashcraft, the mate, I do not see how it can be said that negligence on the part of the latter is established. Upon the notice or hail testified to have been given to and received by the mate, he was justified in supposing that the yawl was entirely clear and in acting upon that report. The negligence, so far as respects those on board the steamer, must be divided between Christensen, who neglected to pull the stern forward and swing the bow off so that the men in the yawl could pull away, and Waldie, in making the report that the yawl was gone without seeing or making sure that the yawl had pulled away. Both of

these men were without doubt fellow servants of Carlson, and their negligence would not sustain this action.

Even if the mate could not be deemed justified in acting upon the report made to him, and in reversing as soon as he did, my own view is that the mate's act would also be that of a fellow servant engaged in the same common employment. The employment of all at that moment was to get the pilot from the Massachusetts to the New York. The yawl was to receive the pilot from alongside, and it was the business of the mate in the pilot house to keep the New York in a proper position to do this work conveniently and safely, without injury to the yawl, the New York or the Massachusetts. The pilot's act in reversing had immediate reference to that purpose and no other. He was not the master of the vessel, nor was his act done in the exercise of any command or authority over subordinates; nor did he neglect to take proper measures for security when attention was called to a menacing danger, as in *The Frank and Willie*, 45 Fed. 494, nor was his act in performance of any duty resting on the owner; nor was it done while he was acting as a special representative of the owner; but it was merely one of the details of navigation while in the execution of a particular service in a common employment with the men in the yawl, in which each took the risk of the others' neglect. *Steamship Co. v. Merchant*, 133 U. S. 375, 378, 379, 10 Sup. Ct. 397; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983; *Same v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848; *Same v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843; *The City of Alexandria*, 17 Fed. 390, 392; *The Queen*, 40 Fed. 694; *The Job T. Wilson*, 84 Fed. 204, 207; *The Miami*, 87 Fed. 757, 759, 760, affirmed in 93 Fed. 218.

As the maritime law gives no action for death caused by negligence on the high seas (*The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140), this action can rest only upon the state statute; and to make that applicable the negligence, or the death, or both, must happen within the jurisdiction of the state. The location of the accident according to the weight of evidence, seems to me clearly more than a marine league, or three miles, from any part of the shores of the state of New York or New Jersey; nor is there any manner of drawing lines from headland to headland, except as below stated, by which this location could be brought intra fauces terræ. Under the act of congress, however, approved February 19, 1895 (28 Stat. 672), having reference to the regulations for preventing collisions at sea and authorizing the secretary of the treasury "to designate and define the lands dividing the high seas from rivers, harbors, and inland waters," the secretary drew a line extending from Navesink light house N. E. $\frac{1}{2}$ E. about $4\frac{1}{2}$ miles to the Scotland light vessel, which is 3 miles from the nearest shore on Sandy Hook, and thence N. N. E. $\frac{1}{2}$ E. through the Gedney Channel whistling buoy to Rockaway Point Life Saving Station on the Long Island shore. The accident occurred undoubtedly to the westward of that line. Even if this line was a couple of miles beyond the usually recognized limit of three miles from shore, it is contended that the line thus established by the secretary of the treasury would be valid as an assertion of the exclusive jurisdiction

of the United States as against other nations, because this extension seaward is undoubtedly less than the range of our modern shore batteries (see Pom. Int. Law, §§ 144, 150; Wheat. Int. Law, 177) and any such extension by the United States, it is urged, extends *pari passu* the jurisdiction and boundaries of the state as its necessary incident. In the case of *Bigelow v. Nickerson*, 17 C. C. A. 1, 70 Fed. 113, however, to which reference on this point is made, the question had reference to the state jurisdiction over the waters of Lake Michigan and was quite different from the present; since there the acts establishing the boundaries of the state expressly included the waters of the lake. In that case, moreover, it was assumed that upon the ocean the state jurisdiction extends but a marine league from shore. See, also, *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559. But I doubt whether in fixing the line as above indicated, the secretary of the treasury intended to pass beyond the limit of a marine league, the usually accepted boundary. The Scotland light ship does not exceed that distance from shore, and if from that vessel a line be drawn to a point one marine league south of the western end of Rock-away Beach, that line will pass through the whistling buoy; so that the secretary's line seems to agree accurately with the old rule of jurisdiction, and the accident would be found to be within the state limits.

Upon the view above expressed, however, on the question of negligence, it is unnecessary to consider further the defense that the tort in question was beyond the jurisdiction of the state law; or to consider whether the establishment of an exterior boundary line for the application of the international rules of navigation as distinguished from the rules for harbors and inland waters, would operate as an assertion by the United States of its exclusive jurisdiction beyond a marine league; or whether, if that line were so intended, its extension seaward, based upon the greater range of the United States shore batteries, would *ipso facto* extend the scope of the state laws over the high seas.

The libel must be dismissed, but without costs.

DUNBAR v. WESTON.

(District Court, N. D. New York. April 5, 1899.)

1. ADMIRALTY—CHARTER PARTY—BREACH—ACTION IN PERSONAM—UNITED STATES DISTRICT COURT—JURISDICTION.

A charter party for the transportation of lumber entirely by boat from the port of shipment to that of destination, is a maritime contract, and therefore the United States district court has jurisdiction of an action in personam in admiralty for its breach.

2. SAME—DEFENSES—EVIDENCE.

Where defendant, having received a lower rate from other shipowners, failed to ship lumber as agreed by a charter party with libellant, which defendant made with the master of the ship, who was an entire stranger to him, and whom he testified he believed was the owner of the vessel, and the entire freight, not being payable until after delivery, was security for the performance of the contract, his defense to an action for its breach, that he was induced to make it by fraudulent representations

that the master was the owner, and that, had he known that defendant was the owner, he would not have chartered the vessel, was not sustained by the evidence.

In Admiralty.

John W. Ingram, for libelant.

Norman D. Fish, for defendant.

COXE, District Judge. This is an action in personam to recover damages for the breach of a charter party. The libel alleges that the defendant chartered the libelant's boats Nellie and Dunbar to carry two full cargoes of lumber from North Tonawanda, on the Niagara river, to the city of New York, via the Erie Canal and Hudson river, at the agreed freight rate of \$2 per 1,000 feet. Such a charter is a maritime contract, within the jurisdiction of this court. The court is convinced that the agreement was made as alleged in the libel. The principal defense is that the defendant was induced to enter into the agreement by reason of false and fraudulent representations as to the ownership of the two boats in question. It is alleged that he was informed and supposed that they were owned by one Thomas Williams, who was their master, and had he known that the libelant was their owner he would not have chartered them. The proof fails to establish this defense. The circumstances surrounding the transaction were of such a character that there can be little doubt that the defendant, through his agent, knew the facts regarding the chartered boats and that the contract was repudiated because he was able to procure a cheaper freight rate. The character of the libelant was certainly as good as that of Capt. Williams with whom, the defendant contends, the agreement was made. It is said that the defendant did not know Williams but did know Dunbar unfavorably. Upon his own showing the defendant was entirely willing to enter into an agreement with a total stranger, which is hardly compatible with the theory that the owner's character was such an important factor in making the contract. It is entirely clear from the testimony that these charters are made by canal men with very little reference to the character of the owner of the boats. If the boat be staunch and strong and properly manned, and if the motive power be adequate, the charterer seldom institutes an inquiry into the moral or financial standing of its owner. It is not an element affecting the agreement one way or the other, and especially is this so where the entire freight is security for the performance of the agreement. The defendant was not called upon to pay a dollar till the lumber was delivered to the consignee in New York. The court cannot resist the conclusion that this defense would never have been thought of had not Capt. Wimett offered to take the lumber for a less sum than the libelant. The libelant is entitled to a decree.

THE STYRIA (four cases).

(District Court, S. D. New York. April 5, 1899.)

1. SHIPPING—DISCHARGE OF CONTRABAND CARGO.

Although provisions in a bill of lading permit the discharge of cargo at other ports than that to which it is consigned in case of circumstances of war, which, in the opinion of the master, render it unsafe to enter or discharge there, the master, as agent of all concerned, is bound to exercise prudence to protect the interests of the cargo as well as the vessel, and the discharge of cargo by him at another port, as being contraband of war, is not justified unless the facts show that there was reasonable necessity therefor.

2. SAME—FACTS CONSIDERED.

The Austrian steamship *Styria* was loaded at an Italian port with a cargo of sulphur consigned to New York, and cleared on April 24, 1898. On the day before, a Spanish proclamation was issued, declaring the existence of a state of war between Spain and the United States, and in which sulphur was declared contraband. On April 27th, the master, who had not sailed, commenced the discharge of the cargo, which was completed May 7th. Almost immediately after the declaration of war the public prints contained statements of negotiations for the purpose of having sulphur exempted from contraband goods, and repeatedly stated that such efforts would be successful, of which statements the master was aware, and also of the announcement of their success, and he was also notified of such result by one of the shippers, before the discharge of the cargo was completed. At the next Italian port, to which he went for a new cargo on May 10th, he heard read an official announcement to the same effect, though it had not been publicly proclaimed. Other vessels sailed at about the same time he cleared with cargoes of sulphur, and were not molested. *Held* that, under the circumstances, it was his duty to wait a reasonable time before discharging the cargo, and, as he had reasonable assurance of safety by May 10th, he was not justified in such discharge.

3. SAME—TRANSHIPMENT OF CARGO.

If the vessel in such case was justified in discharging the cargo under a clause of the bill of lading permitting her to transship in case of emergency, rather than to subject herself to a delay of unknown duration, such clause being for the benefit of the vessel alone, on its being ascertained that she might have proceeded within a reasonable time, the cost of the discharge, storage, and reloading must be borne by her.

4. SAME—CONSTRUCTION OF BILL OF LADING—MEASURE OF DAMAGES FOR INJURY TO CARGO.

A stipulation in a bill of lading limiting the liability of the vessel to the invoice or declared value of the goods does not authorize the carrier to deduct the freight from such value in case of loss or damage.

These were libels by James L. Morgan and others and three other libelants against the Austrian steamship *Styria*.

Cowen, Wing, Putnam & Burlingham, Sullivan & Cromwell, Bowers & Sands, and Stern & Rushmore, for four different libelants.

Convers & Kirlin, for defendant.

BROWN, District Judge. The above four libels were filed to recover the damages claimed to have been sustained by the libelants, who were the consignees of different lots of brimstone shipped upon the Austrian steamship *Styria* at Port Empedocle, Girgenti, Sicily, in the latter part of April, 1898, and shortly afterwards discharged at the same port, as contraband goods, on the breaking out of the war

with Spain. The loading was finished on April 24th, and the bills of lading were signed and the ship cleared from the custom house at Port Empedocle on the same day. On April 20th the Spanish minister left Washington, and on April 21st our minister left Madrid. On April 23d the queen regent of Spain issued a decree announcing the existence of war with the United States, which was published in the official papers at Madrid on April 24th, and communicated to the other powers and made public on or about April 25th. On that day it was published in the newspapers of this country, and presumably in Sicily and England. The declaration of war was made by the United States under an act passed April 25th, declaring the existence of war since April 21st. On the 22d the president had proclaimed a blockade of certain Cuban ports.

In article 6 of the Spanish proclamation, sulphur was declared contraband of war.

On April 23d the master received a telegram from Burrill & Sons, the managing agents of the owners of the *Styria* in London, not to sail until further instructions, and on the 25th, a telegram "to discharge whole cargo as quickly as possible." On the 26th, the weather being bad no work was done. On the 27th the discharge was commenced and continued until May 7th, when it was completed. The ship then cleared and proceeded to Messina and Palermo, from which ports she sailed with a cargo of fruit on May 9th, and arrived at New York on June 3d. At the commencement of the discharge of the sulphur at Port Empedocle the master gave a notice to the shippers, and to the Austrian consul at Girgenti, stating that "on finding risky his passage to New York with a sulphur cargo, for facts of war" he discharged the cargo on their account and risk under the bills of lading. He testifies that though directed to discharge by the owners, he did not deem it safe to proceed with a contraband cargo, and would not have sailed with such a cargo without knowing certainly that sulphur was free; that he knew sulphur to be contraband of war; that Spain held it to be so; that war existed; that he heard that a blockade of New York was going on; that his course lay along the Spanish coast; that Spanish men of war were looking for ships there; that he believed this report; that the newspapers in Sicily reported the capture of a sulphur ship; that up to the time he left Sicily there was no public or official declaration that sulphur had been excluded by Spain from the list of contraband goods.

On the other hand it appears from the captain's testimony and other evidence, that almost immediately after the proclamation was published, negotiations were entered upon for the exception of sulphur from contraband goods; that the captain was aware from the public prints of these negotiations, and of the frequent statements in the public prints that the efforts for the exception of sulphur would be successful, and of the announcement before he left Sicily that sulphur would go free. There was not, however, any official confirmation of this statement, though the papers published it as a fact. On April 25th and 26th the *Lord Warwick*, which lay alongside of the *Styria*, sailed for New York with brimstone, and two other vessels from Licata with a similar cargo; all of which passed safely. One of the

shippers by the Styria, Baller & Co., on May 5th gave notice to the master that "sulphur is no longer contraband of war," though saying in their protest "it is not yet officially confirmed." At Messina, the captain heard read an official announcement by the prefect that the following telegram had been received by him on May 4th from the minister of the interior:

"The Spanish government has declared officially in a circular to the commanders of its own ships, that it has decided that sulphur should not be considered as contraband of war. There is no public or official declaration, but there can be no doubt that sulphur will pass freely."

It does not appear that any vessel was stopped by the Spanish on account of sulphur.

Among the exceptions in the bills of lading, were the following:

(a) "Restraints of princes and rulers or people excepted."

(b) "In case of blockade or interdict of the port of discharge, or if without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense; and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the post office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

(c) "With liberty (in event of steamer putting back to this or into any other port or otherwise being prevented from any acts from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer."

(e) "With liberty either before or after proceeding towards the port of discharge to proceed to and stay at any port or place whatsoever."

The above four libels were filed June 4 to June 7, 1898, a few days after the arrival of the ship in New York. They allege the shipment under the bills of lading, their indorsement to the libelants, the loading of the cargo, the demand for the delivery of the goods at New York, the refusal to deliver and the consequent damage to the amount of the value of the sulphur. Two of the libels allege a conversion of it. The answers were interposed on the following December 1st. In the meantime an agreement by stipulation had been made between the parties, providing that the claimant should forward the brimstone from Empedocle upon the first available steamer to New York, and deliver it to the consignees on the terms for freight as specified in the bills of lading; and that the consignees should pay the agreed freight on delivery; that the goods on arrival should be sold at current market rates, and the proceeds of the goods less charges incurred, be credited on account of the damages, if any, recovered by the libelants; that the respondents should have a lien on the brimstone for the charges against it in Sicily, provided the respondent was justified in re-landing and storing it there as was done; if not justified, then the brimstone should be freed from any such charges or expenses except freight. Under this agreement the respondent again caused the brimstone to be loaded and brought to New York by the Abazzia, one of its vessels, in August and September, 1898, after paying all the expenses in Sicily, and delivered the sulphur for sale under the agreement, whereupon it was sold, netting about the amount of the invoice

prices, and on some of the consignments more than the invoice price, not counting the freight.

The respondent in its answers to the above libels sets up the agreement last named; the payment of the net proceeds to the libelants; that the net proceeds exceeded the invoice price; that the libelants had sustained no damages recoverable against the respondent under the following stipulation in the bill of lading.

"The shipowner is not to be liable * * * in any case for more than the invoiced or declared value of the goods, which ever shall be the least;"

and that the discharge and storage of the sulphur at Empedocle was justifiable under the provisions of the bill of lading and the acts and circumstances of war.

The owner of the *Styria* also filed four cross libels against the above libelants for the recovery of the expenses incurred at Sicily in the discharge and storage of the sulphur upon the same ground pleaded in its answers to the original libels.

1. Though exceptions (a) and (b) above noted in the bill of lading contemplate circumstances of war and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master as the agent of all concerned is still bound to a prudent regard for the interests of the cargo, and "must endeavor to hold the balance evenly" between ship and cargo, when their interests conflict. *The Julia Blake*, 107 U. S. 418, 427, 428, 431, 2 Sup. Ct. 692; *The Spartan*, 25 Fed. 44, 56-58; *The L'Amérique*, 35 Fed. 844, 845; *Cargo ex Argos*, L. R. 5 P. C. 134, 165; *Nobel v. Jenkins* [1896] 2 Q. B. 326, 331, 332.

The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar, would presumably be peculiarly dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure though she were ultimately released. Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband, I have no doubt that it would have been both the right and the duty of the master for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24th until there was some reasonable assurance of safety. See *The San Roman*, L. R. 3 Adm. & Ecc. 583, where there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo, the master in my judgment was bound in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard. No doubt any delay entailed some loss upon the ship, and what should be deemed a reasonable period ought to be determined with reference to the circumstances and interests of both. But taking the circumstances altogether, I am of opinion that the commencement

of the discharge on the 27th was too hasty and precipitate; and that the master was guided in that matter by the telegram from Burrill & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would have discharged the cargo,—certainly not at the time he did; and that before he left Italy, although there was no formal publication of the exception of sulphur, there were such informal assurances coming from the Spanish government as left no reasonable apprehension of danger from sailing with a sulphur cargo.

I must find, therefore, that the ship was not justified by clauses (a) and (b) of the bill of lading above quoted in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time. In *Nobel v. Jenkins*, *supra*, the facts were otherwise.

2. The defendant also invokes the liberty to transship under clause (c) of the bill of lading above quoted. This is a clause which is no doubt designed for the benefit of the ship alone, in any emergencies that might call for the exercise of the option given. That clause might perhaps have been applicable in the present case, though without advantage in the result to the defendant, since the defendant would under this clause alone stand chargeable with all the expenses of discharge, storage and reloading. It was doubtful how long the vessel might be detained before it could be ascertained and determined whether a contraband cargo could be carried with a reasonable prospect of safety or not. The ship may, therefore, have had the option under this clause, in conjunction with clauses (a) and (b) above referred to, to discharge the cargo immediately and store it, as she did, rather than incur a certain loss by detention of the vessel for a more or less indefinite period while waiting until it was found safe to proceed; and while thus discharging at once, she might leave it to the chances of future events to determine against which interest, whether of ship or cargo, the expenses should be charged. If the result should show that the vessel would have been detained an unreasonable time before she could have safely sailed, then the expense would properly fall on the cargo, because the discharge would have been justified by the danger clauses (a) and (b); but if, on the other hand, it should turn out that the vessel might have safely sailed within a reasonable time, having due reference to the interests of both ship and cargo, then the discharge could not be justified under clause (b), but under clause (c) alone; and any such transshipment being at her own option and for her own convenience, all the expenses of discharge, storage and reshipment would fall upon the ship, as in any other case of a transfer and reshipment under clause (c).

In this case, however, the discharge was stated by the master at the time to be based upon his rights under clauses (a) and (b) only; and the various clauses of the agreement subsequently made between the

parties, under which the cargo was brought forward, seem based upon the same assumption.

3. The stipulation in the bill of lading, that the shipowner "is not to be liable in any case for more than the invoiced or declared value" of the goods, does not mean that the consignees shall pay freight in addition to the loss of the invoice price; but under the agreement with the parties for forwarding the cargo to New York, I think that the consignees are entitled to deduct the freight paid by them from the gross proceeds of the sale of the brimstone, as a part of the expenses of realizing the moneys derived from it.

Decrees may be entered in accordance with the above findings; and if the parties cannot agree as respects the net proceeds and the invoice price, a reference may be taken in each case to adjust the same.

THE A. M. BAXTER.

(District Court, D. Washington, N. D. April 4, 1899.)

1. SEAMEN—IMPROPERLY FURNISHED QUARTERS—RIGHT TO ABANDON SERVICE.

To justify seamen in leaving their vessel before the expiration of their term of service because of a failure to properly heat their quarters in cold weather as required by Act March 3, 1897 (29 Stat. 687, § 2), so as to entitle them to wages for the unexpired time, it should be shown that they made complaint to the captain, and requested that the fault be remedied.

2. SAME—SUIT TO RECOVER WAGES—FORFEITURE OF WAGES EARNED.

A court will not decree a forfeiture of the wages of seamen for time actually served because they were not fully justified in leaving the vessel at the time they did, before the expiration of their term of service, where the answer to their libel does not ask such relief, nor charge them with desertion, or other substantial grounds for such forfeiture.

This was a libel by John Anderson and others against the schooner A. M. Baxter to recover wages as seamen.

M. M. Madigan, for libelants.

W. H. Gorham, for claimant.

HANFORD, District Judge. The libelants signed shipping articles at San Francisco for a voyage in the schooner A. M. Baxter from San Francisco to Honolulu via Everett, in this state, and return to a port on the Pacific Coast, and served under their contract on the run from San Francisco to Everett, at which place they voluntarily left the vessel; assigning as their reason for doing so that the food supplied to them was bad, and that the forecabin was wet, cold, and uncomfortable. The preponderance of the evidence is against the libelants on the question as to the quality of the food which was served to them. There is no question but what the forecabin was clean and properly ventilated, and complied fully with the requirements of the statute on the subject, except in one particular,—that it was not supplied with any apparatus for heating. At the time they left the vessel the weather was cold, and the crew suffered discomfort by having to work in the wet, chilly weather, without means for drying their clothing, or any artificial heat in their sleeping room. However, to justify their leaving the vessel before the expiration

of the time for which they were hired, they should have first complained to the captain of the discomfort to which they were subjected, and requested him to supply heating apparatus, as required by section 2 of the act of March 3, 1897, entitled "An act to amend the laws relating to navigation." 29 Stat. 687. That request was not made, and, as they left the vessel voluntarily, I hold that they cannot recover wages for services not rendered, nor expenses for their return to San Francisco. They are entitled, however, to receive their wages at the contract rate for the time of their actual service. No reason for refusing to pay them for the time of actual service in the ship is suggested, except that the contract was broken on their part by their leaving the vessel without reasonable cause. The answer, however, does not charge the libelants with desertion, nor allege that they have forfeited their wages by leaving the vessel without the master's consent. Courts do not favor the forfeiture of wages earned by toil and exposure to hardship and danger, to the extent of giving decrees against seamen suing to recover wages, when such relief has not been demanded, and substantial legal reasons therefor alleged, in the respondent's pleading. Let a decree be entered in favor of the libelant Francis for the sum of \$22, and in favor of each of the other libelants for the sum of \$24, and their taxable costs.

THE RETRIEVER.

(District Court, D. Washington, W. D. April 4, 1899.)

MARITIME LIENS—BROKERAGE COMMISSIONS FOR PROCURING SEAMEN.

Brokers employed to negotiate contracts incidental to commerce carried on by vessels navigating the seas, such as shipping agents employed to procure crews for vessels, are not entitled to a lien upon the vessels for their commissions.

On Exceptions to a Libel in Rem.

Claypool & Cushman, for libelant.

W. H. Gorham, for claimant.

HANFORD, District Judge. This case has been heard upon exceptions to a libel in rem filed to recover brokerage commissions for procuring seamen to serve on the barkentine Retriever. In the case of *The Gustavia*, Fed. Cas. No. 5,876, decided by Judge Betts in the Southern district of New York in the year 1830, it was held that a ship's broker has a lien on a foreign vessel, in the nature of the lien of a material man, for services in shipping a crew for the vessel and for advances for their wages; but, in the light of more recent decisions, I consider it very doubtful whether that case would be, at the present time, sustained by the supreme court, or followed in the district court for the Southern district of New York. See *Vandewater v. Mills*, 19 How. 82; *Seaver v. The Thales*, Fed. Cas. No. 12,594; *Scott v. The Morning Glory*, Id. 12,542; *Marquardt v. French*, 53 Fed. 603.

The case under consideration differs from *The Gustavia* in this: that the libelant has paid no money on account of the wages of those

whom he procured to ship on the Retriever. His claim is simply to recover compensation for his services and for expenses incidental to securing a crew, and the reasons for allowing a lien upon a ship for money advanced to pay the wages of seamen have no existence in this case. The business of shipping agents is usually conducted wholly in a boarding house or an office upon land, and is as much a land business as the negotiations carried on by brokers for the purchase and sale of mining stocks or wheat, or negotiations leading up to the making of other nonmaritime contracts. I have recently had occasion to consider this subject with some care, and have become firmly convinced that brokers employed to negotiate contracts incidental to commerce carried on by vessels navigating the seas are not entitled to hold liens upon vessels for the compensation which they earn. *Grauman v. The Humboldt*, 86 Fed. 351. Exceptions sustained.

THE F. W. VOSBURGH.

THE DR. J. P. WHITBECK.

(District Court, E. D. New York. April 8, 1899.)

1. MARITIME LIENS — POSTPONEMENT BY LACHES — FAILURE TO ISSUE PROCESS ON LIBEL FILED.

The delay of a libellant in rem in having process issued for the seizure of the libeled vessel after the filing of his libel, by which the vessel is allowed to pursue her ordinary business, constitutes laches, as against persons who thereafter and before her seizure furnish supplies to the vessel in good faith, and postpones his lien to theirs.

2. SAME—RIGHTS OF CO-DEFENDANT.

A libellant entitled to recover damages for an injury against two vessels as joint and several wrongdoers may elect to proceed against either or both; and hence, where he joins both in his libel, his failure to issue process against one does not constitute laches of which the other can complain, though it is compelled by reason of such fact and the consequent intervention of other liens against its co-defendant to bear more than its just proportion of the recovery.

On Application for Distribution of Fund Arising from Sale of Libeled Vessels.

James J. Macklin, for libellant.

Goodrich, Deady & Goodrich and Alexander & Ash, for subsequent lienors.

Carpenter & Park, for the F. W. Vosburgh.

THOMAS, District Judge. Heretofore a decree of this court determined that the two tugs Vosburgh and Whitbeck were equally in fault for the collision resulting in injury to the libellant's barge, and payment of one-half damages and costs was awarded primarily against each tug, with a right of recourse to the other in the case of the insufficiency of one tug to meet its share. The collision occurred on the 19th day of December, 1892. A libel in rem was filed against both tugs on March 30, 1893. The Vosburgh voluntarily appeared and bonded, but the Whitbeck was not seized until July 7, 1893, and then only on an order of the court made at the instance of the Vosburgh.

The Vosburgh gave a stipulation for value, but the Whitbeck was sold, and the remnants of the proceeds of sale applicable to the payment of decrees, to wit, \$586.41, are in the registry of the court, from which the libelant asks payment of one-half of the decree ordered to be paid by the Whitbeck. At this juncture, several lienors allege that their claims are liens upon the fund prior in right to that growing out of the collision, on account of the laches of the libelant in the seizure of the Whitbeck; and it is the solution of this question that now engages the court. The claims for supplies furnished the Whitbeck, for which such priority is asserted, are those of Offerman, \$364 for coal; Sullivan, \$97.41 for repairs; and Horre, \$25.60 for coal. These supplies and repairs were all furnished during the year 1893, subsequently to the date of the collision, which was December 19, 1892, and to the date of the filing of the claim for collision, which was March 30, 1893, except Sullivan's account, which extends from November, 1892, to May, 1893. Process upon the claim for collision was issued July 7, 1893, subsequently to the accruing of the other claims, but prior to the filing of the libel for such other claims in this court. It will be observed that, although the libel for the collision was filed March 30, 1893, the application for process to issue was allowed to lie until July 7th of that year. The obvious purpose of this was to allow the tug Whitbeck to continue its operation in the harbor, either with or without an agreement with her owner respecting the matter. In other words, after waiting from the date of the collision, December 19, 1892, to March 30, 1893, for the institution of a suit, the libelant did on the latter date invoke the intervention of the law by filing his libel, and then failed to apply for process for the space of three months, and during this time the libelant permitted the tug to be operated, whereby persons were influenced to aid her navigation by such supplies as her use demanded. It will be observed that it is not a case of the libelant neglecting to take measures to enforce his lien. He did within suitable time file his libel, and thereupon, in the due course of law, process would have issued for the seizure of both vessels. But thereupon the libelant failed to take measures for the usual legal procedure for seizing the tugs. Whereupon the Vosburgh came in voluntarily and bonded, and it was only through her vigorous intervention that the Whitbeck was afterwards seized.

In *The Young America*, 30 Fed. 791, 792, process was issued against the vessel, but the marshal let the vessel go out of his custody and about her regular business; and the court held that the liens accruing while the vessel was so out of the actual custody of the marshal were not cut off by the issue of process, but were subsisting liens on the vessel. The court says:

"The rule excluding subsequent liens cannot be extended to vessels that are not actually, as well as constructively, in the marshal's possession. Where a plaintiff, as in this case, obtains only a nominal arrest of the vessel, and virtually directs that she be left to pursue her ordinary business, with its attendant liabilities to other persons in contract or in tort, he must be held to have waived the benefit of the custody of the court as a protection against other liens, and to be estopped from claiming, as against third persons, the exemptions that belong only to a vessel in actual custody. Otherwise, not

only would third persons be misled and deceived, but ready means would be offered of running vessels without liability to any further liens at all. Such a practice would be a plain abuse of the process of the court."

How much the more should subsequent lienors be protected where the libellant has invoked the intervention of the court, and thereupon suspended its usual and suitable procedure! The learned judge in the case cited, further discussing the question of laches, said:

"As there is no fixed time to constitute laches applicable to all cases, it should be determined with reference to the equitable maxim, '*Sic utere tuo ut alienum non lædas*,'—enforce your own rights so as not to injure others. It would be in the highest degree inequitable to permit lienors like Putnam or the insurers in this case, who have claims far in excess of the value of the vessel, to lie still when there was daily opportunity to enforce their claims by legal proceedings, and to permit the vessel to obtain credit in daily business on her own security from innocent third persons, when the prior lienors knew, but the latter lienors did not know, that the vessel could never be made to respond for a dollar of the credits thus obtained. The rule of justice and equity in such a case clearly demands that a comparatively brief period of inactivity, where there was full opportunity for attaching the vessel, should be held to constitute laches sufficient to postpone the prior lien in favor of subsequent lienors, who were thus prejudiced by the delay and by the want of notice. * * * Of course, there was no intention of any abandonment of the libellant's lien, or of an entire release or discharge of the vessel from suit; but, as respects third persons who were ignorant of the facts, it was equally to their prejudice; and in all such cases I must hold the libellant's lien postponed to the later liens that accrue in consequence of such partial release, and without notice."

It is considered that the facts in the present case strongly demand the application of the principles and rules laid down in the opinion in *The Young America*, and that the lien for the collision damages as regards the *Whitbeck* should be postponed in favor of the three subsequent liens mentioned. The unfortunate result of this decision is that the injury does not fall upon the libellant, where in broad justice it belongs; but as the judgment directs that, in the case of any insufficiency on the part of either tug in the payment of the decree, recourse may be had to the other tug, and as the proceeds of the sale of the *Whitbeck* will be largely absorbed in the discharge of the liens, the decree for the collision damages must fall upon the *Vosburgh*. This is apparently inequitable, but the case falls so clearly within certain usual rules that an escape from the conclusion that the *Vosburgh* cannot be relieved is unavoidable. As the tugs were joint and several wrongdoers, the libellant was privileged to sue either or both, or to make each a formal party, and to seize either under the process of the court. Therefore his failure to seize the *Whitbeck* at all cannot be regarded as laches in favor of the *Vosburgh*, and consequently the staying of the process against the *Whitbeck* was the exercise of a right on the part of the libellant, so far as the *Whitbeck* is concerned, from which no conclusions unfavorable to the libellant can be drawn. A person exercising a right cannot be charged with wrong. Under the rules, the *Vosburgh* had a right to ask to have the *Whitbeck* brought in as a party, if she was not already a party; or, if she was a party, to ask that the delayed process against her should be issued, and that she be seized thereunder. This course the *Vosburgh* did finally take. It was the privilege of the libellant to leave the *Whit-*

beck out of the litigation altogether if he saw fit, and it was the privilege of the Vosburgh to bring the Whitbeck into the litigation. The subsequent liens largely accrued subsequently to the appearance of the Vosburgh, which was on April 3, 1893; and, if there was any delay thereafter in bringing in the Whitbeck, the fault to a considerable degree is ascribable to the Vosburgh, as she had the full right and power to compel the issuing of the process; but no application was made therefor until June 27, 1893. Under these circumstances, it is thought that no relief can be afforded to the Vosburgh, although there was laches on the part of the libelant, so far as the subsequent lienors of the Whitbeck are concerned. An order will be prepared in accordance with the views here expressed.

THE AGGI.

(District Court, E. D. New York. April 7, 1899.)

1. SHIPPING—SEAWORTHINESS—INSPECTION.

The inspection required as to the seaworthiness of a vessel is anticipatory, and not alone for the discovery and correction of defects from which harm has arisen; and a system which contemplates a general overhauling and inspection of the vessel only every four years, and between such times only a general examination by the officers at the end of a voyage to ascertain whether there has been leakage, is inadequate to meet the requirements of the law.

2. SAME—INJURY TO CARGO FROM LEAKAGE.

A steamship had a wooden figurehead under her bowsprit, which was supported by scroll work extending back for several feet on each side of the vessel, to which it was secured by bolts passing through the sides, and fastened by nuts on the inside. This scroll work was subject to the action of the seas in heavy weather, especially when the ship was heavily laden; and such action had a tendency, at least, to loosen gradually the nuts on the bolts, if it did not necessarily do so when continued for any considerable time, and in such event the water could enter around the loosened bolts into the fore peak. The ship started on a voyage of several thousand miles, which would occupy some two months, and during which would occur the autumnal equinox. She was so heavily laden as to bring the scroll work within about nine feet of the water line. The fastenings of the scroll work had not been inspected for two years, and the only inspection made previous to entering upon the voyage was to ascertain that there had not been previous leakage. A consignment of sugar was stowed in the fore peak, which was injured during the voyage by water entering around the loosened bolts securing the scroll work. The ship encountered severe weather during the voyage, but no more so than was reasonably expectable. *Held*, that the facts were insufficient to sustain the burden resting on the owners to show due diligence to render the ship seaworthy at the inception of the voyage, under the requirements of the Harter act.

3. SAME—PERILS OF NAVIGATION—EVIDENCE OF SEAWORTHINESS.

Storms encountered during a voyage, although they may have been an adequate cause for an injury to the vessel resulting in leakage and damage to the cargo, are not sufficient to relieve the carrier from liability for such damage, nor from the burden of proving seaworthiness, where they were not of such an unusual character but that they should have been anticipated, and it is not shown that the injury could not have been provided against by proper inspection and care with respect to the part injured before sailing, and such inspection was not made, nor care exercised.

This was a libel by William Spaulding and others against the steamship Aggi to recover damages for an injury to cargo.

Carter & Ledyard and Walter F. Taylor, for libelants.
Convers & Kirlin and J. Parker Kirlin, for claimant.

THOMAS, District Judge. This action is to recover for injury to a cargo of sugar stowed in the fore peak of the steamship Aggi on a voyage from Java to Boston, begun in August, and ended in October, 1898. The fore peak is limited aft by the collision bulkhead, which extends, without opening, from the bottom of the vessel to the main deck. The vessel has the usual between deck and main deck, but 6 or 7 feet above the latter, and extending some 20 feet aft from the vessel's stem, is the forecandle head, beneath which are the crew's quarters, which are entered by a door on the main deck, and thence through a hatch in the main deck access is had to the fore peak. As the floors of the main and between decks do not fit snugly about the stem, there is an opening along the entire length of the same. Under the bowsprit of the vessel is a wooden figurehead, from which a supporting scroll work of wood extends back for 15 or 20 feet on each side of the vessel, to which it is secured by a single line of bolts, about a foot and a half apart, which pass through the wood and plating of the ship, and are fastened by nuts on the inside. The bolts are about five-eighths of an inch in diameter, and some of them are several inches long. The line of bolts is some 9 feet above the water line, with the ship loaded to a draft of about 23 feet, as she was, and from 1 to 2 feet above the main deck; and consequently the nuts securing them were in the forecandle, not immediately in the crew's quarters, but in a small closet opening into the same, and in the extreme bow, where they were concealed by coils of rope. At the end of the voyage, four, five, or six of these bolts nearest the bow were loosened so that a turn or so of the nut was needed to tighten them. This loosened condition permitted the water to enter and reach the main deck, whence it flowed into the hold through the described opening about the stem, and on the way injured the sugar, but specially damaged it by gathering in sufficient quantity in the bottom of the ship to reach the underside of the cargo. In the peak were athwartship floors, 2 feet apart, of plates standing on edge, and riveted to the frames at the side of the ship. They were something over 2 feet high at the after end of the peak, each successive one forward rising in height 6 or 8 inches, until in the extreme bow their greatest height was 5 or 6 feet. The floors were intersected by intercostal plates, extending fore and aft, and thereby was constituted a series of pockets, from 2 to 6 feet deep, while on these floors dunnage, of the height of $2\frac{1}{2}$ or 3 feet, was laid fore and aft. Hence the cargo was raised from the bottom of the ship the width or height of the dunnage plus the height of the floors. While all the other cargo spaces in the vessel were fitted with steam pumps, and hand pumps in reserve, only a hand pump was provided for the fore peak; and while the other cargo spaces were furnished with sounding wells, which would indicate even a few inches of water in the hold, the sounding well for the fore peak

would not indicate the presence of water until it had risen about 2 or 3 feet from the bottom of the vessel, although it appears that the place could be sounded by the pump. This sounding pipe was so exposed that it could not be used in rough weather, and for that reason was not used between Algiers and St. Johns. The pump was in order, and was apparently sufficient to empty the water entering through the loosened bolt spaces so that injury would not result to the cargo, and was of the kind in use at such place; a steam pump being undesirable, as it would necessitate a penetration of the collision bulkhead. The pump came down at the after end of the peak, and reached the lowest point thereof. As a matter of fact, the peak was not sounded by any process, save at one time, when the ship had proceeded about 1,500 to 1,800 miles on her voyage, and had been out from seven to nine days, during which time she had experienced on several days a "fresh breeze"; but whether this would cause the water to penetrate the bolt holes, if the bolts were loose, is entirely problematical. The evidence does not disclose the result.

The libelants advance several propositions: (1) That the fore peak was an improper place for stowing sugar, because the strain upon the parts about the bow was greater, and the probability of accident greater; (2) that the means of discovering the presence of water in the fore peak were not adequate; (3) that the presumption of seaworthiness does not obtain, and that the claimant has not sustained the burden of showing the same at the inception of the voyage.

It is considered that carriers are not precluded from utilizing the fore peak for the stowage of cargo similar to that here involved. But the fact of unusual exposure to leakage at that space, if such there be, rather bears upon the degree of diligence required of the carrier in securing it against the injurious action of the sea during the voyage. Therefore the first essential inquiry is this: Did the carrier use due diligence to make the vessel seaworthy before she undertook her voyage from Java? This inquiry is resolved into two subordinate questions: (1) As to the propriety of constructing a vessel with a figurehead fastened by bolts subject to loosen and admit water; (2) as to the diligence shown by the claimant in inspecting the vessel before her departure from Java. It appears that the vessel was of the highest class, and constructed under the supervision of the Lloyds and the Norwegian Veritas, and her figurehead was fastened according to the usual manner. For these reasons the court is disinclined to hold that such fastening was a fault in construction, although the suggestion arises readily that a piece of ornamentation subject to derangement from heavy seas, as was this, was not fitted and secured with abundant caution against expectable consequences.

Passing the question of construction, and coming to that of due maintenance, it appears that in March, 1896, the vessel received a general overhauling and inspection; and it is claimed that, in accordance with usage, such overhauling and inspection would not be repeated until 1900. Concerning the interval, it is urged that "it is not customary to go around the ship, and examine every bolt, rivet or fastening liable to become loosened in heavy weather, but that prudent officers would make a general examination of the ship, looking

to the places where the evidence of damage would naturally show," and, if the bolts "had been started prior to this voyage, they would have shown the same evidence of it that they did on this occasion; there would have been water below, which an ordinary examination of the ship would have discovered." The master testified that there had never been any damage to cargo in the fore peak; that he and other officers "had been down there plenty of times, looking around," and that "we have all considered the peak an exceptionally dry peak, compared to other ships; * * * we have had coals there in pretty rough weather, and when she was deeper loaded than on this voyage, and without appearance of water in the peak." This seems to have been the examination, inspection, care, and diligence to ascertain the continuing tightness of the nuts that held fast this line of bolts, from the construction of the ship to the time of injury. The claimant's theory of its duty seems to be founded on the expectation that, when the peak shall have leaked, the cause thereof shall be sought and corrected thereafter, with an additional overhauling at the end of each four years. The expert for the claimant states clearly this position, by saying that, if the ship comes in with a dry peak, it would be unnecessary to examine the bolts. The logical result of this contention is that a specific inspection of the bolts would be necessitated only by a wet peak (that is, after the damage the duty of activity in the examination of details arises); that when, by the presence of water in the peak at the end of the voyage, it should be indicated that the bolts had started, the moment for inspection of the bolts would have arrived. Such a governing rule for inspection is unhesitatingly condemned as inconsistent with the probable action of men of ordinary prudence. The inspection required of the carrier, as regards seaworthiness, is anticipatory, and not alone corrective of a defect from which harm has arisen. The diligence demanded by the Harter act precedes, and does not succeed, the injury. But what should the carrier in the case at bar have expected in the course of a voyage from Java to Boston, and with what precision should the minor attachments of the vessel have been examined? The vessel was deeply laden, and the voyage was several thousand miles in length, and would occupy some two months in performance; and within that time would be embraced the autumnal equinox. Mr. Martin, the expert called by the claimant, asserts that:

"If the vessel had very heavy weather for a period of two weeks, without substantial intermission, and was diving continually into the sea, this would be an adequate cause of loosening bolts, even if they were tight and in proper and seaworthy condition at the beginning of the voyage."

He further testified as follows:

"Q. Would it be a necessary cause? Must the result that you found necessarily flow from such a state of weather? A. Yes, sir; I think it must. Q. Therefore, if the shipowner, sending out a ship in that condition, knew that if she met with two weeks of heavy weather, wherein her bow would be constantly plunged into the water, there would be a loosening of those bolts and a necessary leakage? A. No; he might not know that. Q. He would know it just as well as you, wouldn't he? A. What I mean to say is this: If that vessel meets heavy weather, the seas are liable to loosen the scroll work."

The evidence of the witness leaves the court in some doubt as to whether he regards heavy weather as necessitating a loosening of the bolts, or whether it would be simply liable to do so. Taking the view most favorable to the carrier, it would be this: He would know (1) that the figurehead was fastened by means of bolts passing through the ship in such manner that, if loosened sufficiently, water would be allowed to pass through, and find its way along the stem to the cargo in the fore peak, and injure the same; (2) that the ship was going upon a long voyage at a time of the year when it might expect to meet with weather, liable to loosen the bolts and permit the damage above suggested. With this knowledge of the mechanical construction, and of the things expectable upon the journey, was it not his duty, before the ship started, to see that these bolts, which had not been overhauled or examined since 1896, were in a reasonably favorable condition to withstand the strain that would be brought upon them? Was it sufficient to rely upon the fact that there was no previous evidence of leakage in the fore peak from which he could infer a defective condition of the bolts, and did he have a right to rely upon this, and the overhauling which took place in 1896, and predicate thereon the absence of probable defect as regards these bolts? The ship was laden so deeply that even moderate weather would bring strain upon the bolts. Men of ordinary and reasonable prudence would know that weather of a severe nature would be met in the course of the voyage, and of the peculiar exposure of the figurehead to the buffeting of the waves, and would give particular care to the fastenings of such figurehead. As pointed out by the libelant's advocate, the mate testified:

"My experience as a sailor at sea would tell me that, if such a thing as a molding only three-quarters of an inch thick is washed against by a heavy sea,—constantly washed against by a heavy sea,—it can't stand the pressure."

And the claimant's expert, Mr. Martin, says:

"Any man who knows anything about a steamship knows that, if a ship meets with heavy weather, she is liable to loosen the scroll work on her bow."

And yet the care observed to discover whether over two years of voyaging had loosened the bolts was no greater than that above stated.

But this situation is met in a twofold way by counsel for the claimant:

(1) It is stated that when the vessel was 1,500 or 1,800 miles out of Java, and after she had been sailing from seven to nine days with a fresh breeze that should have exerted an influence upon the figurehead, the carpenter sounded the fore peak. It does not appear whether he discovered any water in the fore peak, although it may be inferred that he reported any excess of water; but, as he was unable to sound the fore peak within two or three feet of the bottom, it does not follow that there was no water present at the time.

(2) It is urged that the loosening of the bolts which allowed the water to enter the forepeak was caused by perils of the sea, of such an unusual nature that it could not have been reasonably expected by the claimant, and that, as they were adequate causes of the loosened bolts, the burden resting upon the owner to show seaworthiness is met. There is evidence of a consumption of 50 tons more coal than

was expected, in consequence of which the vessel put into St. Johns for an additional supply. The captain states that heavy weather was expected during these months, "but not so heavy as we had, nor so continually bad." And the log kept by the chief officer shows entries of stiff gales and high seas, and plenty of water on the deck; that she encountered gales of wind, with high seas. And there are records of a strong breeze, and large quantities of water; plenty of water on deck; heavy gales from the west; that the vessel was pitching heavily, and taking immense quantities of water on deck. And the mate characterizes the voyage as "a very rough voyage,—very stormy, rough voyage after we passed the Western Islands, at least." Now, it is argued that weather of this description, causing defects, necessitates the holding that the defect was caused by perils of the sea, and that, as such perils were sufficient to cause the leaks, it cannot be presumed that the ship was unseaworthy at the beginning of the voyage. However, it is not considered that the storms were so excessive in their nature as to constitute perils of the sea, within the exceptions in the bill of lading; nor were they of such an unexpected nature that the carrier should not have anticipated them, in fulfilling the duty of providing a seaworthy vessel.

In *The Colima*, 82 Fed. 665, it appeared that the weather "did not amount to a gale until 8 a. m., but at 6 p. m. the master, in order to head the seas, had turned the ship two points off her course. The ship could not be kept head to the seas, and occasionally fell off into the trough of the sea, where she rolled heavily, and in three successive large waves was turned over completely, with nearly a total loss of ship, passengers, and crew." It was held that the storm was not phenomenal in character, nor more severe than every steamer should be prepared to meet, and that the ship should have been, but was not, sufficiently seaworthy to meet such a condition.

In the case of *The Exe*, 6 C. C. A. 410, 57 Fed. 399, the law was reiterated that a carrier by vessel could not escape liability for loss or injury of goods during transportation through dangers of navigation caused by his own previous default, notwithstanding the exception in the bill of lading from liability for sea perils, and that if the damage to the cargo, though immediately caused by danger of navigation, would not have been incurred if the steamship had been in a reasonably fit condition to resist the escape of water from the ballast tank into the hold, the libellant should not recover, notwithstanding the exempting clause. But it was held that there was no evidence tending to show any original fault in the construction, and that the stanchion which was found bent at the end of the voyage was in apparent good order at its beginning. And it is said in the opinion:

"Unless the strain or wrench was caused by some sudden or violent straining of the vessel on some of the occasions when she was plunging and rolling heavily, or by the pressure of the cargo, which yielded and surged with the surging of the ship, or by a combination of these conditions, the cause of it cannot be explained or even conjectured."

It is, indeed, stated that:

"The primary cause of the loss was the excepted cause,—the violent seas which set in motion the train of events that resulted in the entrance of the water into the hold, and the injury of the cargo."

If the weather encountered and described in the opinion be adopted as a standard for determining that the storms in the case at bar constitute sea perils, within the meaning of the exemptive clause, nevertheless the fact then present, and now absent, that the ship was seaworthy at the inception of the voyage, in regard to stanchion, lug, and bolt, afterwards found in a defective state, differentiates that case from the one now under consideration.

In *The Edwin I. Morrison*, 153 U. S. 199, 211, 14 Sup. Ct. 823, 827, it is said:

"We do not understand from the findings that the severity of the weather encountered by the *Morrison* was anything more than was to be expected upon a voyage such as this, down that coast, and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded and with a hard cargo might have anticipated under the circumstances."

An examination of the thirteenth finding (page 205, 153 U. S., and page 826, 14 Sup. Ct.) in that case shows a condition of weather, and consequent results upon the ship, much exceeding, in degree of severity, anything indicated in the present case, and quite easily supports the conclusion here reached.

The argument of the claimant seems to be that, if the heavy weather would be an adequate cause for the leak, the burden of proving diligence to have the bolts in order before sailing has been met, although there be no evidence whatsoever that the bolts had been examined since 1896. The law is not so understood. The former obligation of a carrier was one of insurance of seaworthiness at the inception and during the voyage. This obligation has been lifted by the Harter act, provided it be shown that the owners used due diligence to make the ship seaworthy before she was sent out. The burden of proving this is on the owner. What diligence has he shown, either to discover whether the ship was seaworthy, or to correct any unseaworthiness discovered? Not the slightest fact is exhibited, save the overhauling some two years before, and that the captain and officers were down in the peak, and did not notice evidences of water. If, now, it be kept in mind that these nuts loosened gradually, as claimant's expert states, can the owner be said to have been diligent, who for two years has done nothing by way of inspecting the nuts because no leak had been observed, upon the apparent theory that there is time enough to look at the bolts that permit a leak, when the leak shall have occurred, and that the heavy seas encountered well enough account for their condition. Such a doctrine of caretaking cannot be sanctioned by this court, and is in direct antagonism to the expression of the supreme court in *The Edwin I. Morrison*, 153 U. S. 199, 215, 14 Sup. Ct. 823.

The following rules are fairly deducible from the decisions:

1. The requirement of "seaworthiness" intends that the ship shall be in a fit state, as to repair, equipment, crew, and in all other respects, to encounter the ordinary perils of the contemplated voyage. *The Edwin I. Morrison*, 153 U. S. 199, 211, 14 Sup. Ct. 823; *The Titania*, 19 Fed. 101, 105. But seaworthiness does not require perfection, but only reasonable fitness. *Dupont de Nemours v. Vance*, 19 How. 162, 167; *The Rover*, 33 Fed. 515, 521; *Steel v. Steamship Co.*, 3 Mar. Law Cas. 516.

2. The burden of proving seaworthiness is upon the carrier. *The Edwin I. Morrison*, 153 U. S. 199, 211, 14 Sup. Ct. 823; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413, 415; *The Kensington*, 88 Fed. 331; *The Colima*, 82 Fed. 665, 669; *The British King*, 89 Fed. 872, 873. And this burden requires that there shall be proof, not only of due inspection, but of actual repair, if repair be found necessary. *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823; *The Alvena*, 74 Fed. 252, 254, affirmed in 25 C. C. A. 261, 79 Fed. 973.

3. General evidence of seaworthiness may be sufficiently strong and satisfactory to show seaworthiness in the detail of construction which is the subject of the action. *The Sandfield*, 79 Fed. 371; *Id.*, 61 U. S. App. 385, 92 Fed. 663; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413, 415.

4. When a vessel, soon after leaving a port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unseaworthy before setting sail. *The Sandfield*, 61 U. S. App. 385, 92 Fed. 663; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413, 415; *Pickup v. Insurance Co.*, 3 Q. B. Div. 594.

5. Where the loss is fully accounted for by sea perils (that is, where it is proven that sea perils caused the injury), the shipowner may not be called upon to show seaworthiness. *The Sandfield*, 79 Fed. 371, 375; *The Kensington*, 88 Fed. 331, 334, and the cases there cited and explained.

6. Where there was general proof of seaworthiness at the inception of the voyage, and an adequate cause is shown for the defect on the voyage, the burden of proving seaworthiness was deemed fulfilled. *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413, 415; *The British King*, 89 Fed. 872.

7. The fact that a vessel had been for a sufficient time subjected to conditions calculated to test her seaworthiness in the respect wherein she subsequently showed defect, without any evidences of such defect, and thereafter an adequate cause for the defect was present, is sufficient evidence that the ship was seaworthy at the beginning of her voyage. *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413, 416; *Dupont de Nemours v. Vance*, 19 How. 162, 168, 169.

It is considered that the claimant has not fulfilled the burden resting upon it to show seaworthiness, that it has not used due diligence in the matter of inspection, that its general evidence of seaworthiness is insufficient proof that the nuts and bolts covered by the coils of rope in the closet off the sailors' quarters were in order, that there is no evidence that the loosening of the bolts was caused so entirely by the storms on the voyage as to negative unseaworthiness at the inception of the voyage, and that the seaworthiness of the ship in regard to the bolts and nuts was not so tested and found to be satisfactory in the earlier stage of the voyage as to justify the finding that their final condition was ascribable wholly to the later prevailing storms. The difficulty is that the claimant used the fore peak for a cargo of sugar, knowing of the greater probability of strain upon that part of the ship, and the consequent greater exposure to leakage, and yet paid no attention to the bolts whatever, subsequent to the general overhauling more than two years before, save as the officers occasionally, when in

the peak, observed no leakage, and concluded that an opportunity therefor did not exist. It was evidently waiting for a leak before investigating the bolts as a cause thereof, and intended to wait another general overhauling in 1900 before doing so, unless a leak sooner discovered indicated the necessity of immediate examination. Carriers are not privileged, usually, to abstain for such time from detailed investigations of attachments which the expectable conditions of the journey may injuriously affect, and it is not apparent that a ship should be exempted from the ordinary requirements of prudent action applicable to the care of other vehicles of transportation. With what regard would courts receive the plea of a railway company that it had not examined bolts and nuts of a freight car for over two years, and did not intend to do so for two years more, unless some injurious effects from the bolts becoming loose should earlier appear; and this, too, while it knew that the bolts loosened by degrees, as the claimant's expert Martin testified was the case with those now under consideration, and also knew that such loosening would be likely to result from violent strains in the course of operation. Such a plea would merit and receive instant condemnation. Pursuant to the foregoing views, a decree is directed for the libelants, with costs.

THE BARON INNERDALE.

(District Court, E. D. New York. April 6, 1899.)

NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action by a stevedore to recover for personal injuries received while assisting to discharge a vessel, and caused by the breaking of an iron hook furnished by the vessel and used by libelant and his fellow servants, on the ground that such hook was of poor material and had been previously partly broken, the burden rests upon the libelant to prove that the respondent was negligent in the selection of the hook or in failing to keep it in fit condition, and such burden must be sustained by evidence sufficiently clear, distinct, and preponderating to enable the court to find such fact without resort to conjectures or surmises as to the cause of the breakage.

This was a libel by Eduardo Capitano against the steamship Baron Innerdale to recover damages for a personal injury, on the ground of negligence.

Richard A. Rendich, for libelant.

Convers & Kirlin, for claimant.

THOMAS, District Judge. This accident happened on the 17th day of October, 1898. The libelant was one of several stevedores engaged in unloading the steamer Baron Innerdale, through the bunker hatch. The libelant's immediate duty was attendance upon the winch near such hatch at which the lift was operated, which was attached to a boom, used as a derrick, fitted in a gooseneck, and suspended with a 1½-inch wire rope running forward to the mainmast, and a similar rope on each side fastened to the boom by sister hooks, made of one-half inch wrought iron, which were clamped on to the derrick. At the time of the accident the stevedores were lifting baskets of sugar

from the between-decks; two baskets, each weighing 750 or 800 pounds, constituting a single haul. The libelant's evidence tends to show that as a haul was coming up through the hatch, and after it had cleared all possible obstructions, one of the side lines gave way, by reason of the breaking of one of the hooks, and the boom, thus released, swung to the opposite side, striking the libelant, and shoving him against the house, whereby he received injury.

Under the contract, it was probably the duty of the ship to furnish the hooks. In any case, it did furnish such hooks, and there is no evidence as to the cause of the breaking, except that the libelant claims that the iron was of a very inferior quality, and that there was a small crack in each arm of the hook which caused it to break. Knowledge of this break is predicated upon the statement of witnesses that a small portion of each face of the broken surface was rusted, and that some 10 or 12 days after the accident an inspection of such broken surface showed that it was rusted unevenly. The burden of proving that the shipowner did not use ordinary care in the selection and maintenance of the hooks is upon the libelant. The evidence produced to fulfill that burden must be sufficiently clear, distinct, and preponderating to convince the court, without resort to conjectures or surmises, that the claimant was negligent. When, after a careful study and consideration of the case, a judge cannot state candidly that his reason is convinced by the weight of evidence that the respondent, in some particular pointed out, has negligently done, or omitted to do, some act, in breach of his duty, the libelant has not fulfilled the burden resting upon him. Courts are required to examine, compare, analyze, infer, weigh, and strike the balance of probabilities; but they are not required to hazard opinions that a person has done wrong, without the presentation of intelligible and substantiated facts which tend to establish the accusation. A question of fact may be refined to such a degree that an accurate solution is beyond any reliable intellectual process. At such point of mystification, the court is justified in holding that the libelant has not sustained the burden of proof; that the domain of reasoning has been passed, and that of pure surmise entered.

In the present case, several persons state (1) that the iron of which the hooks are made is of a very inferior quality; (2) that the edge and face of the break show evidences of a water crack, old break, or other imperfect condition, of which the claimant should have known. These witnesses are practical workmen, and apparently honest, and their opinions carry weight, and might carry conviction, did not Manor, Dickey, and Townsend, on the part of the claimant, testify that there was not the slightest evidence of what the former witnesses stated. These witnesses are not only practical men, but are obviously men of superior education and opportunities. In any case, there is nothing that justifies the court in preferring the libelant's witnesses.

But there is another phase of the case more perplexing. It is perfectly obvious that the proper office of the hooks did not require them to bear any considerable strain. If the sugar was properly handled, and not allowed to catch, the lateral strain on the hook would be nothing, or very slight, as the chief strain would fall on the support-

ing wire rope running from the boom to the mast. Why should hooks of any fair strength, much the more hooks like these, which, even if of the inferior quality stated by the libelant's witnesses, should be capable of bearing large burdens, break, in the absence of any considerable lateral strain? Let the argument be systematically stated: (1) The hooks, if in reasonably good condition, would bear a strain of at least 2,000 pounds. (2) The hooks were used to resist lateral strain, and, if the draft were handled properly by the libelant's co-servants, such strain would be little or nothing. (3) The hook broke as a draft was being hauled from the hold, and the libelant's evidence, of which there is no contradiction in terms, is that the particular draft did not catch and was not otherwise interfered with. (4) There is no preponderating evidence that the hook was defective.

It will be observed that there are two possible causes presented for the breaking of the hook,—one a defective condition, and for this the respondent would be liable if such condition resulted from his negligence; the other, the negligence of the libelant's fellow servants in handling the draft. But there is no preponderating evidence in the first case, with the burden of proof upon the libelant, and there is direct and uncontradicted evidence in the second case negating the cause. This seems to be a puzzling condition, but the embarrassment is only apparent. The respondent is not liable, unless his negligence be proved. Such proof requires a preponderance of evidence, and such evidence is absent. In such case, it is not necessary for the respondent to point out the cause, nor to disprove the attempted exculpation of another person, who had the power and opportunity to be the wrongdoer. If the exculpation of those working the draft be accepted, the respondent is not proved guilty by the doctrine of exclusion. This is so, because (1) it does not appear certainly that all other causes are excluded, as, for instance, a previous draft catching may have caused the breakage; and (2) because by reversing the argument, and starting with the premises that there is no preponderating evidence that the break resulted from the respondent's negligence, if the doctrine of exclusion were applicable, it could be inferred that the hook was broken by those handling the draft, in such way as to allow it to catch. It is well known that drafts often catch on the coamings of the hatch, with disastrous results to the lifting apparatus, and were this not denied, and were the matter left to conjecture, a hindrance of that nature, resulting in a sudden and powerful lateral strain on the boom, could be conjectured. The surmise would be unjustified in either case. It was suggested on the argument that the breaking of the hook raises a presumption of negligence. There is some authority for such contention, but it is not sustainable in reason or by general authority. It invokes the doctrine of *res ipsa loquitur*, which is quite inapplicable to this class of cases. There is, however, one practical and well-assured reason for believing that the hooks were in good condition at the inception of the work. They had been used to load the ship in Java, and at the very time of discharge 450 bags of sugar had already been taken from the hold before the accident occurred. Each bag lifted of this number attested the strength and proper condition of the hooks, and is vigorous, palpable proof that they were not defective. The libel should be dismissed.

THE NEW YORK.

(District Court, E. D. New York. April 12, 1899.)

1. ADMIRALTY PRACTICE—CLAIMANT'S BOND.

Where, on motion of a libelant in rem, the court makes an order setting aside a sale of the libeled vessel under a decree entered at the same term in another suit, unless a bond is given by the claimant and he furnishes an ordinary claimant's bond, such bond is available to the libelant in case of his recovery.

2. MARITIME LIENS—NATURE OF VESSEL—BARGE.

A barge, though without means of self-propulsion, is subject to a maritime lien for breach of a contract of hiring to the same extent as any other vessel.

3. SAME—LIEN OF CHARTERER FOR DAMAGES CAUSED BY UNSEAWORTHINESS—LEASE OR DEMISE OF VESSEL.

If a vessel be let to a carrier for a voyage, or for a day, or other time, at an agreed price per day, with a warranty of seaworthiness, and with a stipulation that the hirer shall provide crew and everything for the purpose of her navigation, and if by her unseaworthiness a cargo received by the carrier for transportation is injured, and the damage is discharged by the carrier, he has a lien on the vessel for the amount of such damages, and may recover the same in an action in rem against the ship.

4. SHIPPING—CHARTERING OF VESSEL—IMPLIED WARRANTY OF SEAWORTHINESS.

Where a vessel is chartered or let, there is an implied warranty on the part of the owner that it is seaworthy, and sufficient for the use to which it is to be devoted.

5. MARITIME LIENS—EFFECT OF PROVISIONS OF CHARTER PARTY—SUBROGATION OF CHARTERER TO LIEN OF CARGO OWNER.

Where a charter party amounts to a demise or lease of the vessel, the owner surrendering to the charterer the entire possession and control, the latter takes the place of the owner, and becomes responsible as such to shippers for damages for injuries to the cargo, though the vessel remains liable therefor; and where, in discharge of his personal liability, he pays such damages, and they resulted from the fault of the ship,—as from her unseaworthiness,—he is subrogated to the lien of the cargo owner therefor, his relation to the ship as to such damages being that of surety.

6. SAME—INJURY TO CARGO—RIGHT OF CHARTERER TO ENFORCE.

A charterer, as carrier, is so far the representative of the owner of the cargo that he may sue in his own name for an injury thereto, and may maintain an action in rem for such injury against the carrying ship where the cargo owner could do so.

7. ADMIRALTY JURISDICTION—MARITIME CONTRACT.

An action for damages growing out of the breach of a contract for the hiring of a barge by reason of its unseaworthiness, which caused injury to the cargo while the barge was at sea on a voyage, is based upon a maritime contract, and is within the jurisdiction of a court of admiralty.

This was a libel in rem by Edward C. Smith and another, as receivers of the Vermont Central Railroad Company, against the barge New York, to recover damages for an injury to cargo, alleged to have resulted from the unseaworthiness of the barge.

Carpenter & Park and Robert D. Benedict, for libelants.

Hyland & Zabriskie and Nelson Zabriskie, for claimants.

THOMAS, District Judge. In September, 1895, the Vermont Central Railroad Company, of which the libelants are now receivers, entered into a contract with the claimant for the use by the said company of a barge, at an agreed price of \$10 per day, which included the

services of the man furnished and paid by the owner of the vessel, who should accompany the barge during her use by the railroad company. In the preceding May an agent of the company had examined the barge, and learned "what sort of a barge she was, as far as her capacity went, and that she would answer our purpose." The agent informed the claimant that the intended use of the barge was to carry general merchandise to New London, and that it might be desirable to put 1,000 tons on her, to which he stated that she was good for 2,000 tons. Nothing further was said with reference to her seaworthiness, and the barge was taken for six days, with the privilege of longer time. Pursuant to such agreement, the railroad company, who were carriers, received and used such barge for the transportation of goods for third persons between New York and New London; but on the first night of her use, and while being towed on the Sound, with fair weather, the upper seams of the vessel leaked to such an extent that water was admitted to the hold, and injured a cargo of coffee stowed therein. Her burden was less than 1,000 tons. For this injury the company accounted to the owners of the cargo, and libeled the barge for the damages thus necessarily paid. The original libel was filed in the Southern district of New York on the 26th day of March, 1896, and process was issued thereon, but upon the appointment of the present libelants as receivers such suit was not prosecuted further. Thereupon another action was brought in the same district by the libelants, on which process was issued on the 19th day of May, 1896, and the barge at the same time was seized. But it was discovered that she had been sold, on May 13, 1896, by the marshal of the Eastern district of New York, on process issued in the suit of Gray against the barge on a libel filed April 21, 1896, and that James McAllister, the claimant herein, who was in control and possession of the said barge, had purchased the same. Gray, the libelant in such action, was the master of the barge, acting under the orders of McAllister at the time the libel was filed and the sale had; but said Gray sued for damages as a seaman, and at that time McAllister owned an interest in the barge, and such suit was begun at his instance, and for the purpose of cutting off libelants' liens, and of acquiring title to the barge. Upon the discovery of the sale the libelants herein filed a libel in the Eastern district on May 29, 1896, and moved the court to set aside the decree and sale in the Gray suit, and upon the hearing of the motion on such date the court made an order that the sale should be set aside unless within five days the claimant McAllister gave a bond in the sum of \$2,000. Thereafter, on the 2d day of June, 1896, the respondent gave the usual claimant's bond. It was within the power of this court to set aside the sale at the time the motion was made therefor, quite irrespective of any inquiry as to the fraudulent and collusive nature of the Gray suit; and the court determined that it would set aside such sale, unless the claimant accepted the alternative condition by giving the bond, which he did. It is therefore considered that, if a cause of action exists against the claimant, recourse may be had to the bond so given.

It is urged further on the part of the claimant that the nature of the contract between the railroad company and McAllister was such that

there was no expressed or implied warranty of seaworthiness; and, even if there was such warranty, the libellant acquired no lien on the barge for breach thereof, and that, as a consequence, the present action in rem cannot be maintained. It is quite unimportant that the vessel is a barge, without means of self-propulsion. For purposes of admiralty jurisdiction, a barge is equivalent to a full-rigged ship, or the most important steamship. *Disbrow v. The Walsh Brothers*, 36 Fed. 607; *Mosser v. The City of Pittsburgh*, 45 Fed. 699. Therefore the question to be solved is this: If a steamship be let to a carrier for a voyage, or for a day, or other time, at an agreed price per day, with a warranty of seaworthiness, and with a stipulation that the hirer shall provide crew and everything for the purposes of her operation, and if by her unseaworthiness a cargo received by the carrier for transportation be injured, and the damage be discharged by the carrier, may the latter recover the damages thus incurred in an action in rem against the vessel by reason of a lien on the ship for the same? It will be observed that in the case put the fact that a man was placed on the barge is ignored. He was placed there for a general oversight of her condition, and, if the injury had occurred through his negligence, as it did not, his master would have been liable for the same. If this indicates any retention of the possession of the barge on the part of the owner, it is relatively unimportant to the present question. The broad, naked facts are preferred. The first step in the inquiry is this: Does the contract amount to a charter party? In a general sense, it does. A charter party is a specific contract, by which the owners of a vessel let the entire vessel, or some principal part thereof, to another person, to be used by the latter in transportation for his own account, either under their charge or his. An equivalent definition is given in *Vandewater v. Mills*, 19 How. 91. Mr. Parsons, in his work on Contracts (volume 3, p. 301), states: "The charter party might provide and express that the charterer hired the whole ship, and took it absolutely into his own possession, and manned, equipped, furnished, and controlled her during a certain period, or for a certain voyage;" although he states that such a contract is seldom made. It is in accordance with such definitions that a charter party is often called a "mercantile lease." Although in the case at bar there is a representation of seaworthiness equivalent to a warranty thereof, yet, if it were otherwise, an assurance amounting to a warranty is implied that the ship is sufficient for the use to which it is to be devoted (3 Kent, Comm. p. 205; *Fland. Mar. Law*, § 182; *The Thames*, 61 Fed. 1014; *Work v. Leathers*, 97 U. S. 379); and the care required of barges, at least as regards shippers, is emphasized in *The Northern Belle*, 9 Wall. 526. Charter parties have or omit terms which have an important influence upon the obligations and rights of the parties to them and those who contract with the charterer for the carriage of goods. The provisions as to manning a ship or controlling the crew are such that the owner in some cases is deemed to have surrendered and in other cases to have retained the possession of the ship during the continuance of the charter party. In cases of surrendered control and possession, the ownership, for the voyage, is in the hirer, at least as to all shippers who have not knowledge of the charter. *Leary*

v. U. S., 14 Wall. 607; *The Northern Belle*, 9 Wall. 526. In *Baumvoll Manufactur Von Scheibler v. Gilcrest* [1892] 1 Q. B. 259, approved by the house of lords, Lord Esher said:

"The question [in that case whether an owner was liable for the acts of the captain of his ship] depends, when other things are not in the way, upon this: whether the owner has, by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent: that he has given to the charterer a power and right independent of him, and without reference to him, to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship."

Although the cases of demise are old cases, and their authority modified by the modern tendency against such constructions of charters, it will be assumed for the purposes of the present discussion that the case is one of demise or lease, which in fact is just what any charter party is. Now, how does this characterization of the charter as a demise change the relations of the parties? The first and obvious change is to make the charterer the apparent owner, and to substitute him for the owner in matters that involve personal liability. Hence he is accountable as owner to freighters, and the actual owner is not so accountable to the charterer or to the shippers, at least those ignorant of the charter, for acts of the master and crew, but shippers must look to the owner *pro hac vice* as the carrier. If the charterer hires the vessel, employs the master and hands, and bears the expenses of the voyage, he becomes the owner *pro hac vice*, and incurs all the personal liabilities which would otherwise have fallen on the owners. *Sherman v. Fream*, 30 Barb. 478; *Macy v. Wheeler*, 30 N. Y. 231, 241. Moreover, the actual owner, being out of possession, has no lien on the cargo for the freight due under the charter, or for the money agreed to be paid for the hire of the boat, which he would have otherwise. *U. S. v. Taylor*, 2 Sumn. 588, Fed. Cas. No. 16,442. The result of the inquiry to this point is this: The ship, for the time, has by the demise received apparently a new owner. The shipper traces personal liability, if any arises, to this new owner; and the relation of the actual owner to third persons who have to do with the ship is suspended. But the relation of the ship to the undertaking is precisely the same as before, and whenever she would be liable in rem if her real owner were navigating her she remains liable while under the control of the substituted and temporary owner. In 3 Kent, Comm. p. 218, this is expressed as follows:

"The ship itself, in specie, is considered as a security to the merchant who lades goods on board of her; and it makes no difference whether the vessel be in the employment of the owner directly, or be let by a charter party to a hirer, who was to have control of her. * * * The ship is bound to the merchandise and the merchandise to the ship."

The cargo owner has a lien on the demised ship. *The Euripides*, 52 Fed. 161. Indeed, the maritime law creates reciprocal liens between the ship and cargo. *The Maggie Hammond*, 9 Wall. 435. It follows that, if the ship is in collision, the action in personam against the temporary owner and in rem against the ship accrues in favor of third persons. If goods delivered to her for transportation are dam-

aged by the unseaworthiness of the ship, a like action in rem and in personam may be maintained. Such is the rule as to all charter parties. *Dupont De Nemours v. Vance*, 19 How. 162, 168; *The Rebecca*, 1 Ware, 187 (and see annotation of authorities to the head-note of the same case in 20 Fed. Cas. 373). In such case the real owner is not liable personally to the shipper for the loss, but the temporary owner as such is liable, and the ship is liable. Hence, in the present case, the cargo owner could have sued the Vermont Central Railroad personally and the ship in rem, and therefore through the real owner's breach of warranty the charterer has been placed in a position where he must, as regards the cargo owner, discharge the damages. Constrained by his personal liability, he does liquidate such damages. Thereupon he should be subrogated to all rights of indemnity which belong to the cargo owner for whose injury he has made compulsory compensation to escape personal liability. Such cargo owner had a lien upon the ship. It was security on which the shipper consigned his goods for transportation. To that lien the charterer succeeds, because he stood in the relation of a surety for the ship to the shipper, and the fault was not in reality that of the charterer, but that of the person actually owning the ship. In such case the charterer succeeds to the lien by virtue of the fact that he stood in the relation of an indemnitor, and has discharged his obligation. Hence the statement would be this: (1) The ship is liable in rem to the cargo owner for injury to the cargo for unseaworthiness, even though the charter be a demise; (2) the charterer personally is liable to pay the damages in case of a demise; (3) the fault is that of the real owner alone; (4) the charterer, to acquit himself of personal liability, pays the damages. Here, through the fault of her real owner, the ship is the offender, and the charterer, as apparent owner, is, as between him and the ship, a mere surety. He should, on payment of the cargo owner's demand, succeed to the latter's security, viz. a lien upon the vessel. Such was the holding, in effect, in *The Jersey City*, 43 Fed. 166, and the ruling is in harmony with equitable principles. It does not seem necessary to go further, and to point out by other reasoning that the barge in the present case is subject to a lien for the loss of goods from unseaworthiness. But the same conclusion may be reached by another course of argument. The carrier is so far the representative of the owner of the cargo that he may sue in his own name for injury to the goods carried. The extent to which this rule may be applied is illustrated in *The Beaconsfield*, 158 U. S. 303, 307, 15 Sup. Ct. 860. Therefore, where the cargo owners may maintain an action in rem against the carrying ship, the charterers, who are related to the cargo as carriers, may enforce the lien by an action in rem. From this there seems to be no logical escape. In addition, it is considered that it is not necessary to trace the charterer's right to a lien through the rights of the cargo owner. The precise question was decided in *Wood v. The Wilmington*, 5 Hughes, 205, 48 Fed. 566, where the controversy arose distinctly between the charterer and the owner, and it was held that for repairs of the ship, which it was the duty of the real owner to make, the hirer had an action in rem against the ship.

The learned advocate for the claimant, in his excellent presentation

of his case, relies upon *The Daniel Burns*, 52 Fed. 159, which involved a controversy over an alleged shortage of cargo. The contract between the parties was quite similar to that in the case at bar. The damages alleged were not due to any breach of the contract of letting, or any act of the man placed on the barge, and the decision of the learned judge obviously was correct. The court in that case did not hold that a vessel demised for the carriage of cargo on the sea was not liable in rem for damage to cargo from unseaworthiness against which he had insured. Had the *Burns* proved unseaworthy, to the detriment of cargo, whether that of the charterer or of a third person, it may be asserted safely that it would have been adjudged that a lien for damage attached to the barge. Indeed, a survey of the facts in this case, in connection with the applicable law, illustrates that the present contract is maritime in every feature. It relates solely to a vessel for the carriage of goods on the sea by a common carrier. The goods were intrusted by the hirer to the vessel on the faith of the assurance of seaworthiness. The development of the injury by reason of unseaworthiness was on the sea. The carrier's liability to the cargo owner was measured by the maritime law. For such injury the cargo owner, whether the charterer or a third person, could maintain an action in rem for his damages against the offending barge. Hence, in respect to the subject-matter, in respect to the locality of the injury, which arose in the course of actual navigation on the sea, the case falls within the rules that give jurisdiction to the courts of admiralty. Of course, it is unimportant that the contract was actually made on land. *Insurance Co. v. Dunham*, 11 Wall. 1. In the last case the opinion, referring to the decision in *Ferry Co. v. Beers*, 20 How. 401, strongly intimates that the effect of the decision that a contract to build a ship is not a maritime contract was not to be extended by implication to later cases. Certainly, it should not be extended to a contract to furnish a seaworthy boat to carry goods on the sea, which is carried into effect, with the resulting injury to the cargo from unseaworthiness. It is apparent that the admiralty law in its several phases compels the conclusion that the barge was subject to a lien for the damage to the cargo, and that the usual remedy in rem obtains. The decree should be for the libelants, with costs.

THE CHALMETTE.

(District Court, S. D. New York. March 23, 1899.)

1. COLLISION.

At the time of a collision in the Narrows, the channel had been mined by the government, leaving an irregular passage, marked by buoys, which varied in width from 100 feet between the middle buoys to 1,100 and 1,250 feet between the upper and lower ones, respectively. Patrol boats were stationed at either end, and, on the steamer *C.* coming in, she was directed to go to the west side of the passage, and, on passing the middle buoys, changed her course to port until she was near the line of the west buoys, when she straightened. Tug *G.* with a tow, followed by the *Ceres* and tow, on coming down, were notified to keep to the east, and the *G.* signaled the *C.* that she would pass on the east side, which she did; but

the *Ceres*, without signaling, passed diagonally across the passage, so that the last scow of her tow swung close to the west buoy, and was run into by the *C. Held*, that the collision was caused by the failure of the *Ceres* to keep to the eastward as directed, and that the *C.* was not liable for the injury.

2. SAME—MANŒUVRE IN EXTREMIS.

The fact that the *C.* stopped her engines three minutes before the collision, and backed one minute, thereby canting her head slightly to the starboard, nearer the scow, being a manœuvre "in extremis," and in compliance with the rule requiring reversal in imminent danger, did not render her at fault.

In Admiralty.

James J. Macklin, for libelants.

Maxwell Evarts, for defendant the *Chalmette*.

Cowen, Wing, Putnam & Burlingham, for defendant the *Ceres*.

BROWN, District Judge. At about 6 a. m. of May 13, 1898, the libelants' Scow No. 10 being the aft boat of a tandem tow of four mud scows that were going out to sea, towed by the tug *Ceres*, was capsized by a collision with the steamship *Chalmette*, coming in from sea, in the Narrows, about opposite Ft. Lafayette. The above libel was filed against the *Chalmette* to recover the damages, and the *Ceres* was brought in by petition under the fifty-ninth rule as an additional defendant.

At the place of collision, the ordinary channel was largely obstructed by submarine mines that had been placed on each side not long before, under the orders of the war department, for the defense of the harbor during the war with Spain. The mines extended from a point a little above Ft. Lafayette to three-fourths of a mile below it. The boundaries of the passageway left open for vessels in the center of the channel, were quite irregular, and were marked on each side by three mine buoys painted white; namely, on the east by three nun buoys, and on the west by three can buoys. The two upper buoys were 1,100 feet apart, across the channel; the two middle ones opposite each other were 450 feet apart, and the two southerly buoys 1,250 feet apart. On the easterly side the middle buoy was 2,900 feet below the upper one; on the westerly side the middle buoy was 2,700 feet south of the northwesterly buoy. The collision was 200 or 300 feet south of the northwesterly can buoy, and the *Chalmette* a few moments before collision was pointing nearly for that buoy and about north and having the westerly middle buoy half a point or more on her starboard quarter. Between the two middle buoys there was a clear passageway of only 100 feet in width, the rest of the space on each side being occupied with mines. A government patrol boat was stationed at this point, as well as at the upper buoys, to direct vessels coming either way as to the proper course to avoid the mines.

On the morning of the collision, the *Chalmette* was met by the patrol boat at the lower buoys, and her course was directed to be held through the narrow passage of the middle buoys, and thence to the westward. While she was coming up, the *Ceres* with her tow, and 4 other tugs with tows in the immediate vicinity, were coming

down with a strong ebb tide. The tug Governor with her tow, a quarter of a mile or more ahead of the Ceres, gave a signal of two whistles to the Chalmette in accordance with previous directions from the patrol above to keep to the left. This signal was answered by two whistles from the Chalmette when the latter was in the passage between the middle buoys. The Chalmette hard a-starboarded before she was completely through the narrow passage and kept to the westward until she was about on a line with the westerly buoys, when she straightened up, heading about north for the upper buoy, so that her stern was to the westward of the line of the buoys and the westerly middle buoy a little on her starboard quarter. When nearly up to the westerly buoy as above stated, she struck the starboard quarter of Scow No. 10, which as her witnesses testify, was at that time heading two or three points across the channel to the eastward. No whistles were exchanged between the Chalmette and the Ceres. Braine, a witness from the northerly patrol boat, testifies that the Ceres was notified some time before collision to keep on the east side of the passage, and that she had previously been warned that her practice in coming down on the ebb tide was to go too far to the westward, which, on turning to the southward, caused her tow to swing too much towards the westerly side of the passage way; and he says at this time she did the same, going to the south-westward and then swinging round. The pilot of the Ceres denies that such was his course, or that any such instructions were given him; and he says that on previous days he had been ordered to go to the westerly side of the channel, and not to the easterly side. He and his mate testify also that they had come down in a nearly straight course, near the middle of the passage, heading about S. $\frac{1}{2}$ E. with the tow nearly straight behind, and that the collision was caused by the reversal of the Chalmette's engines, which made her head swing to starboard while running at considerable speed, and that otherwise she would have passed clear; and that the Ceres which was on a hawser about 500 feet ahead of No. 10 had passed the Chalmette about 150 feet to the eastward of her.

The testimony of most of the important witnesses presents some very gross inconsistencies in detail, and some impossibilities. It is needless to attempt to deal with them seriatim. It is evident that the account of the pilot and mate of the Ceres as to their course cannot be correct. From the time the Governor and Chalmette exchanged signals of two whistles, which were observed by the pilot of the Ceres, the latter knew perfectly well that the steamer and his tug and tow must pass each other by going to the left, even if he had not received any warning from the patrol to keep to the easterly side. The pilot saw the sheer of the Chalmette to the westward in accordance with the signals; and he gave no signal of his own, as he certainly would have done, if he had expected to pass on the westward side. After the previous signals and the evident sheer of the Chalmette much to the westward, there was no further necessity for signals between the Chalmette and the Ceres; and their conduct shows that the previous signals were adopted as sufficient for them both. There was about 900 feet breadth of water in the passage way

at the place where this collision occurred, which was abundant for these vessels to pass each other safely.

The weight of evidence, as I have already said, is that the Chalmette at the time of collision was well over to the westward, upon the line of the westerly buoys, leaving nearly the entire breadth of the channel for the use of the Ceres and her tow. Braine, on the Dalzelle, near the northeast buoy, was watching the Ceres at the time of the collision and is the best disinterested witness of the occurrence. He thrice states, as the officers of the Chalmette also say, that the collision was close over to the west line of the buoys,—“right up against the can (west) buoy.” The Chalmette “struck the can buoy” (after collision). “She was crowded onto the can buoy.” The Ceres, 500 feet ahead of No. 10 and heading to the S. E., was then probably at least one-third the way across. What Braine says, however, as to intervals of time and the position of the Ceres before entering the passage has some manifest absurdities, which arise perhaps from his confounding the Ceres with the Luckenback, which was one-fourth of a mile astern and to the eastward of the Ceres. But this does not affect his observation of the collision itself. The important point is, where at that time was No. 10, 500 feet astern of the Ceres. On this point, Quinn’s testimony is much inferior; he was half a mile below; the upper buoy was “hid from his view by the stern of the steamer”; and his incorrectness as to the Ceres is manifest from his statement that she was heading about S. by E. and her tow straight behind her, which if true, would have made collision impossible. No. 10, the rear boat of the tow, the master of the Chalmette says went close to the buoy. Quinn’s location of the collision by the models shows it was on the west line of the channel, although the heading he gives to the Chalmette is manifestly too much to the eastward, and that of the Ceres too little. He estimates the swing of the Chalmette to starboard through reversing, to be only one or two points, while the master thinks her swing was little, if any, and not at most over one-half a point; and the heading of the Chalmette before reversal was about north, as stated by both masters.

The log of the steamer and her testimony show that her engine was reversing one minute before collision; and as she came up at only about four or five knots speed by land, and even that speed had been checked by two or three minutes’ stop of her engines, she must have been moving at the time of collision very slowly, and was probably nearly still by land. As the Ceres passed about 150 feet to the eastward of the Chalmette when the latter reversed, it is certain that if the tow had been coming nearly straight down and directly behind her, as her pilot and Quinn testify, the libelants’ scow, though about 500 feet astern of the Ceres, could not have been struck by the Chalmette merely through her swing of a point to starboard. The Ceres was going down at the rate of a little over two knots in addition to the tide, so that the interval between the collision and the time when the Ceres was abreast of the Chalmette (when the Chalmette reversed) could not have much exceeded a minute.

I have no doubt, therefore, that the collision was caused by the

fact that the tow was not going down on the line of mid channel, viz. about S. $\frac{1}{2}$ E., nor near mid channel, but was crossing the bow of the Chalmette near the westerly limit of the channel, somewhat crescent shaped, and sagged down upon her; and as the Chalmette was nearly in the line of the westerly buoys, it is clear that the Ceres had previously gone much too far to the westward, as Braine testifies, and that she was no where near the center of the channel way. As there was plenty of space to the eastward, the Ceres was wholly responsible for this false position of the tow. At the signal of two whistles the Ceres and the Chalmette were about two-thirds of a statute mile apart, and there was an interval of five or six minutes before collision. Had the Ceres, moving at least at the rate of 2 knots through the water, pulled to the southeast for half this interval, which there was nothing to prevent, her tow would have been 200 feet further to the eastward, nearer where she should have been and out of harm's way. The Ceres, therefore, has no excuse for being where she was. Contrary to her own pilot's statement, some witnesses say she was crossing the channel at an angle of 45°, heading S. E., and was doing all she could to keep away; but it is plain that this could only have been true at the last moment and too late to be effectual. It is what the Ceres ought to have done much earlier, but did not do. The tide, through the Narrows, moreover, is about true, and did not present, as suggested, any material hindrance to a straight course down the center or east side of the passage.

I do not think any fault is established in the Chalmette. When she passed the middle buoys, the three tows behind the Governor were at different distances,—the nearest two-thirds of a mile away,—and they did not interfere with any necessary manœuvres of each other. There was room for all. The Chalmette's speed was very moderate. Being on the extreme westerly line of the passageway she had a right to expect that the Ceres would seasonably haul her tow sufficiently to the eastward, as she might easily have done, and which she began to do too late. The Chalmette stopped her engines about three minutes before collision, and backed one minute when reversal seemed necessary. The libelants and the Ceres contend that this reversal was a fault, and brought about the collision by canting the steamer's head to starboard. But as I have said, any starboard swing must have been small in so slight a change as about one point. But even if the scow might have barely escaped had the steamer not reversed, reversal under the circumstances cannot be considered a legal fault in the Chalmette. Reversal, in the apparent danger, was justified by the rule. The master was not bound to take the responsibility of departing from the rule, and he was in no way responsible for the false position of the scow. He had come up with entire prudence and caution and rightly delayed backing until backing seemed necessary, because he was apprehensive of the mines to the westward of the line of the buoys, which would prevent backing far. He acted according to his best judgment under peculiar circumstances, backing when collision seemed imminent; and this manœuvre so near collision, was a manœuvre in extremis, in the exercise of his best judgment; or, at least, any fault of the

Chalmette is so doubtful that according to the doctrine of The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, she cannot properly be held responsible.

Decree for damages against the Ceres only, with costs; as against the Chalmette, the libel is dismissed with costs.

THE MARS.

(District Court, E. D. New York. April 15, 1899.)

COLLISION—TUG AND BARGE IN TOW—FOLLOWING VESSEL.

A tug which was following another tug with two barges in tow on a parallel course, and about abreast of the tows, slowed and sheered to the starboard, and, in attempting to pass under the stern of the last barge to a position on the other side, came into collision with the barge and injured her. *Held*, that the tug, being the burdened vessel, under duty to keep out of the way, was presumptively in fault; and a claim that the barge, which carried some sail, sheered suddenly from her course, causing the collision, must be well supported by evidence to exonerate the tug.

This was a libel in rem against the steam tug Mars to recover damages for collision.

Owen & Sturges and Edward L. Owen, for claimants.

Peter S. Carter, for libelants.

THOMAS, District Judge. On the afternoon of the 7th day of January, 1898, the tug Luckenbach, conducting two barges by intervening hawsers of about 200 fathoms, preceded out of Hampton Roads the tug Mars, with a similar tow. The weather was fair, the sea calm, the tide ebb, and the wind moderate. At about one o'clock p. m. the Mars' starboard bow, just aft the stem, collided with the port quarter of the Smith, the second barge in the other tow, and the latter vessel seeks compensation for the resulting injury.

For a little time preceding the collision the Mars had been holding a course about parallel to that of the other tow, and about 200 feet or more from the same. The libelants charge that the Mars went too quickly to starboard for the purpose of going under the stern of the Smith, while the Mars charges that the barge, which was carrying sails, took a sudden sheer to port, and ran across the Mars' bow. So here are mutual accusations of a sudden alteration of course, and on each side any attempted narration of events conduces with usual nicety to the justification of the tow with which the witnesses were connected.

Certain salient features appear. The tows were shaped to go outside the Cape Charles light, which at the time of the accident was some nine miles distant. To accomplish this, the tows had been headed about E. N. E., but a corrected course to N. E. was adopted by the Luckenbach shortly before the accident, and to this course the Mars at first accommodated herself, by holding a little more to the westward. Although there were several miles of available water on her port side, the altered course of the Luckenbach led the Mars to anticipate that she might later come to shallow water, and she slowed

down so as to go on the starboard side of the other tow, as the latter should pull by, in which position she had been an hour or so before, and where the ocean was uninterruptedly at her disposal. After slowing, the Mars found that she was in danger of coming in contact with the Smith, because, as she alleges, the Smith was sheering to port; but, in any case, the Mars stopped and reversed, and undertook to go backward, but was not in time to avert the accident. Certain witnesses state that they saw the Smith sheer; that her heading at some time before or after the accident, or both, with reference to the rest of her tow, or the land, showed that she had sheered; while other witnesses testify, with equal solemnity, that the barge followed her tow with no greater deviation than is usual in the course of good navigation on a quiet sea, with a moderate wind, but that the Mars turned sufficiently to starboard to cause the contact.

A careful study of the evidence leaves the court in doubt of the relative veracity or accuracy of the witnesses. Hence the use of other resources must determine in what direction the probabilities point. In the first place, the avowed purpose of the Mars in slowing was to allow the other tow to proceed, so that the Mars might be put in a position of greater sea room, after having taken up her position on the starboard side of the Luckenbach's tow. The execution of that purpose would take the Mars to starboard. In fact, she struck the barge on her port quarter, and scarcely failed of going under her stern, which would indicate a course on her part which accorded with the intention which her mate declares he had of going on the other side. On the other hand, there would be no intelligent reason for the barge going to port, confessedly out of the course of her tug and preceding barge. Hence, if she did so, it was an accidental sheer, and not an intended deflection. It is urged that no one was in her pilot house, but the evidence of her own crew on this point is preferred. It is undoubted that the barge, with limited means of self-propulsion, did not follow with precision her conductors; but that was expectable, and should have been an ever-present consideration in the mind of the mate, who was at the wheel of the Mars. But if the Mars had slowed up to allow the other tug to pass ahead, and if it was her intention to go, and she did all but go, under the Smith's stern, is it not reasonable to believe that her effort to do so, plus the ordinary and expectable sheering of the barge, was the cause of the collision? It seems a fit conclusion. And this view is strengthened by a consideration of the obligation resting upon the tug. She was the following vessel. It was her place to keep out of the way. She evidently attempted to pass on the port side, and, precluded from this, she was dropping out of one position for the purpose of taking another, and while doing this the collision occurred. It seems to burden her with the necessity of exculpation, and she attempts it by accusing the tug of an aberration in navigation, senseless and unaccountable, done without purpose, but so delicately timed as to relieve the tug of her responsibility. It is observed, in cases where a vessel is charged with a breach of the imposed duty of avoiding a privileged vessel, that a customary defense is that the preferred ship was proceeding with well-ordered behavior, which had every appearance of continuance,

but that she suddenly whirled from her right course, and did the very wrong which is charged against the other vessel. Of course, this is not impossible. But when a following tug, with the intention of dropping behind and going to starboard, collides with the port quarter of a preceding barge in tow, a charge that the barge suddenly whirled off her course, and struck the other vessel, while some 200 feet away, does not carry on its face distinguished badges of credibility, and should be well supported by evidence. It must be confessed that conclusions, to a considerable degree based on presumptions, burdens of proof, and inferences flowing from statutory obligations, are not wholly satisfactory. But courts are not responsible for the inaccuracies, mendacities, or contradictions of witnesses, and, in cases of confusion created thereby, there must be called to the solution of controverted facts the artificial aids which have been regarded as valuable and efficient for the solution of obscure inquiries, and such aids have been adopted accordingly. The decree should be for the libelants, with costs.

THE SHADY SIDE.

THE HENRY U. PALMER.

(District Court, S. D. New York. March 31, 1899.)

COLLISION—NAVIGATING NEAR PIERS—MAKING LANDING—CROSSING BOWS—DAMAGES DIVIDED.

Where, in a collision between a tug and car float and a steamer, while attempting to turn and make a landing at her pier, the tug and float were pursuing a course close to the piers, instead of as near the center of the river as possible, as required by statute, and the steamer attempted to make the turn ahead of the tug at a dangerous rate of speed, exceeding that permitted by statute in such river, and without having received any answer to her signal to the tug, both vessels were guilty of negligent navigation, and hence the damages should be divided.

In Admiralty. Collision.

James J. Macklin, for the Shady Side.

Carpenter & Park, for the Henry U. Palmer.

BROWN, District Judge. The above libel and cross libel were filed to recover the damages growing out of a collision between a car float going up the East river near the New York shore, in the ebb tide, in tow on the port side of the tug Henry U. Palmer, at about 10:45 a. m. of April 5, 1898, and the passenger and freight side-wheel steamer Shady Side, while the latter, coming on a trip from Stamford, was rounding to make her regular landing at the Pike street pier, New York.

The car float was 226 feet long by 36 feet wide, and her bow ran ahead of the Palmer's bow 110 feet. The Shady Side was 175 feet long, and made regular daily trips between Stamford and New York, arriving here very regularly between half past 10 and a quarter of 11. Her speed was about 13 or 14 miles per hour including the tide, which was about $2\frac{1}{2}$ knots, and the float was making probably about $4\frac{1}{2}$ miles per hour against the tide.

The width of the river between Pike street and Catherine ferry, measured from pier to pier, is about 1,300 feet. The Shady Side by going within 150 feet of the Brooklyn shore can round to against the ebb tide and make her turn of a half circle so as to head up river about 150 feet off the New York piers; that is, in a diameter of about 1,000 feet, keeping nearly at full speed with her wheel hard a-port. This under the drag of her rudder would be at the rate of about 11 miles per hour. Her rounding on this occasion was in the usual manner; namely, by porting her wheel when off the coal yard a little above Catherine ferry on the Brooklyn shore, and reducing to "half speed" until the wheel is got hard a-port, and then resuming and keeping full speed until near the New York shore. The collision occurred when she was one or two piers below Pike street, and lacking two or three points of being headed up river, her bow being from 150 to 200 feet off the New York piers. Her port quarter and paddle box were struck by the starboard corner of the float. The Shady Side did not stop or reverse her engines until a few seconds before the collision, nor did the tug reverse until within about 30 feet of the steamer.

Soon after the Shady Side began to turn under her port wheel, and when 150 or 200 feet from the Brooklyn shore, a signal of one whistle was given to the tug and tow, which were then about 1,000 feet distant near the Catherine street ferry on the New York side, or a little below. The captain of the tug had previously noticed the Shady Side when she was off Adams street. He testifies that he heard her whistle when she was off the upper pier of Catherine ferry, Brooklyn, but "as she was headed straight down river he supposed the signal was for some other vessel." On looking around and seeing no other vessel, he concluded that this signal was for himself, and thereupon he says he gave a signal of two whistles followed by an alarm signal, deeming it impossible for the Shady Side to go ahead of him. At the time this signal was given, he says the Shady Side had turned so as to head straight across the river and was then opposite the Empire Stores, a pier below Catherine ferry. He says the Shady Side replied with two whistles and an alarm (the Shady Side says it was one whistle and an alarm), whereupon he again blew an alarm signal and ordered his engines reversed. The Shady Side, he says, was about 400 feet distant from him at his first signal and was pointing for the float; and at the second alarm, about 10 seconds afterwards, he says the Shady Side was about 100 feet from him and about 20 feet below the bow of the float. The mate, who was also a pilot and assisting at the wheel in the pilot house, says that at the second alarm she was about 50 feet distant and a little below the bow of the float. The report made to the local inspectors by the captain of the tug on the day following the collision, does not agree with his testimony at the trial. In that report he says he was about 150 feet from the New York shore; and he puts the Shady Side at her first signal of one whistle heading about $1\frac{1}{2}$ points towards the New York shore, showing she was in the act of rounding to; and as this agrees with the Shady Side's testi-

mony, I have no doubt that was her heading at that signal, and not straight down; and there would have been no difficulty in making her landing without accident had the tug given way by stopping or reversing when the first signal was heard.

The interval from the time when the Shady Side ported her wheel a little above Catherine street to the collision, going at a speed of 11 or 12 miles per hour, could not have exceeded $1\frac{1}{2}$ or 2 minutes. In a strong tide in order to make a turn of half a circle in so narrow a space, it was necessary that she should maintain a fair speed, though not such high speed, in order to keep under full command and to avoid accidents with other vessels; and she could not maneuver while making such a turn without evident embarrassment. The position of the tug and float close to the New York shore, was in violation of the state statute, which requires vessels to navigate in the middle of the river as near as may be; and in this case the tug's position was evidently an embarrassment to the Shady Side in conveniently making her regular landing. Had the float been near mid-river, as the statute requires, the Shady Side could have rounded to either ahead of the tug, if the tug was sufficiently below her, or if not, then under the stern of the tug and float, and come up on a curve to the westward between the float and the New York shore, which the Shady Side could not do when the tug was navigating near the shore. The master of the tug recognized the Shady Side when he first saw her; he knew her habit of rounding and her place of landing. In the position which he had voluntarily taken close to the New York shore, contrary to the statutory requirement, it was his duty, on hearing the signal of the Shady Side indicating that she was about to turn to go to her landing, to give way at once, and to check his speed as might be necessary. It is evident from his own testimony that at least a minute must have elapsed before he checked his speed at all, as he says that was after he had given his first alarm, which was given when the Shady Side was in mid-stream and was heading straight across. I credit the statement of the officers of the Shady Side that they gave no signal of two whistles, but when in mid-stream did repeat the signal of one whistle, followed by an alarm signal. I cannot credit the statement of the witnesses for the tug that the Shady Side, when in mid-stream, was below the bows of the float. That does not agree with the Shady Side's testimony; and on computation of the necessary turn that the Shady Side must have made in rounding so as to reach Pike street landing, making all allowances for her drifting with the tide at the rate of $2\frac{1}{2}$ knots, I cannot bring her so far down stream as the bow of the float must have been when the Shady Side was heading straight across. In turning six points afterwards, she would not have moved up river against the tide over 150 feet, and the tug must have come nearly twice that distance below the point of collision.

Notwithstanding the primary duty resting on the tug in navigating near the shore, to give way to the Shady Side while rounding for her landing, and the consequent fault of the tug, I think

the Shady Side is also to blame both for dangerous navigation in rounding ahead of the tug in so narrow a space at such high speed (which was above the 10 miles allowed by statute in the East river), and also for proceeding as far as to mid-river at such speed, and so near to the float as she must have been at that time, without first obtaining any answering or assenting signal from the tug. At that time they were not more than about 500 feet apart, and the Shady Side was heading but little above the tug and very rapidly approaching her path; so that it is doubtful whether collision could have been then avoided by any acts that either or both of them could thereafter have done, considering the speed at which both were then going. That is in fact the excuse the pilot of the Shady Side gives for not reversing at that time. He had no right, however, to run into such a position, at such speed and crossing the tug's bows, without an assenting signal. From the position in which the tug was previously seen to be, the pilot of the Shady Side must have perceived that he could not round to and make his landing unless the tug should give way by stopping or reversing; and although he might naturally expect her to do so, he had no right to run into a position where collision was unavoidable before receiving an answering signal promising that concession.

The damages and costs should, therefore, be divided.

HUGHES v. PENNSYLVANIA R. CO. et al.

(District Court, S. D. New York. March 8, 1899.)

1. COLLISION—FOG—FERRY BOAT.

A ferry boat, which cannot, owing to the public necessities, entirely stop making trips, even when there is a fog which makes navigation dangerous, cannot be held in fault for a collision, if carefully and skillfully handled, and having no notice of any obstruction by signal or otherwise.

2. SAME—TUG AND TOW.

A tug having in charge eight canal boats, in three tiers, tied them up on reaching a pier in East river at 1 o'clock a. m., to await a favorable condition of the tide before further proceeding. The night was then clear, and the tug left its tow, and engaged in other work, intending to return at 6 o'clock, when the tide would be flood. At 3 o'clock a fog came on, which at 6 was extremely dense. The canal boats were tied by a single line, and tailed down the river with the ebb tide, but when the tide rose they started to swing round, and when about half way, and standing out in the stream, a ferry boat rounding the battery in the fog came into collision with the outside boat of one of the tiers and injured it. Held, that it was the duty of the tug, on the coming on of the fog, to return and look after the safety of the tows which were still in her charge, and which she had tied up for her own convenience, and that she took all the risk of changes of weather or tide which might result in their injury.

3. SAME—SIGNALS BY TOW—NEW RULES.

A tow of canal boats is not required to signal in a fog. If any signal is required from it as a matter of prudence, it belongs to the tug to see that it is given.

This is a libel for collision filed by James Hughes against the Pennsylvania Railroad Company and another.

James J. Macklin, for libelant.
Robinson, Biddle & Ward, for claimants.

BROWN, District Judge. The above libel was filed to recover damages to the libelant's canal boat *F. B. Morris*, which was run into off pier 5, East river, at about 6:40 a. m. of February 9, 1898, in a dense fog. The canal boat had been brought up during the night previous from South Amboy, being one of a tow of eight canal boats in three tiers, by the defendants' tug *Media*. The libelant's boat was on the port side of the middle tier. Arriving at pier 5, East river, at 1 o'clock a. m., the head boats had been tied by a single line at the end of pier 5, and in the ebb tide tailed down stream. Libelant's boat was bound for the Harlem river, and the current would not run flood until after 6 a. m. The tow was made fast at pier 5, according to the usual practice, and the tug in the meantime left the tow for the purpose of performing other towage duties, intending to come back and take the *Morris* up on the flood tide. When the tow was tied up at pier 5 the weather was fair and clear. At 3 a. m. fog began to come on; at 4 there was considerable fog; at 5 it was thick, and after 6 extremely dense, so that neither boats nor lights could be seen more than a few feet distant. The current at this point begins to run flood about 8 hours after the preceding high water, which at Governor's Island on February 9, 1898, was at 10:10 a. m. The *Ludvig Holberg*, 36 Fed. 917, note. The necessary effect of the flood tide was to turn the tow around, the tail swinging up river slowly and thus bringing the libelant's boat outside in the stream. The collision occurred while the tow was thus slowly swinging around. The fog was so dense that neither boat was seen by the other with sufficient clearness to enable either to be identified at the time; but the defendants' ferry boat, *Annex No. 5*, was rounding the Battery on a trip from Jersey City to Brooklyn at about half past 6, and had a collision with a canal boat; and from the other circumstances in evidence, I have no doubt that this collision was with the plaintiff's boat. Her collision was at 6:40 according to the ferry boat's time, which agrees sufficiently with the time stated by the witness for the libelant.

I find that the ferry boat was not to blame for this collision. The case is in all respects analogous to that of *The Orange*, 46 Fed. 408. The reasons there assigned are applicable here. The ferry boat was handled as carefully as possible, picking her way, as was necessary, along the shore in rounding in the East river. As no signals were sounded from the canal boats, she had no notice of the situation of the tow, which at this time was tailing out into the East river over towards the Brooklyn shore to a distance of 300 feet. At the time of collision the ferry boat was heading east, about in line with the New York shore off piers 5 and 6, and the blow was nearly at right angles, showing that the fleet of canal boats was at that time tailing nearly straight across the river—a situation of extreme danger, both for the tow and for other vessels that might be obliged to navigate in so dense a fog.

I must find the *Media*, however, chargeable with neglect of duty in not returning to take proper care of the fleet of canal boats when the

fog came on. If the custom was sufficient to justify leaving the boats fastened only by a single line to the pier in clear weather, no custom is proved to extend to a neglect to attend to them sufficiently to keep them out of danger in thick fog; nor could any such custom, if testified to, be held valid. The fleet had been tied up at pier 5 for the convenience of the tug. They were waiting to be taken by the Media to their several destinations, at a convenient time of the tide; but in the meantime the canal boats were still in charge of the Media, and she was bound to give them all needful attention, and in leaving them, she took all the risks of lack of needful attention in any changes of weather or tide. *Connolly v. Ross*, 11 Fed. 342; *The Governor*, 77 Fed. 1000; *The Battler*, 55 Fed. 1006; *The American Eagle*, 54 Fed. 1010; *The Thomas Purcell, Jr.*, 92 Fed. 406. The Media had gone up the North river and taken a tow down to the stakes near Bedloe's Island where she had arrived at 4 a. m. There was fog at that time; enough to warn her of the necessity of attending to the boats that she had left at pier 5, but not enough to prevent her proceeding to take care of them. Other tugs were moving about at that time, and also subsequently in thicker fog. Had the Media gone to pier 5 to attend to the tow, it would have been her duty either to make the tow fast, tailing down as it then was, or to expedite its swing when the current changed, and not to leave the tow for a considerable time, as the evidence shows it was left, in a situation most dangerous to itself and to other vessels. The respondents, as the owners of the Media must, therefore, be held answerable for the damage.

The claim that the canal boats should have signaled while tailing out in swinging with the tide, is not set up in the answer; nor if this fault had been alleged is there any provision in the new articles regulating the navigation of inland waters (30 Stat. 96), or in the rules of the inspectors, which seems to reach this case. If signals from the tow were required as a matter of prudence, it belonged to the Media to be at hand to give them. *The Raleigh*, 44 Fed. 781, 783. The provision of the old rules by which the tow was there held bound to signal also, has been dropped from the new rules; and the decision in the case of *The City of New York*, 44 Fed. 693, and *Id.*, 1 C. C. A. 483, 49 Fed. 956, seem to forbid holding the tow answerable for not signaling in this case.

Decree for libellant, with costs.

BALL et al. v. RUTLAND R. CO. et al.

(Circuit Court, D. Vermont. March 14, 1899.)

1. JURISDICTION OF FEDERAL COURTS—STOCKHOLDERS' SUITS—JURISDICTIONAL ALLEGATIONS.

When a suit in equity by stockholders to restrain action by the corporation alleged to be in violation of the rights of complainants arises upon a constitutional provision which gives a court of the United States jurisdiction, the question whether complainants have complied with rule 94 by alleging want of collusion is immaterial.

2. CORPORATIONS—SUITS BY STOCKHOLDERS—SUFFICIENCY OF DEMAND ON CORPORATION.

An allegation in a bill by stockholders to restrain certain action by the corporation that complainants made a request of the president that such action should not be taken, which the company declined to grant, shows a sufficient demand and refusal to authorize the maintenance of the suit.

3. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS—CORPORATE FRANCHISES.

A provision in the charter of a railroad company giving it the right to fix the rates of fare on its road, within certain limits, constitutes a contract between the state and the corporation; and a corporate franchise, which passes by a sale of the company's property and franchises to a second company, empowered by its charter to make the purchase, under the provision of the federal constitution, is no more subject to impairment by the state after its transfer than before.

4. SAME—DUE PROCESS OF LAW—LEGISLATION AFFECTING EARNINGS OF RAILROAD.

State legislation reducing the rates of fare on a railroad below what will permit the railroad company to earn a reasonable income on the capital invested is in violation of the fourteenth constitutional amendment, as a taking of property without due process of law.

5. JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE—ENJOINING LAW OFFICERS.

Where a state statute requiring railroad companies to sell mileage books imposed a fine on any company refusing to obey its provisions, requiring the state's attorney of any county where a violation occurred to prosecute for such fine, a suit by stockholders of a railroad company to enjoin the state's attorneys of the counties through which the road of their corporation passed from proceeding under such statute is, in effect, a suit against the state, the sole purpose of which is to test the validity of the statute, and of which a federal court is without jurisdiction, under the eleventh constitutional amendment, no act of wrong or trespass being charged as having been done or threatened against the complainant's property.

On Motion for Preliminary Injunction.

Frederick H. Button, Michael H. Cardozo, and William W. Stickney, for plaintiffs.

P. M. Meldon, for defendant Rutland R. Co.

David J. Foster, for defendant railroad commissioners.

Frank L. Fish, for defendant state's attorneys.

WHEELER, District Judge. By the charter of the Champlain & Connecticut River Railroad Company, which became the Rutland & Burlington Railroad Company, and afterwards the Rutland Railroad Company, it was granted "the right to receive and collect toll or compensation at such rates as the directors may from time to time prescribe and establish, for the conveyance and transportation

of all passengers and freight over their road, or any part thereof," which the supreme court may alter "for a term not exceeding ten years at any one time, as said court may judge reasonable, and in such manner that the income of said company shall not be reduced below twelve per cent. per annum on the amount of its capital stock, after deducting all expenses." Laws Vt. 1845, p. 75. The road was built, 119 miles long, under this charter, which was perpetual, and not made subject to alteration or repeal, has been twice mortgaged, and has ever since been operated. By section 3898 of Vermont Statutes a person or corporation operating a railroad was required to keep mileage books of not more than 1,000 miles each for sale at the principal stations, which, by section 3899, were required to be good for all members of a firm or family named, and from the duty of providing which the railroad commissioners might, by section 3900, exempt any railroad. V. S. p. 696. By the Laws of 1898, section 3898 was so amended as to read that the price "shall not exceed two cents per mile for such coupon book"; section 3899: "Coupon books shall be of convenient size, and shall be good in the hands of any person presenting them;" and section 3900: "If a person or corporation owning or operating a railroad neglects or refuses to comply with the two preceding sections, it shall be fined not more than one thousand nor less than five hundred dollars; and it shall be the duty of the state's attorney of any county where a violation of said two preceding sections occurs to prosecute therefor." Laws Vt. 1898, pp. 53, 54. Section 10 of article 1 of the constitution of the United States provides that "no state shall * * * pass any * * * law impairing the obligation of contracts"; article 14 of amendments that, "Nor shall any state deprive any person of life, liberty or property without due process of law"; and section 2 of article 6 of the constitution that, "This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

This bill is brought by the orators as holders, respectively, of large amounts of the preferred stock of the defendant the Rutland Railroad Company, which arose from the first mortgage bonds of the Rutland & Burlington Railroad Company, and is alleged to be now outstanding to the amount of \$4,239,100, over common stock to the amount of \$2,480,600, to restrain the issue and sale of such mileage books at two cents per mile, good to bearer, involving the exclusion or reduction of profits applicable to dividends upon their stock. The bill further alleges that the ordinary and a just charge for passengers is three cents per mile; that the road is economically managed; that the profits applicable to dividends for the year ending June 30, 1897, amounted to but 1 per cent. on the preferred stock, and for the year ending June 30, 1898, to but 2 per cent. on the preferred stock; "that such mileage books, if issued, will be purchased by different dealers or brokers located at all the differ-

ent stations upon the said road, and by such dealers or brokers resold at a slight profit to nearly all persons wishing to travel upon said road, and thus the defendant the Rutland Railroad Company will be deprived of selling its ordinary local tickets at said rate of three cents per mile, and that nearly all passenger traffic upon said road will be at the rate of two cents per mile, and that said reduction will prevent said railroad from paying said dividend of two per cent., and will reduce the dividend at least one per cent." The state's attorneys of the several counties through which the road runs, and in which it has principal stations, and the railroad commissioners, are made parties; and a motion for a preliminary injunction has now been heard upon the bill and the answer of the Rutland Railroad Company, which admits the allegations of the bill, before referred to, to be true.

Question is made whether the bill sufficiently sets forth either the efforts of the plaintiffs to procure refusal to issue and sell the mileage books, or that the suit is not a collusive one to give this court jurisdiction, according to *Hawes v. Oakland*, 104 U. S. 450, and equity rule 94. That a stockholder has a remedy in equity against directors to prevent violations of charter rights or breaches of trust to the reduction of profits, and that it may be sought in the courts of the United States in cases of proper citizenship or foundation, appears to have been settled in *Dodge v. Woolsey*, 18 How. 331. *Hawes v. Oakland* pointed out what would be necessary for maintaining such a bill, and rule 94 followed it to prevent collusive suits by nonresident stockholders in federal courts. Although the orators are nonresidents, this suit arises upon the constitution of the United States, and this court has jurisdiction of it without reference to citizenship, and allegations of want of collusion in procuring suit to be brought on adverse citizenship would be immaterial. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418. The bill shows that the plaintiffs, as stockholders, directed a communication to the president, calling attention to the provision of the original charter relating to fares, and requesting the directors to decline to give effect to the acts mentioned, and to resist their enforcement in all lawful ways, and that "the Rutland Railroad Company declined to comply with the request." This appears to be a sufficient compliance with the rule, which, in this respect, merely requires the plaintiffs to set forth with particularity their efforts to secure such action as they desired; and the allegations show a refusal that stands in the way of relief by action of the directors or of the company. The answer admits these allegations to be true, and alleges that the reason of the refusal was the fear of a harassing number of suits and expensive litigation. These allegations, which are to be taken as true, show that the plaintiffs could not obtain relief from the loss which the sale of the mileage books would involve but by suit in their own behalf.

That a grant of special privileges in a charter is a contract between the sovereignty and the corporation, within the meaning of the constitution of the United States, appears to have been well settled ever since *Trustees v. Woodward*, 4 Wheat. 518. In *Bridge Co. v. Dix*, 6

How. 507, the legislature of Vermont had incorporated the plaintiff there, with the exclusive privilege of erecting a bridge over West river within four miles of its mouth, and the right of taking tolls for passing over the bridge, which the corporation had enjoyed until the bridge was taken by the right of eminent domain, under the laws of the state, on compensation. In delivering the opinion of the court, Mr. Justice Daniel said:

"In considering the question propounded in these causes, there can be no doubt, nor has it been doubted in argument on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared or implied, formed a contract between the plaintiffs and the state of Vermont, which the latter, under the inhibition in the tenth section of the first article of the constitution, could have no power to impair."

The contract between the state and the predecessor of the defendant railroad company here for the building and operating this road was that the corporation should always have the right to demand and receive such fares as the directors might fix, which could be reduced by the supreme court of the state only, and not below 12 per cent. on the capital stock. This rate is large, but the risk was great; and the limit was fixed, in view of the whole, by the legislative discretion. Question is also made whether this franchise for taking tolls and fares has passed to the Rutland Railroad Company, and is so held now as not to be subject to legislation. It was the most important corporate right from the beginning; was covered by the mortgages, the first of which went into preferred stock, such as is held by the orators; and was a part of what the act of incorporation of the Rutland Railroad Company (section 7) authorized it to obtain, and of which it, pursuant thereto, took conveyance. That act was, by section 12, made subject to the action of any future legislature to amend, alter, or repeal, as the public good might require; and this provision is much relied upon as authorizing this legislation. But this franchise existed before that act, and, if that whole act should be repealed, the franchise would remain, as the road itself would, and belong to the orators and others, where the repeal of the act would leave it; and it would be as much outside of impairment by the legislature as before. If this were not so, the Rutland Railroad Company would still have the right to operate its road, and to take reasonable fares and tolls for profit; and while the legislature has the right to regulate, and within proper bounds to limit, them, it does not appear to have the right thereby to destroy or take away such reasonable profits as may be earned by the corporation for the benefit of its stockholders. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418. The 2 per cent. dividends on the preferred stock, without any dividend reaching to the common stock, would seem to be far within a reasonable return upon the investment of the stockholders, and far below what the legislature could regulate away. This meager profit would be the property of the orators, of which the legislature could

not deprive them by giving it, or one-half of it, to such part of the public as would use the road. Due process of law is a regular course of judicial proceedings, of which parties to be affected are entitled to notice, and in which they may be heard. An act of the legislature is not such due process, and in the taking of property by such an act the state would be depriving the person entitled to the property of the property, contrary to the fourteenth amendment. That persons, whom legislation contrary to these provisions of the federal constitution attempts to affect, have a right to relief in the federal courts, is not now, and could not well be, questioned. In this case the mileage books, if issued and sold, would go beyond reach, and adequate relief against consequent loss can only be had by injunction, in equity, as is sought here.

The railroad commissioners of the state and the state's attorneys of the several counties where there are principal stations on the road being made parties, an injunction to restrain them from instituting proceedings to enforce the act is sought, and a multiplicity of proceedings is alluded to in the answer of the railroad company as feared. The penal amendment constituting the new section 3900, V. S., did not take effect till February 1, 1899, and before then a restraining order in this cause, pending this motion, which has continued ever since, had prevented the issue and sale of these mileage books on this road. So there has been this restraint, but no neglect or refusal otherwise, by this railroad company; and there can be none that would be unlawful while that order, or an injunction following it, is in force and controls. The neglect or refusal would not be the act of the party, but obedience to the order or injunction; and it is not to be expected or supposed that any officers of the state would attempt to prevent or interfere in any way with such obedience. The railroad commissioners proceed by recommendations with which the supreme court only has power to compel compliance, "if, upon hearing and legal proofs it judges that such recommendations are just and reasonable." V. S. §§ 3989, 3990. And the state's attorneys must, of course, proceed by indictment or information against the corporation for the fine, which the statute attempts to impose upon the corporation only, and but once. It does not provide for a fine for neglect or refusal at each principal station, or at the stations of each county, nor in any way cumulate the penalty; and, if the fine could be sued for, there would be no danger of a multiplicity of actions. The requirement of prosecution by the state's attorney of any county where there should be a violation would seem to be a provision for venue, and not for the creation of penalties, or of addition to their duties otherwise imposed. Nothing can be done, if attempted, but by judicial proceedings; and the judges of the state courts are expressly as much bound by these constitutional provisions as any judges, and would, of course, as scrupulously regard them. Article 11 of amendments to the constitution of the United States prohibits suits against states by individuals. The subject of injunctions of federal courts against state officers acting for their states under statutes contrary to the constitution of the United States has lately been under con-

sideration by the supreme court of the United States in *Fitts v. McGhee* (decided Jan. 3, 1899) 19 Sup. Ct. 269. In the opinion of the court Mr. Justice Harlan said:

"In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were *Polindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962; *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925-962; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785; *Reagan v. Trust Co.*, 154 U. S. 362, 388, 14 Sup. Ct. 1047; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265; and *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418. Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass, to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespass or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination."

None of the state officers here are alleged to be about or to threaten to interfere in any way with the property or operations of this railroad company but through and at the end of legal proceedings in behalf of the state as mentioned, and none could apparently be had unless some attachment or levy, on mesne or other process, should be attempted. No reason for any injunction against these officers now appears. The denial of the motion as to them may, however, be without prejudice. Motion as to railroad company granted, and as to railroad commissioners and state's attorneys denied, without prejudice.

COE BRASS MFG. CO. v. SAVLIK.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 119.

1. CIRCUIT COURT OF APPEALS—JURISDICTIONAL QUESTIONS.

The circuit court of appeals has no authority, under its appellate powers, to adjudge whether the court below erroneously determined that it had jurisdiction of the person of defendant. Act March 3, 1891, §§ 5, 6.

2. ADMINISTRATION—NONRESIDENTS—DECREE—COLLATERAL ATTACK.

Code Civ. Proc. N. Y. § 2476, authorizes the surrogate's court to grant letters of administration "where the decedent, not being a resident of the state, died without the state leaving personal property within" the county, "or leaving personal property which has since his death come into" the county, "and remains unadministered." *Held*, that where the petition for letters alleged that decedent, a nonresident, died possessed of personalty which since his death had come into the county, and there was no allegation that the property remained unadministered, and no evidence of that fact, and the decree recited no jurisdictional fact, but was based on the petition, and the letters recited that decedent died intestate, not being an inhabitant of the county, "but leaving assets therein," but there was no evidence of the latter fact, the grant of letters was without jurisdiction, and hence subject to collateral attack.

In Error to the Circuit Court of the United States for the Southern District of New York.

Edw. C. Perkins, for plaintiff in error.

F. W. Catlin, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. Error is assigned of the rulings upon the trial that the court had jurisdiction of the person of the defendant, and that the plaintiff, as an administratrix, could maintain the action.

This court has no authority, under its appellate powers, to adjudge whether the court below erroneously determined that it had jurisdiction of the action. *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39. Consequently, only those assignments of error will be considered which relate to the capacity of the plaintiff to maintain the action.

The action was brought by the plaintiff, as the administratrix of John Savlik, deceased, appointed by the surrogate's court of the city and county of New York, to recover damages for his death, caused, as was alleged, by the negligence of the defendant. The defendant alleged in its answer that the letters of administration granted to the plaintiff by the surrogate's court were void for want of jurisdiction in the premises.

It appeared in evidence that John Savlik was a resident of the state of Connecticut, and died there in April, 1897. His widow, shortly after his death, removed to the city of New York, bringing with her a small sum of money, which she had realized by selling the household furniture and collecting a demand which had be-

longed to him. In the meantime she had been appointed administratrix of his estate in Connecticut by the probate court of the last domicile of her husband, and, according to the record of that court, had accepted the trust. The proceeding seems to have been taken by the procurement of the defendant, with a view of effecting a settlement of its liability for damages for causing the death of her husband.

After her removal to New York, and in October, 1897, she made application to the surrogate's court for letters of administration upon the estate of her husband. Her petition stated that John Savlik was, at the time of his death, a resident of Connecticut, and that he died on the 1st day of April, 1897, "possessed of certain personal property which since his death came into the county and state of New York." Upon this petition, and no other evidence, the surrogate's court made a decree or order that letters of administration be awarded her. The letters, granted October 12, 1897, recited that John Savlik departed this life intestate on the 1st day of April, 1897, "not being at or immediately previous to his death an inhabitant of the county of New York, but leaving assets therein," by reason whereof the administration appertains, etc.

At the close of the evidence the defendant moved for the direction of a verdict in its favor, upon the ground that the surrogate's court of the city and county of New York had no jurisdiction to grant the letters of administration, because it appeared that there were no assets in that county at the time of the death of John Savlik, and that there were none brought into that county after his death remaining unadministered. The denial of this motion by the trial judge is assigned as error.

By the statutes of New York, the surrogate's court obtains jurisdiction by the existence of the jurisdictional facts prescribed by the statute and by the citation or appearance of the necessary parties; but an objection to a decree or other determination founded upon any omission therein, or in the papers upon which it was founded, of the recital or proof of any fact necessary to jurisdiction, which actually existed, is available only upon appeal. Code Civ. Proc. § 2474. Where the jurisdiction to make a decree or other determination is drawn in question collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and, in the absence of fraud or collusion, conclusively, established by an allegation of the jurisdictional facts contained in a petition used in the surrogate's court. *Id.* § 2473. Among the cases in which the surrogate's court of each county has jurisdiction, exclusive of any other surrogate's court, to grant letters of administration, are those "where the decedent, not being a resident of the state, died within that county, leaving personal property within the state, or leaving personal property which has since his death come into the state and remains unadministered"; and "where the decedent, not being a resident of the state, died without the state leaving personal property within that county, and no other; or leaving personal property which has since his

death come into that county, and no other, and remains unadministered." *Id.* § 2476.

It is well settled by the adjudications of the courts of New York that, although surrogates' courts are courts of special and limited jurisdiction, their orders or decrees are conclusive where jurisdiction to act exists until they are revoked or are reversed on appeal; and that whenever they decide, upon evidence having a legal tendency to support the finding, that a jurisdictional fact exists, that decision, although erroneous, cannot be annulled by a collateral attack. *O'Connor v. Huggins*, 113 N. Y. 511, 21 N. E. 184; *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001. These adjudications, however, cannot avail to support an exercise of judicial power made without any evidence before the surrogate's court of the existence of a prerequisite jurisdictional fact. Formerly, the orders and decrees of the surrogate of the county of New York were placed on the same footing as those of a court of general jurisdiction (*Laws 1870, c. 359*), but the cases cited for the defendant in error decided under that statute, like *Harrison v. Clark*, 87 N. Y. 572, are no longer applicable.

There was no evidence before the surrogate's court showing, or tending to show, that the nonresident decedent died leaving personal property within the county of New York, or leaving personal property which since his death came into that county and remained unadministered. The decree awarding letters of administration did not recite any jurisdictional facts, but referred to and was based upon the petition. If the petition had alleged the existence of the necessary jurisdictional facts, it would have supported the decree, and established them conclusively as against the present attack, in the absence of evidence showing fraud or collusion in the proceeding. The petition alleged that the decedent died without the state, leaving property which since his death came into the county of New York, but it did not allege that such property remained unadministered. It omitted the averment of a necessary jurisdictional fact, and the existence of the fact was affirmatively disproved upon the trial.

The statute conferring power upon surrogates' courts to grant administration of the property of nonresident decedents not within the state at the death of the decedent is carefully expressed, so as to confine it to cases in which the property remains unadministered. Without this limitation, the power would have extended, under some circumstances, to assets brought here from the state of the domicile of a decedent after his death. Such a case arose in *Re Hughes*, 95 N. Y. 55, where one of the next of kin of an intestate, who at the time of his death was domiciled and died in Pennsylvania, brought some of the assets into this state, and administration was granted here. Administration was granted subsequently in the state of the decedent's domicile, and the domiciliary administrator applied to have the assets remitted to him. The court said: "The assets being in fact here, the surrogate of Kings county acquired jurisdiction to grant administration, and was not deprived of jurisdiction because the assets were

irregularly brought here. Nor does that fact deprive him of jurisdiction to decree distribution." Thus, the anomalous instance was presented of a primary administration by the courts of this state of assets the administration of which, upon principles of comity, appertained to the courts of the domicile of the decedent. In its opinion the court took occasion to intimate that, if the assets had been illegally removed from the jurisdiction of the domicile to the prejudice of domestic creditors, or others interested in the estate, it would have been the plain duty of the courts, in another jurisdiction where they were found, to direct their return to the jurisdiction of the domicile. Subsequent to that decision, the statutes respecting the jurisdiction of surrogates' courts were amended by inserting the words of limitation.

Upon the facts stated in the petition, as well as those appearing by extrinsic evidence upon the trial, the case was one in which there should have been an application for ancillary letters of administration, under section 2696 of the Code of Civil Procedure.

We are constrained to the conclusion that the letters of administration were granted without jurisdiction, and that the trial judge erred in refusing to direct a verdict for the defendant as requested.

The judgment is accordingly reversed.

THE PRESTO.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1899.)

No. 796.

1. JURISDICTION OF CIRCUIT COURT OF APPEALS — QUESTIONS OF JURISDICTION OF DISTRICT COURT.

Where want of jurisdiction is one ground, among others, of exceptions to a libel in the district court, though the one in which the exceptions are sustained and the libel dismissed, but the jurisdictional question is not certified, the circuit court of appeals may entertain an appeal from the decree of dismissal.

2. COSTS ON APPEAL.—NECESSITY OF BOND.

The fact of poverty does not, of itself, relieve an appellant of the necessity of giving an appeal bond, but there must be statutory authority for an appeal in forma pauperis.

3. SAME.—FEDERAL STATUTE.

Act July 20, 1892 (27 Stat. 252, c. 209), which provides that a plaintiff in a federal court, who is a citizen of the United States, "may commence and prosecute to conclusion" any suit without prepayment of costs or fees, on making an affidavit of poverty and of merits, and that he "shall have the same remedies as are provided by law in other cases," does not authorize an appeal to the circuit court of appeals without giving security for costs, after an adverse decision by the court of original jurisdiction.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This is a libel in rem to recover for material and supplies furnished the schooner yacht *Presto*. The claimant filed the following exceptions: "(1) That the court is without jurisdiction, inasmuch as the service rendered to a vessel of the character of the *Presto* is not cognizable in a court of admiralty; and because the said *Presto* is not now, and for a long period of time prior hereto has not been, engaged in commerce and navigation, but, on the con-

trary, is a vessel of less than five-tons burden, not required to be registered, enrolled, and licensed. (2) That there is misjoinder of parties libelants. Wherefore claimant prays that these exceptions be maintained, and the libel filed herein be dismissed, at libelants' costs, and for general relief." After taking testimony, the district court entered a decree as follows: "The exception in this cause filed by the claimant came on to be heard at this term, and after argument by the proctors for the parties, respectively, was submitted, when the court took time to consider. Upon due consideration thereof, and for the reason that it is not shown that said yacht Presto had any commercial relations to trade, it is ordered, adjudged, and decreed that the libel in this cause be, and it is, dismissed, with costs." From this decree the libelants below appealed to this court, which appeal appears to have been allowed by the district judge without bond, on an affidavit to the effect that the libelants were citizens of the United States, and, because of their poverty, were unable to give an appeal bond, and that they believe they are entitled to the relief they seek by the appeal. In this court the claimant moved to dismiss the appeal, because (1) the sole question involved is one of jurisdiction in the district court only, hence this court is without jurisdiction to determine the same; and, (2) if the court is vested with jurisdiction to hear and determine this cause, then the appeal should be dismissed, because the appellants have not filed an appeal bond as required by law. The case was submitted on the motion to dismiss and on the merits.

J. A. Woodville, for appellants.

John D. Grace, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The exceptions in the district court involved more than the question of jurisdiction, and, although the libel was dismissed in the district court for want of jurisdiction, the question of jurisdiction was not certified. Under these circumstances, and considering *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, we are of opinion that we may entertain jurisdiction of this appeal, if the same is properly brought.

Section 11 of the act of congress approved March 3, 1891 (26 Stat. 826), creating the circuit court of appeals and defining its jurisdiction, provides as follows:

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act and in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error."

Section 1000, Rev. St., is as follows:

"Every justice or judge signing a citation on any writ of error, shall except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

The fact that the appellant is a pauper does not, of itself, relieve him of the necessity of giving an appeal bond, and the general rule is that there must be express statutory authority for an appeal in forma pauperis. *Butler v. Jarvis*, 117 N. Y. 115, 22 N. E. 561; *Halloran v. Railroad Co.*, 40 Tex. 465; *Fite v. Black*, 85 Ga. 413, 11 S. E. 782.

The contention in this case is that the act of congress approved July 20, 1892 (27 Stat. 252, c. 209), as follows:

"Section 1. That any citizen of the United States entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury as in other cases.

"Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases."

—Applies to cases on appeal as well as to the commencement and prosecution of a suit in the court of original jurisdiction. Stress is laid upon the terms, "may commence and prosecute to conclusion," in the first section, and "the plaintiff shall have the same remedies as are provided by law in other cases," in the third section.

In our opinion, the statute does not warrant the construction claimed: Even if express statutory authority is not required to dispense with an appeal bond, we think that the object and purpose of the statute in question was to give a poor person, unable to advance costs, an opportunity to have his case inquired into by a responsible court; and we cannot infer that it was the intention of congress that after the commencement and prosecution of the case through the court of original jurisdiction the case could thereafter be carried through all the appellate courts, without security for the costs and fees necessarily incurred. It would be a decided injustice to the adverse party to make him responsible for all costs in the court of original jurisdiction, and thereafter, without the usual security, give his opponent the right to carry him through the appellate courts. There are decisions in the supreme court which hold that the omission to give a bond for costs at the time the appeal was taken does not necessarily avoid the appeal, and the appellant may be allowed to file a bond afterwards, within a reasonable time. *Anson v. Railroad Co.*, 23 How. 1; *Davidson v. Lanier*, 4 Wall. 447, 454; *Seymour v. Freer*, 5 Wall. 822. The affidavit filed in the court below shows that the parties desiring to appeal cannot give a bond. It seems, therefore, a useless delay to give them time within which to file a bond. The appeal is dismissed.

GILMORE v. HERRICK et al.

(Circuit Court, N. D. Ohio, W. D. April 13, 1899.)

REMOVAL OF CAUSES—SUITS AGAINST FEDERAL RECEIVERS.

Suits against receivers of a federal court, brought in a state court, as permitted by section 3 of the judiciary act of 1888, cannot be removed from that court on the ground that they are ancillary to the receivership suit, and are not removable unless the amount in controversy is sufficient to bring them within the general removal provisions of section 2.

On Motion to Remand.

I. N. Huntsberger, for plaintiff.

Doyle & Lewis and Squire, Sanders & Dempsey, for defendant.

TAFT, Circuit Judge. This is a motion to remand. The suit was filed in the common pleas court of Lucas county against receivers managing a railroad under orders of this court, to recover damages in the sum of \$1,995 for negligence in their operation of the road, resulting in plaintiff's injury. By virtue of section 3 of the jurisdiction act of August 13, 1888, suits of this character may be brought against such receivers without previous leave of the court. It is conceded by the counsel for the plaintiff that such a suit is one arising under the constitution and laws of the United States, and the concession is based on a number of cases. *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 463, 14 Sup. Ct. 654; *Rouse v. Hornsby*, 161 U. S. 588, 16 Sup. Ct. 610; *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, 59 Fed. 523; *Landers v. Felton*, 73 Fed. 311; *Board v. Peirce*, 90 Fed. 764. By the first section of the act of 1888, circuit courts of the United States are given original jurisdiction of such suits when the amount in controversy exceeds, exclusive of interest and costs, \$2,000. By the second section of the same act, suits of which, by the first section, the federal circuit courts have original jurisdiction, may, when brought in a state court, be removed to the proper federal circuit court. The amount involved in the suit before the court, exclusive of interest and costs, is but \$1,995. This court would not, therefore, have original jurisdiction of it under the first section of the act of 1888, and, as a necessary consequence, it could not, if brought in a state court, be removed, under the second section of the act, to this court. *Tod v. Railway Company*, 65 Fed. 145.

It is said, however, that a suit against a receiver is ancillary to the suit in which the receiver is appointed, and therefore that, if it is brought in a state court, it may be removed to the federal court in which the principal suit is pending. The power of one court to stop proceedings in a suit lawfully begun and pending in another, and to take such suit within its own jurisdiction for further hearing and final disposition, is the exercise of an unusual and high prerogative, and must be based on clear statutory authority. Such a power is not to be presumed or implied. There is no language in any removal statute which justifies removal of a cause from a state court to a federal court on the ground that it is ancillary to a suit in a federal court. On the contrary, the removals under the second section of the act of 1888,

which is the only section permitting removals, are expressly limited to those cases of which the circuit court has original, not ancillary, jurisdiction by the first section. It may be conceded that, where a principal cause is removable, under the statute, from a state court, the removal of it might carry with it ancillary proceedings in the same court and cause as part of the same suit. But that is not the case before us. The principal suit is now in the circuit court of the United States. The so-called "ancillary suit" is in the state court, and it is sought to unite them by the power of removal. Except in two cases recently decided, and hereafter cited, it has never been held that a federal court of equity might use the power of removal to control the course of proceedings ancillary to causes pending before it. It is true that, before the enactment of section 3 of the act of 1888, litigants against federal court receivers were prevented from resorting to the state courts by their inability to sue such receivers except with the permission of the court appointing them. Such suits were then purely ancillary to the suit in which the receivers were appointed, and were completely subject to the control of the court in which the main action was pending. They were kept within the control of the court not by removal, however, but by the process of contempt against any one who should attempt to sue the receivers without leave. So, too, suits in which it is sought to deal with the property in the custody of the receivers, to subject it to sale or other remedy, can still be brought only by intervening petition, or by dependent bill filed by leave of the court. *Compton v. Railroad Co.*, 31 U. S. App. 486-524, 15 C. C. A. 397, 68 Fed. 263. In this sense it is said that a court having custody of property draws to itself jurisdiction to consider and decide all questions arising concerning its disposition and management, even between persons not parties to the original suit in which it became necessary to take custody of the property. This is not effected, however, in a federal court, by virtue of any statute of removal, but solely through the inability of any other court to grant relief in respect of such property because it is in the custody of the federal court, and thus is beyond the jurisdiction of such other court. Any one claiming an interest in such property may appeal to the federal court for relief, which, in order to prevent injustice, through its process may exercise a purely ancillary jurisdiction to administer justice between such claimant and any one else claiming an adversary interest. Such ancillary jurisdiction is exercised only upon the prayer of the claimant filed in the principal cause. It is not exercised against one who might be a claimant by removing a suit lawfully begun by him in another jurisdiction. Congress, by section 3 of the act of 1888, has, in effect, declared that suits against receivers touching their transactions as such are no longer to be brought only where and in the form which the court appointing them shall permit, but in any court of competent jurisdiction, and in the form in which suits against other persons may be brought. They have ceased to be ancillary in the sense that they can be drawn to the court and cause in which the defendants were made receivers, either by process of contempt or otherwise. As suits they are no longer part of the original litigation. When reduced to judgment, of course, payment can only be enforced against the prop-

erty, and the priority of the claim determined, in the court in which the original litigation is pending, and in which the receivers were appointed; and this is the scope and meaning of the second paragraph of section 3 of the act of 1888. *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, 59 Fed. 523. Under that section suits against receivers are to be conducted, so far as their trial is concerned, not as ancillary suits, but as suits of original cognizance. If, thus considered, they come within the removal statute, and can be removed to the same court in which the receivers have been appointed, that court must try them, not as ancillary proceedings, but as independent suits, and can exercise no power to change their form from that which they had in the state court. Thus, if brought as suits at law in the state court, when removed they must be tried before a jury as suits at law.

Much reliance is placed by counsel and by the courts upholding the right to remove suits like the case at bar upon *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018. That was not a removal case. The question certified and answered in that case was whether a federal court of equity might authorize its receiver, appointed upon a creditors' bill to collect and distribute the assets of an insolvent corporation, to bring suits in the course of his administration in the same court against debtors of the corporation for sums less than \$2,000. The question was answered in the affirmative on the ground that such suits were merely ancillary to the main cause, and were in furtherance of, and therefore within the original jurisdiction obtained by the court in, the principal cause under the statutes and constitution of the United States. But there is nothing in the opinion of Mr. Justice Brown in that case, and nothing in the scope of the question and answer, justifying the inference that a suit begun in the state court by or against a receiver for less than \$2,000 could be removed to the federal court either under the statute or by virtue of any implied power of removal vested in federal courts of equity for the purpose of protecting and perfecting the exercise of their original jurisdiction.

Section 3 of the act of 1888 was enacted to save expense to those suing receivers. It secured to them the right to choose their own court, except as this might be modified by the removal statutes. To hold that the right of removal in all such cases is implied, is to defeat the chief purpose of congress, which was the reduction of the cost of litigation to the smaller claimants. Section 3, it will be conceded, has prevented federal courts of equity from drawing to themselves jurisdiction of suits against their receivers by injunction and process of contempt. *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, 59 Fed. 523. It would certainly be a strange anomaly if the intention of congress could be defeated by now implying a power of removal as a means of bringing about the same result.

The foregoing considerations lead me necessarily to the conclusion that suits against receivers of a federal court of equity cannot be removed from a state court unless the amount in controversy exceeds \$2,000, exclusive of interest and costs. The point under consideration has been four times before circuit courts of the United States,—before Judge Hanford in *Carpenter v. Railroad Co.*, 75 Fed. 850, before Judge Baker in *Ray v. Peirce*, 81 Fed. 881, before Judge Phillips in *Sullivan*

v. Barnard, 81 Fed. 886, and before Judge Thompson in Pitkin v. Cowen, 91 Fed. 599. Judge Hanford held that a suit in the state court which was ancillary to a suit in the circuit court of the United States might, for that reason, be removed to the latter court. Judge Phillips, without critically examining the question himself, yielded to the authority of Judge Hanford's judgment. Judge Baker and Judge Thompson take the opposite view, and hold that such suits are not removable unless they come within the terms of sections 1 and 2 of the act of 1888. For the reasons already stated, I concur with Judge Baker and Judge Thompson. The motion to remand is granted.

SCHWARTZ et al. v. DUSS et al.

(Circuit Court, W. D. Pennsylvania. February 13, 1899.)

1. VOLUNTARY ASSOCIATIONS—VALIDITY OF AGREEMENT FOR COMMUNITY OF PROPERTY.

Written agreements, signed by the members of a voluntary society from time to time, which form the constitution of the society, and which provide for the community of property, and that neither a withdrawing member nor the representatives of one deceased shall have any claim on the society or its property on account of the contributions of such member thereto, constitute valid contracts, and no claim so arising is enforceable so long as the society continues in existence.

2. SAME—RIGHTS OF WITHDRAWING MEMBERS—LIMITATION.

Claims against the property of a voluntary society or community in favor of withdrawing members, if legal and enforceable, are barred by lapse of time where no attempt is made to enforce them for nearly 70 years after the withdrawal.

In Equity. Sur pleadings and evidence, report of master, and exceptions.

Shiras & Dickey and S. Schoyer, Jr., for complainants.

D. T. Watson and C. S. Fetterman, for defendants.

ACHESON, Circuit Judge. The plaintiffs sue as heirs of certain persons who were formerly members of the Harmony Society, and who continued to be members until their voluntary withdrawal or death. The bill is against all the persons who composed the society at the commencement of the suit, namely, June 27, 1894, the membership then embracing 16 persons. The bill joins, as co-defendants with the members of the Harmony Society, Henry Hice, John Reeves, and the Union Company, a corporation; the bill charging that these three defendants and the defendant John S. Duss,—a member of the society and the senior trustee thereof,—were acting together in a conspiracy to wreck and dismember the society, and appropriate to themselves the entire assets of the society. The bill further alleges that all the purposes for which the society was founded and its established practices had been abandoned, and that by common consent the society had ceased to exist as an association, and had been dissolved, and that "the assets of such dissolved association have reverted to the donors thereof, among whom were the ancestors and intestates" of the plaintiffs. The bill prays for the appointment of a receiver, and for the

division and distribution of the assets of the society among the persons legally entitled thereto, including the plaintiffs. All the defendants have answered the bill. In their answers they all deny the above-recited charges and allegations, and all the averments in the bill upon which the plaintiffs' supposed right to relief rests; and they also deny that the plaintiffs have any interest whatever in the property of the Harmony Society, or any right to intermeddle with its affairs. After the cause was at issue, the parties thereto entered into and filed a written agreement, whereby they stipulated—

"To request the court to appoint W. W. Thomson, Esq., as examiner and master in this case; that to said Thomson shall be given, as examiner and master, the authority to hear and take all the testimony, and to find all the issues of law and fact, and to report the testimony and such findings to the court; * * * the parties reserving the right to be heard before this court on exceptions to such finding, and reserving the right of each to take appeals from the decree, decision, and judgment of this court therein, to the proper appellate court, with the same force and effect as though this cause had been decided by the court below without the intervention of a master."

And thereupon, at the request of all the parties to the suit, the court appointed Mr. Thomson examiner and master in the cause, with the authority specified in the said agreement. In conformity with the agreement of the parties, and pursuant to the order appointing him, the master took a large amount of testimony, and made findings which are embodied in a written report to the court. The master filed with his report the testimony and exceptions taken by the plaintiffs to his findings. The cause has been heard upon the pleadings and evidence, the master's report, and the exceptions thereto.

The report of the master is altogether adverse to the plaintiffs. He finds that the charges of conspiracy and misconduct, and the allegations of abandonment of the purposes and established practices of the Harmony Society and of the dissolution of the society, contained in the bill, are not sustained by the evidence, and that they are not true. Upon every material question of fact the finding of the master is distinctly in favor of the defendants, and he recommends the dismissal of the bill. The master's report covers the entire case, and evinces the most careful consideration of every question here raised. Nevertheless, the court has felt it to be its duty to make an independent investigation of the facts and merits of the case, and therefore we have attentively read and considered the whole of the evidence. Avoiding, as needless, a particular discussion of the numerous exceptions to the master's report, we will briefly state our general views and conclusions.

The constitution of the Harmony Society is embodied, and the general purposes of the association are set forth, in a series of written agreements, executed in the years 1805, 1821, 1827, 1836, 1847, and 1890. These agreements were signed at their respective dates by all the then members of the society. By the agreement of 1805 the doctrine of community of property became, and by the subsequent agreements, continued to be, a fundamental principle of the society. Its acceptance is an essential condition of membership. By the constitution of the society individual ownership of property is renounced in favor of the community or society. The members have all things in

common, and each is entitled to receive from the society necessary maintenance, support, and education, and in return each is bound to render to the society labor and obedience. The agreement of 1827 contained a provision that, if any member withdrew from the society, there should be refunded to him the value, without interest, of all property he had brought into the community. The agreement of 1836, however, rescinded that provision wholly, and stipulated that if any individual shall withdraw from the society, or depart this life, neither he, in the one case, nor his representatives, in the other, shall be entitled to demand an account of his contributions, whether in lands, goods, money, or labor, or to claim anything from the society as matter of right, but that it shall be left altogether to the discretion of the superintendent to decide whether any, and, if any, what, allowance shall be made to such member, or his representatives, as a donation.

In view of the decision of the supreme court of Pennsylvania in *Schriber v. Rapp*, 5 Watts, 351, and the decisions of the supreme court of the United States in *Goesele v. Bimeler*, 14 How. 589, and *Baker v. Nachtrieb*, 19 How. 126, it is clear that the above-recited articles of agreement are valid contracts, and that thereunder, upon the death of a member of the society in fellowship, no claim, enforceable against the society or its property, passes to his heirs or personal representatives, and that since 1836 no member voluntarily withdrawing from the society could acquire any such claim. Now, not one of the plaintiffs was ever a member of the Harmony Society. Furthermore, it does not appear that any of the persons through whom the plaintiffs claim contributed any money or property to the society. The master has found that no such contribution was ever made by any of those persons. The correctness of that finding has not been impeached. All the members through whom the plaintiffs claim, who left the society, withdrew in or before the year 1827. Presumably they retired upon terms satisfactory to themselves. If, however, those persons, so withdrawing, had any legal demands against the society, those demands have been barred by lapse of time. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610. The other persons through whom the plaintiffs claimed remained with the society and died in fellowship. They thus received and enjoyed all the benefits secured to them by the recited articles of agreement, and therefore no rights, enforceable against the society, passed from them to their heirs or personal representatives.

The soundness of the view that the deceased ancestors and collateral relatives of the plaintiffs could transmit to them no rights, enforceable against the Harmony Society as a living organization, is impliedly conceded by the bill, for it alleges that the society had come to an end. The bill proceeds upon the theory that a dissolution of the society had been brought about. Upon this assumption, and under the allegation "that recently said Harmony Society had become dissolved as aforesaid," the bill prays that the court take charge of the assets of the society, and distribute the same among the parties legally and equitably entitled thereto. But the hypothesis of dissolution is not well founded. The proofs show that the society is in full life.

There has been no dissolution of the society, either by the common consent of the members or by their acts. The membership, indeed, has become greatly reduced, but the rights of the society as now constituted are as sacred in the eye of the law as they were when the membership was twenty-fold greater. The society as an organization exists, in law and in fact. Under the evidence, the findings of the master upon this branch of the case undoubtedly are right. Hence the very foundation of the bill fails. The plaintiffs do not show that they are entitled to any equitable relief whatever. It is not necessary, nor would it be proper, for the court to express any opinion as to what would be the legal status and the ultimate disposition of the property of the Harmony Society, were its existence terminated by the death of all its members, or were a dissolution of the society otherwise effected. No such questions are before us. We are not dealing with the assets of a defunct or dissolved association.

In respect to the alleged conspiracy to wreck and dismember the Harmony Society, we feel called upon to say that we fully agree with the conclusion of the master. The acts here principally complained of were, we think, designed, not to destroy the society, but to save it from the consequences of business mistakes made by none of the present officers or members of the society, and for which none of them are at all responsible. The measures resorted to in the emergency which was upon the society were successful in extricating it from great financial peril. Those measures were adopted and carried out under the advice of eminent counsel, whose rectitude of purpose the court cannot doubt. And now, before closing, we deem it to be our duty to declare that, after the most careful scrutiny of the evidence, it is our judgment that the charges of immorality made against John S. Duss, the senior trustee, in the twenty-fourth paragraph of the bill, are not sustained by the evidence, but are disproved.

The general rule in equity, that costs follow the decree, we think, should be applied here, under the circumstances. *Swentzel v. Bank*, 147 Pa. St. 140, 154, 23 Atl. 405, 415. The bill alleges conspiracy, fraud, and immorality, and these grave charges have not been withdrawn. Having successfully vindicated themselves from these charges, the defendants are justly entitled to full costs.

Decree.

This cause came on to be heard at this term of the court, upon the pleadings and evidence, and the report of the master and exceptions thereto, and was argued by counsel. And now, this 13th day of February, 1899, upon consideration, it is ordered, adjudged, and decreed that the plaintiffs' bill be, and the same is hereby, dismissed; and it is further ordered, adjudged, and decreed that the plaintiffs pay the costs, including the master's fee, to be fixed sec. reg., and which, together with his compensation as examiner, shall be paid to the master in the first instance by the defendants.

CONTINENTAL TRUST CO. OF CITY OF NEW YORK v. TOLEDO, ST. L.
& K. C. R. CO. et al.

In re RHODE ISLAND LOCOMOTIVE WORKS.

(Circuit Court, N. D. Ohio, W. D. April 20, 1899.)

RAILROADS—FORECLOSURE OF MORTGAGE—PRIORITY OF CLAIMS FOR EQUIPMENT

A manufacturer who furnished locomotives to a railroad company in part on credit, taking notes for such deferred payment indorsed by a third person, must be held to have relied on the credit of the company and the indorser, and is not entitled to a lien on the company's property superior to that of a prior mortgage, though the locomotives were needed to enable the company to continue the operation of the road.

In the matter of the intervening petition of the Rhode Island Locomotive Works.

E. C. Henderson, for Continental Trust Co.

Potter & Emery, for Rhode Island Locomotive Works.

Taft, Circuit Judge. The question is on the exceptions to the report of the master as to the priority over the mortgage bonds of the claim made by the Rhode Island Locomotive Works upon notes given by the railroad company for the last 20 per cent. of the purchase price of certain locomotives furnished to the railroad company, part of them eight months before the receivership, and part of them four months before the receivership. The railroad company was in great need of addition to its locomotive equipment. It applied to the Rhode Island Locomotive Works to furnish them. It had no money with which to pay for them. It was agreed that the Railroad Equipment Company, a third corporation, should take title to the locomotives; should pay to the Rhode Island Locomotive Works 80 per cent. of the purchase price; should enter into a contract of lease and conditional sale with the railroad company, by which, after the company should have paid the 80 per cent. of the purchase price, with interest, the title of the locomotives should be free and unincumbered in the railroad company. The locomotive works received pay for the additional 20 per cent. in notes of the railroad company indorsed by S. H. Kneeland, who was largely interested in the stock of the railroad company. It is contended by the Rhode Island Locomotive Works that it has an equity prior in right to that of the mortgagee, to be paid out of the earnings and corpus of the property, because it furnished this equipment at a time when it was needed to keep the company up as a going concern. The master, after a full hearing and a very satisfactory discussion of the authorities, has reached the conclusion that the locomotive works contracted this loan of 20 per cent. on the faith of the credit of the company and S. H. Kneeland, and that the claim does not come within the class of claims which the supreme court has held may be given priority to a vested mortgage lien. I fully concur in this conclusion, and think it well sustained by the authority of *Penn v. Calhoun*, 121 U. S. 251, 7 Sup. Ct. 906, and *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824.

The exceptions to the master's report are overruled, and the report confirmed.

RHOADES v. PENNSYLVANIA CO. FOR INSURANCES ON LIVES &
GRANTING ANNUITIES et al.

(Circuit Court, E. D. Pennsylvania. April 7, 1899.)

PARTIES—RIGHT OF INTERVENTION.

A creditor is not entitled to intervene as a co-plaintiff in a suit against his debtor brought by another creditor in his own interest alone, for the purpose of continuing the suit after the plaintiff's claim has been adjusted, but will be remanded to a new action in his own right.

On Petition of Alice Barrett for Leave to Intervene as Co-Plaintiff.

J. W. M. Newlin, for petitioner.

Samuel Dickson and Thomas Hart, Jr., for respondents.

MCPHERSON, District Judge. We see no reason for granting the prayer of this petitioner. The suit in which she desires to intervene as plaintiff was an action brought by Rhoades to advance his own interests, and was not intended for the benefit of any other creditor. His claim has been adjusted, and he has assigned the judgment upon which the bill is based to another person, who may or may not intend to proceed with the cause. But, even if the assignee is content to do nothing further, this fact gives the petitioner no right to intrude upon the suit, and to go on with it as if it had been originally brought as well for her benefit as for the benefit of Rhoades himself. If she is entitled to raise the questions referred to on the argument of this motion, she can raise them in a suitable proceeding under her own control. The petition is refused.

DEWEY v. WHITNEY et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 68.

1. SPECIFIC PERFORMANCE—SALE OF LAND—MISTAKE OF VENDOR.

Two sisters were the owners of certain land, and one of them clothed the other with power to sell every part of the land of which she had the legal title, except an acre and a third, which carried with it a right of way of necessity to a highway. The purchaser knew from the vendor that the other sister had been consulted, and objected only to the sale of her acre and a third. *Held*, that the fact that the sisters had forgotten the details of the title, and that the sister owning the acre and a third had certain equities in the rest of the land, was not such a mistake as to prevent specific performance by the vendor of the contract.

2. VENDOR AND PURCHASER—RESERVATIONS IN CONTRACT.

Where land of two vendors is sold subject to the right of one of them to an acre and a third, the location of which was not designated, on the failure of the vendee to seek definite information regarding the reserved lot the court will locate it with reference to all the testimony and upon such principles as are equitable, taking the entire situation into consideration.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This is an appeal by each defendant from a decree of the circuit court for the Northern district of New York (85 Fed. 325) upon a bill in equity which prayed for the specific performance of a contract by one of the defendants for the sale of real estate, and that the legal title to a portion of the land that was conveyed by one defendant to the other should be declared to be held in trust for the complainant.

Wallace Macfarlane and Edward B. Whitney, for appellants.

Richard L. Hand, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Some time in 1883, Miss Maria Whitney, of Cambridge, Mass., and her sister-in-law, Mrs. Elizabeth W. Whitney, of New Haven, Conn., favorably entertained the idea of purchasing together a lot of land in the part of the Adirondacks near Lake Placid, in the township of North Elba, and of erecting cottages thereon. Mrs. Whitney left the mountains before a purchase was made. Afterwards, in September, 1883, Miss Whitney bought for \$450 a tract of three acres, known as No. 1, from one Brewster, and subsequently bought from Miss Florence Este a strip of land 30 feet wide, called No. 2, extending from the southwest corner of lot No. 1 to the highway, and thence to Mirror Lake, and took both deeds in her own name. The strip to the highway was for a roadway hereafter called the "Lane," and the strip on the lake was for a boat house. Mrs. Whitney was informed of these purchases, and sent to her sister-in-law \$215 for one-half of No. 2, and for one and one-third acres of No. 1. Afterwards, in consequence of the illness of her husband, she did not visit the Adirondacks. Miss Whitney bought for herself four other small parcels of land, built a cottage upon No. 1, and a boat house upon 15 feet of the lake front of No. 2, and occupied the property until the autumn of 1893. She grew weary of the care of the house, and wrote in August, 1893, to Mrs. Whitney in regard to a sale of the entire property, who replied in the same month that, if the reservation of her strip (meaning the strip of No. 1) prevented a sale, she would make no opposition, but that she wanted to keep that piece of land. Miss Whitney replied that she would try to sell her share of the land, reserving the one and one-third acres above the Este lot. A deed of this strip to Mrs. Whitney would give her a right of way by necessity through the lane to the highway. Correspondence between Dewey and Miss Whitney ensued in regard to a purchase of her property, and she wrote him on September 8th that "my sister-in-law, who owns an acre and a third of the place, and who, I supposed, had consented to have it sold with the rest, has written me that she would rather hold on to it longer. I shall inclose a plan of the estate, copied from a map made by the state surveyor a few years ago, and I will mark upon it the piece which belongs to her." Shortly after, they met upon the property, when negotiations were renewed, which resulted in an offer by Dewey of \$3,500 for the entire land, buildings, and their contents, with a few exceptions, and

excepting the acre and a third. This verbal offer Miss Whitney accepted all too hastily by letter written on the train as she was leaving the mountains on October 6, 1893, saying that she would be glad of a cash payment of \$500, the residue to be secured by mortgage, and making a reservation of a few personal articles in the cottage. This letter was received, and Dewey entered forthwith into possession of the entire portion contracted for. Then followed the discovery by Miss Whitney that she had, in her hurried agreement to sell, forgotten to take note of, and reserve sundry articles of, furniture; but these modifications were accepted. The omission of the boat-house site was first spoken of on October 12th in a letter to Dewey, in which she says:

"There is also another matter that did not come into my mind at all since I left Lake P., and that is in regard to the land on which my boat house stands, and which belonged to my sister-in-law in common with me. I shall wish to make good the loss to her by purchasing a piece just as large on one side or other of the present boat house. Does the piece you have bought of Kennedy or of Snow include the land on the border of Mirror Lake, and, if so, will you sell me the desired bit, and at what price? If it is not yours, I must apply to Kennedy or to Miss Este."

She made an unsuccessful attempt to buy from Kennedy land for the purpose named in this letter, and on October 20th received from Dewey \$350, which she had agreed to take as a cash payment, instead of \$500. It was then agreed that Mr. Chellis, a surveyor at North Elba, should make the deed, and Miss Whitney supposes that he "understands all about the $1\frac{1}{2}$ acres which belong to my sister-in-law." On November 20th, Dewey wrote to Mrs. Whitney for a copy of the description of her acre and a third. She replied on December 9th, proposing that the lane "now jointly held by you and me, by the side of Miss Este's field, shall be continued for, say, 30 feet past my lower boundary line," and "I shall leave the marking entirely to you of the upper boundary. The other three lines lie, of course, between your roadway (that is the roadway which was an eastern extension of the lane), Miss Este's acre, and the Billings line." It was natural that Mrs. Whitney did not wish that the roadway, though it was originally a part of lot No. 1, should be taken as a part of her lot. She would then have left less than an acre and a third in her inclosure. This letter was not replied to; but it appears by Dewey's letter of November 29th to Miss Whitney that he at that time thought that the road running east from the Este purchase was a proper boundary. His explanation of this letter is that he had mistakenly supposed that this road was a distinct purchase, and was not a part of lot No. 1. The title of Mrs. Whitney in the fee of the lane was now brought to mind, and on December 3d Miss Whitney wrote to Dewey that it belonged to her sister-in-law and herself in common, and again on December 6th that the complication about the boat house and the lane did not occur to her until after the sale, and giving as the reason, which was undoubtedly the correct one, that, as her sister-in-law had been continuously away from the vicinity after the joint purchase, her pecuniary rights in the lane had passed out of mind. The Chellis deeds were sent to Mrs. Whitney on October 4, 1894, which con-

veyed to Mrs. Whitney one and one-third acres on lot No. 1, but which included in the lot a part of the roadway, subject to a right of way over it for his benefit, and gave her a right of way over the lane to the lake. A correspondence ensued for six months, which in part related to propositions for settlement of the controversy, and which it would serve no useful purpose to recite, but which ended in Miss Whitney's executing a deed, acknowledged April 26, 1895, to Mrs. Whitney of part of No. 1, the undivided half of a piece of roadway in the southwest corner of No. 1, of 30 feet square (both parcels making one and one-third acres), the undivided half of the lane, and the north 14 feet of the boat-house site. A deed of the remaining parcels was tendered on May 13th to Dewey, with notice that, unless accepted by May 25th, Miss Whitney would rescind the contract. This action was thereupon commenced in the state court, and was removed by the defendants to the United States circuit court. The circuit court decreed that Miss Whitney and Mrs. Whitney should deliver to the complainant a quitclaim deed of the land in question, less an acre and a third, bounded as indicated in Mrs. Whitney's letter of December 9, 1893, who was also to have a perpetual right of way over the complainant's land, to be reserved in the deed. The decree also provided for the complainant's mortgage deed to Miss Whitney, and limited Mrs. Whitney's title to the acre and a third and right of way to the highway.

It appears from the foregoing facts that Miss Whitney had the legal title of a tract of land of about seven acres, with buildings thereon, near Lake Placid; that, as between herself and her sister-in-law, the latter owned one and one-third acres of a three-acre parcel, and half of the lane to Mirror Lake, and of a boat-house site of 30 feet front; that, before the sale to Dewey, Miss Whitney had obtained Mrs. Whitney's consent to a sale of the entire property, but accompanied with the wish that her acre and a third should be reserved. The initial and an important part of the case is that Miss Whitney was clothed with power to sell the whole land, and that the only restriction was a hope that she would not sell Mrs. Whitney's part of lot No. 1. The origin of the difficulty was Miss Whitney's hurried acceptance of Dewey's proposition to purchase at a time when the equities in regard to the ownership of the property had passed from her mind. When she did recollect the facts in regard to the boat house, she undertook, with consideration and courtesy both to Mrs. Whitney and to Dewey, to fulfill her agreement to sell, and to buy another site for her sister-in-law. The latter part of her undertaking she could not accomplish, but she did not recede from her agreement. Meanwhile, during the continuance of the discussions in regard to the terms of the deeds, and after May, 1894, Dewey was expending money in the development of the property and of other adjoining land which he bought.

The case is put by the defendants as if the vendee before the execution of the deed, but after acceptance of the vendor's offer and partial payment, had received notice of the outstanding title of a third person, but persisted in expenditures and in the demand for a deed, notwithstanding such notice. In such case the vendee is

not a bona fide purchaser without notice. That doctrine "has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase money fully paid." *Villa v. Rodriguez*, 12 Wall. 323, 338; *Lytle v. Lansing*, 147 U. S. 59, 70, 13 Sup. Ct. 254; *Wormley v. Wormley*, 8 Wheat. 421, 449. This case does not rest upon the doctrine that Dewey was a purchaser without notice of outstanding equities, but upon the fact that the vendor, who was clothed with power to sell every part of the land of which she had the legal title, did make a sale, except the acre and a third, which carried with it a right of way of necessity to the highway, and that Dewey knew from the vendor that Mrs. Whitney had been consulted, and objected only to the sale of her part of the Brewster lot. Permission having been given to sell her equities, subsequent notice that they ought not to have been sold is not effective. It is true that both ladies were under a misapprehension because they had forgotten the details of the title, and perhaps if they had remembered everything they would have sold as Miss Whitney did sell; but this forgetfulness of a minor detail is not one of the class of unilateral mistakes which entitles a party who made the mistake, and is the sufferer, to relief. *Moffett, Hodgkins & Clarke Co. v. City of Rochester* (Oct. term, 1898) 33 C. C. A. 319, 91 Fed. 28.

We perceive no escape from the conclusion that the court is compelled to carry out the agreement of the parties as made, and as intended to be made under the authority conferred by Mrs. Whitney, especially in view of the complainant's immediate possession and his expenditures in improvements and upon other purchases in the vicinity. The location of Mrs. Whitney's acre and a third remains to be designated, and upon this part of the case we concur in the suggestions of the circuit court, which seem to us to be very pertinent. The court said:

"In determining this question [that of the location of Mrs. Whitney's lot], it should be remembered that the complainant had full and timely notice of Mrs. Whitney's interest, and that he was not justified in relying wholly upon the representations of others. If he wanted definite information regarding Mrs. Whitney's claim, he should have applied directly to her. It is entirely clear that neither party to the contract knew at the time it was entered into precisely where Mrs. Whitney's piece was situated. The descriptions were all general, vague, and uncertain. It certainly was not settled at the time of the original purchase from Brewster, neither was it settled by agreement between the defendants prior to the sale to the complainant. If then the location was not agreed upon between Mrs. Whitney and the complainant, the court must locate it with reference to all the testimony, and upon such principles as are equitable, taking the entire situation into consideration."

The court, after quoting Dewey's letters of November 20th and November 29th, also Mrs. Whitney's letter of December 9th, says:

"Thus it may be said that the minds of the parties met when all were endeavoring to arrive at a fair settlement, and before the situation was obscured by the disputes and misunderstandings which subsequently arose. Furthermore, it is thought that this is the location which the court would have selected if compelled to fix the boundaries had the dispute arisen between the defendants before the sale to the complainant. It would be inequitable to

reduce Mrs. Whitney's lot by a strip 30 feet wide, running its entire length. She would then have not an acre and a third, but an acre and a third minus a strip 30 feet wide. Thus construed, the contract is perfectly intelligible and capable of execution. The complainant purchased all the land to which Miss Whitney held title, less Mrs. Whitney's acre and a third, which is located as before stated, with the right of way to the public road which the law gives and which the complainant concedes."

The decree of the circuit court is affirmed, with costs in this court.

NELSON et al. v. LOWNDES COUNTY.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1899.)

No. 756.

1. EQUITY PRACTICE—NECESSITY OF CROSS BILL.

Where a defendant files no cross bill, he cannot be granted affirmative relief, beyond such as necessarily follows the dismissal of the bill.

2. REVIEW IN EQUITY—MUST BE BY APPEAL.

An appeal is the proper mode of review in equity, and a decree of a circuit court in equity cannot be brought to the circuit court of appeals for review by writ of error.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

The Land, Mortgage, Investment & Agency Company of America, Limited, —an English corporation,—owned a tract of land in Lowndes county, Miss. This tract of land was sold by said company on June 4, 1894, to the county of Lowndes, for the sum of \$6,000. The county of Lowndes paid \$1,000 cash, and the board of supervisors gave obligations of the county for payment of balance of purchase money,—10 notes, of \$500 each, payable January 1, 1895, to January 1, 1904, inclusive. These notes were secured by a trust deed on the land. Notes of the county for the payment of interest annually were likewise executed by the board of supervisors of the county. All these notes of the county were payable to the Land, Mortgage, Investment & Agency Company of America, Limited, at the Commercial Bank of Selma, Ala. In December of 1896 the Commercial Bank of Selma, where the notes were payable, having failed, the president of the board of supervisors of Lowndes county sent to W. R. Nelson, who was the trustee of the deed of trust of the English company, New York exchange for \$820, to cover notes (\$500 principal and \$320 interest) due by the county on January 1, 1897. Through error, the draft was made payable to the British & American Mortgage Company. W. R. Nelson returned the draft, and requested that a draft payable to the Loan Company of Alabama be sent him. Franklin, president of the board, wrote Nelson that the county did not know the Loan Company of Alabama in the transaction, but requested Nelson to send notes to some bank at Columbus, Miss., and assured Nelson that, if such was done, the notes would be paid promptly on presentation. Nelson declined to do this. Franklin, president of the board of supervisors, then sent New York exchange for \$820 to the City National Bank, of Selma, Ala., payable to the said Land, Mortgage, Investment & Agency Company of America, Limited, who were the payees of the notes, and requested the City National Bank to call on Nelson and pay the notes. Nelson refused to accept it, as it was not payable to the Loan Company of Alabama. The county of Lowndes then, through the Columbus Insurance & Banking Company (a bank in Columbus, Lowndes county), requested the City National Bank of Selma to pay to W. R. Nelson the sum due on the two notes, in money, whenever he (W. R. Nelson) would produce the notes properly indorsed. The Selma bank declined to do this, as they would not guaranty Nelson's indorsement of the notes. The county of Lowndes

then, through the same Columbus Bank, instructed the City National Bank to pay all of the notes (principal and interest accrued) to whomsoever might have them, and that the county would assume all responsibility for indorsements. Nelson replied to the Selma bank as follows:

"Law Office of W. R. Nelson.

"Selma, Ala., Feby. 17th, 1897.

"Mr. A. G. Parish, Cashier, Selma, Ala.—Dear Sir: The note from Columbus Ins. & Banking Co., sent over by you, received. I take it for granted that you are prepared to tender the \$4,366.30 in matter of notes of Lowndes county; but you did not say so. However, if tendered, I'd decline, for two reasons: 1st, notes and trust deed have been forwarded our attorney in Columbus for collection, or advertisement of the property; and, 2nd, the amount of \$4,366.30 would not pay the claim, as it now stands.

"Yours, truly,

W. R. Nelson."

At the next meeting of the board of supervisors of Lowndes county after Nelson's refusal of February 17, 1897, to accept the money (principal and interest to date), the board passed the following:

"Order of Board of Supervisors, Lowndes County, March 3, 1897.

"The sum of \$4,450.00 is hereby placed in the hands of C. L. Lincoln, clerk of the board, and clerk of the chancery court of Lowndes county, Mississippi, with instructions to pay to the Land, Mortgage, Investment & Agency Company of America, Limited, or its assignees, upon presentation to him, and all interest accrued to date of presentation, the notes of Lowndes county, Mississippi, executed on the 4th day of June, 1894, payable to the Land, Mortgage, Investment & Agency Company of America, Limited, as follows:

"One note for \$500.00,	due 1st January, 1897,
" " " 500.00,	" 1st January, 1898,
" " " 500.00,	" 1st January, 1899,
" " " 500.00,	" 1st January, 1900,
" " " 500.00,	" 1st January, 1901,
" " " 500.00,	" 1st January, 1902,
" " " 500.00,	" 1st January, 1903,
" " " 500.00,	" 1st January, 1904,
" " " 320.00,	" 1st January, 1897,

—and interest that may be due on said above-described notes up to date of presentation, as contained and represented by a note of \$280.00, dated June 4, 1894, and due January 1, 1898. Or, in default of any presentation of said notes for payment, said C. L. Lincoln, clerk of this board, and clerk of the chancery court of said Lowndes county, is ordered to pay said money as he may be directed by the chancery court of Lowndes county, Mississippi, or any other court of competent jurisdiction. It is ordered that a warrant be drawn on the county treasurer, in favor of C. L. Lincoln, chancery clerk, for said sum of \$4,450.00 payable out of county fund.

"Date of order of board and warrant, 3d March, 1897."

W. R. Nelson, trustee, advertised the tract of land for sale. As the notes were executed to the Land, Mortgage, Investment & Agency Company, Limited, and the Loan Company of Alabama demanded the money, the county instituted this suit by bill of interpleader, containing the following tender: "Complainant tenders with this bill of complaint, and makes that tender continuous, the full amount of its notes maturing January 1, 1897, and all interest thereon, and, acting under its option to call in all its notes, makes tender of the full amount, principal and all accrued interest, to date of presentation of all said notes executed as aforesaid on June 4, 1894, to the Land, Mortgage, Investment & Agency Company of America, Limited, of London, England, and makes that tender continuous. This tender is made to the Land, Mortgage, Investment & Agency Company of America, Limited, of London, England, to the Loan Company of Alabama, to Wm. R. Nelson, or to whomsoever may be the legal holders of said notes." The prayer of the bill of interpleader was as follows: "Complainant asks for process of this court to all

the defendants hereinabove named, and for an order enjoining the said Wm. R. Nelson and all of the other defendants from foreclosing of the said deed of trust until this cause shall have been heard and determined by this court, and that all of said defendants interplead and propound their respective claims to the said notes. And complainant asks that this court will enforce the right of complainant to call in and pay off all of said notes upon payment of principal and accrued interest to date of payment, and that this cause be referred to a commissioner to state an account of the amount due thereon, and that, upon failure of defendants to deliver up its said notes for payment, that complainant be permitted to leave the amount thereof in the custody of this court, and that this court will decree the cancellation of the deed of trust executed as aforesaid to secure them. Or, if complainant has not asked for proper relief, for general relief." The injunction prayed for was issued.

W. R. Nelson, in his individual character, and as trustee for the benefit of the English company and the Loan Company of Alabama, jointly, filed a very lengthy answer, to the effect that the notes were the property of the Land, Mortgage, Investment & Agency Company of America, Limited, of London, England, and that the county of Lowndes was in default for not paying the amount of said notes to the Loan Company of Alabama, or Nelson, trustee, and that they had a right to proceed to the foreclosure of the trust deed and the sale of the mortgaged property. This answer was accompanied with exhibits of all the interesting correspondence between the parties from the beginning, and concluded with a prayer that the bill be dismissed, the injunction be dissolved, and for a decree of 10 per cent. on the amount due on the notes, because of the damage wrongfully sustained by suing out the injunction. The English company filed an unsworn answer, asserting their ownership of the notes, and adopting the answer of Nelson and the Loan Company of Alabama.

The matter was subsequently brought before the judge at chambers, and the following decree was rendered:

"Be it remembered that on this 20th day of January, 1898, came on to be heard and considered at Columbus, by the written consent of all parties, the motion of all the above-mentioned defendants to dissolve the injunction which had been granted in this case for the reasons given in their motion to dissolve the same. And the court having considered fully the said motion, and all the pleadings, exhibits, and proof, and being satisfied that the grounds taken in said motion for dissolution are well taken, it is therefore ordered, adjudged, and decreed that the complainants have ten days in which to tender the amount of principal and interest as promised in said notes, from maturity up to the present time, to the holders of the notes, or their attorneys of record, and, if not so tendered, the injunction be, and the same is hereby, dissolved after the expiration of said ten days. It is further ordered and decreed by the court that the liability of complainant for the five per cent. fees for the trustee, and the ten per cent. on the amount of the debt for attorney's fees, be held for adjudication and decision until the hearing of the bill in this case at a future term of the court. The cost of the injunction to be paid by the complainants.

"So adjudged at chambers this 20th January, 1898."

At the term following, the following decree was entered:

"Be it remembered that on this, the 13th day of April, 1898, came on to be heard and considered this case, on bill, answer, exhibits, and proof; and it appearing to the court that since the decree of this court, rendered on the 20th day of January, 1898, at chambers, directing a dissolution of the injunction unless the amount of principal and interest due on the notes should be tendered within ten days, the complainant has paid the amount to defendants, and it now being considered by the court that the county is not liable to pay the ten per cent. lawyer's fee, nor the five per cent. fee to the trustee, it is so ordered and adjudged. It is further ordered and decreed that the complainant shall pay all the costs of this suit, for which an execution may issue as at law. The motion of complainant to remand the cause to state court is hereby overruled by the court. The defendants' petition for an appeal from the decree refusing defendants' attorney's and trustee's fees to appeal court of the

Fifth circuit, at New Orleans, is granted by the court, upon the complainant entering into bond for costs of the appeal in the sum of two hundred dollars within sixty days from this date.

"Done in open court.

H. C. Niles, Judge."

The record does not show that any bond was given for an appeal, but on the same day the last-mentioned decree was rendered a petition for a writ of error to this court was filed, and was allowed, upon a bond in the sum of \$300, to be conditioned according to law. On May 16th following, a bond for writ of error was given, and approved by the judge of the court, and thereupon a writ of error removing this case to this court was duly issued.

J. A. Orr, for plaintiffs in error.

Wm. Baldwin, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

As the defendants below filed no cross bill, and as the answer prayed only for a dissolution of the injunction, and 10 per cent. damages for its wrongful issue, no affirmative relief, beyond such as necessarily would follow the dismissal of the bill, could have been properly awarded against the complainant in the lower court. See *Bradford v. Bank*, 13 How. 57; *Book v. Mining Co.*, 58 Fed. 827; *Moran v. Hagerman*, 12 C. C. A. 239, 64 Fed. 499.

The case has been exhaustively argued on the proposition that the notes and deed of trust in controversy were void because, while having full authority to purchase the lands described in the deed, for a poor farm, the county of Lowndes had no express power to issue the notes in question in payment therefor. From the examination we have given the evidence in the record, if we should hold that the notes and deed of trust were not void for the reason given, but were in all respects valid, we would still doubt whether, in equity and good conscience, the defendants below, under the circumstances shown by the pleadings and evidence, were entitled, after the payment of the principal and interest of the notes, to further prosecute the foreclosure of the trust deed to recover counsel fees and trustee compensation. As we view the case, however, we decide none of these questions, because we are of opinion that the writ of error must be dismissed.

The suit below was properly instituted, prosecuted, and heard as a suit in equity. Under the judiciary act of 1789, and the act of March 3, 1803, a writ of error in an admiralty case was dismissed; the court holding that "causes of admiralty and maritime jurisdiction, or in equity, cannot be removed to an appellate court by writ of error." *The San Pedro*, 2 Wheat. 132. "A writ of error is not the proper mode of bringing up for review a decree in chancery. It should be brought up by an appeal." *McCollum v. Eager*, 2 How. 61. In *Taylor v. Savage*, 2 How. 394, an appeal in a case at law was dismissed. "Notwithstanding the peculiarities of the Civil Code of Louisiana, the distinctions between law and equity must be preserved in the federal courts in this state; and equity causes can only be brought to the supreme court for review by appeal, and causes at law by writ of error." *Walker v. Dreville*, 12 Wall. 440.

"When a proceeding below is, in its essential nature, a foreclosure of a mortgage in chancery, an appeal is the only proper mode of bringing it to the supreme court." *Marin v. Lalley*, 17 Wall. 14. "There are two principal methods known to English jurisprudence, and to the jurisprudence of the federal courts, by which cases may be removed from an inferior to an appellate court for review. These are the writ of error and the appeal. There may be, and there are, other exceptional modes, such as the writ of certiorari at common law, and a certificate of division of opinion, under the acts of congress. The appeal, which is the only mode by which a decree in chancery or in admiralty can be brought from an inferior federal court to this court, does bring up the whole case for re-examination on all the merits, whether of law or fact, and for consideration on these as though no decree had ever been rendered. The writ of error is used to bring up for review all other cases, and, when thus brought here, the cases are not open for re-examination on their whole merits, but every controverted question of fact is excluded from consideration; and only such errors as this court can see that the inferior court committed, and not all of these, can be the subject of this court's corrective power." *Murdock v. City of Memphis*, 20 Wall. 621, 622. Further on it is said in the same opinion (speaking of a writ of error): "But this writ cannot bring a decree in chancery or admiralty from the circuit court to this court for review. It has no such effect; and we dismiss, every day, cases brought here by writ of error to a circuit court, because they can only be brought here by appeal, and the writ of error does not extend to them." "An appeal is the only mode by which the appellate jurisdiction of this court can be exercised in equity suits brought in the courts of the United States, and it does not lie before a final decree has been rendered." *Hayes v. Fischer*, 102 U. S. 121. And see *Improvement Co. v. Bradbury*, 132 U. S. 515, 10 Sup. Ct. 177; *Fleitas v. Richardson*, 147 U. S. 544, 13 Sup. Ct. 429; *Land Trust v. Hoffman*, 6 C. C. A. 358, 57 Fed. 336. While the decree recites, "The defendants' petition for an appeal from the decree refusing defendants' attorney's and trustee's fees to appeal court of the Fifth circuit, at New Orleans, is granted by the court, upon the complainant entering into bond for costs of the appeal, in the sum of two hundred dollars, within sixty days from this date," the record shows no such petition, nor that such appeal was perfected; but the record does show that the petition was for a writ of error, which was allowed, issued, and filed, and proper bond therefor accepted by the trial judge. We are clear that, if the case has been removed to this court for review, it is here solely on a writ of error, and that for the reasons given above the writ must be dismissed; and it is so ordered.

SOUTH CAROLINA & G. R. CO. v. CAROLINA, C. G. & C. RY. CO.

FARMERS' LOAN & TRUST CO. v. SAME.

(Circuit Court of Appeals, Fourth Circuit. March 31, 1899.)

No. 260.

1. RAILROADS—RECEIVERSHIP—CONTRACT WITH RECEIVER FOR OPERATION OF ROAD.

The receiver of a short line of railroad, the earnings of which were less than the expenses of operation, entered into a contract with a company owning a connecting line by which the latter agreed to operate the road, keeping the accounts thereof in the receiver's name and subject to his inspection, and charging against the road only the actual cost of its operation, including ordinary and necessary repairs. *Held*, that such contract was not one of lease, but one under which the second company operated the road as agent of the receiver.

2. SAME—POWERS OF RECEIVER.

A receiver of a railroad may be authorized by the court to make any contract relating to the road or its operation, during the term of the receivership, which the corporation of which he is receiver had power to make.

3. SAME—RATIFICATION OF PRIOR CONTRACT BY RECEIVER.

A receiver of a railroad, appointed by a state court in a cause in which all parties interested in the property were before the court, with the approval of the court entered into a contract with another company for the operation of the road. Subsequently the cause was removed into a federal court, and there consolidated with another, and in such court the same person was appointed receiver. The operating contract previously made, though terminable on 15 days' notice, was continued by the receiver, and was several times before the court, and recognized by orders made on the petition of the receiver; and no objection was made to its continuance by any of the parties. *Held*, that such action amounted to a ratification or adoption of the contract, which rendered it as valid and binding on the receiver, as an officer of the federal court, as though expressly authorized by that court.

4. SAME—EXPENSES OF OPERATION UNDER RECEIVER—DAMAGES FOR INJURIES.

Damages for personal injuries caused by the negligence of employes are incidental to the operation of every railroad, and may properly be classed as a part of the operating expenses, whether the road is operated by a corporation or a receiver; and the liability for such damages, as between themselves, is a legitimate subject of agreement between the parties to a contract for the operation of a road, who deal with each other on equal terms.

5. SAME—CONTRACT FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE—POWERS OF RECEIVER.

A receiver of a railroad and a company owning a connecting line entered into a contract by which the company agreed to operate the receiver's road without any direct compensation therefor, beyond the actual expenses of such operation, and which, in effect, constituted it the receiver's agent for the purpose. Under the statutes of the state, a railroad company was authorized to make a contract to run, use, or operate the road of another company on such terms as might be agreed upon. *Held*, that a provision of such contract that the company should not be held responsible in any way for any accident or damages to either persons or property that might occur on the line of such road, in its operation, but should be held harmless and indemnified from any suits or damages by reason thereof, was not ultra vires, either on the part of the company or the receiver, when construed, as it must be, to exclude liabilities arising

from the recklessness or gross carelessness of the company, and to apply only to such as might arise in its operation of the road in good faith, and in the exercise of due care in selecting its employes, from the mere negligence of such employes.

6. SAME—PUBLIC POLICY.

Nor is such contract, as so construed, void, as against public policy, on the ground that it exempts the company from the consequences of its own negligence, where the parties in making it stood on an equality, and it is shown to have been advantageous to the receiver, since, for the mere negligence of any agent whom he might have employed to perform the service, the receiver, and not the agent, would be liable.

Appeal from the Circuit Court of the United States for the District of South Carolina.

The Carolina, Cumberland Gap & Chicago Railroad Company was a corporation formed by the consolidation and merger of various railroad companies chartered by the state of South Carolina with a view to the construction of a railroad from the town of Aiken, in South Carolina, to a point in the valley of the Ohio river; and 24 miles were constructed, extending from the town of Aiken to the town of Edgefield. A mortgage was executed November 1, 1882, to the Farmers' Loan & Trust Company of New York, to secure bonds to the amount of \$550,000; and upon the construction of this section, in the year 1888, 550 bonds, each of the value of \$1,000, were issued. On May 1, 1890, the road was leased to the receiver of the South Carolina Railway Company, at an annual rental of \$18,750, less taxes, for the period of the receivership, which continued until May 15th in the year 1894, when, the South Carolina Railway Company having been sold, the South Carolina & Georgia Railroad Company became its successor. On November 27, 1893, Neil McDonald, claiming to be the holder of a large amount of the first mortgage bonds, commenced proceedings in the court of common pleas for Aiken county, in the state of South Carolina, alleging that coupons of said bonds to the amount of \$3,210 were past due and unpaid, that the corporation was insolvent, and that its equipment was totally inadequate to pay its first mortgage bonds, and praying the appointment of a receiver; and on December 1, 1893, Wilbur F. Herbert was appointed by the presiding judge of that court receiver of the company, with the usual powers of receivers, and gave bond, filed an inventory, and took charge of the road. In this proceeding there were no parties except the plaintiff and the defendant company. On April 27, 1894, an order was entered giving plaintiff leave to amend his proceedings by bringing in as defendants T. G. Croft and others, holders of a small amount of bonds and stock, and also giving leave to join as party plaintiff the Farmers' Loan & Trust Company. Leave was also granted to plaintiff to amend his complaint by adding such allegations as might be necessary to obtain a decree of foreclosure. On November 28, 1894, the Farmers' Loan & Trust Company filed a petition in said cause, setting forth that it is one of the plaintiffs in that suit, that it is a nonresident, that the matter in dispute exceeded in amount the sum of \$2,000, that the order making it a party plaintiff had only come to its knowledge since the last term of the court, and praying that the cause be removed to the United States circuit court. A removal bond was filed with the petition, but no order of removal was entered. On November 30, 1894, the Farmers' Loan & Trust Company filed a bill in the United States circuit court for the foreclosure of the mortgage; and on the same day Wilbur F. Herbert was appointed receiver, with the usual powers of receivers, and he was directed to take possession, and to operate the road. There was no reference, either in the bill or in the order appointing the receiver, to the proceedings in the state court. On January 17, 1895, an order was entered in the United States circuit court, in a cause entitled "Neil McDonald, Plaintiff, v. The Carolina, Cumberland Gap & Chicago Railway Company and others, Defendants," reciting the consent of all the counsel therein to the removal from the state court, and ordering that the same be removed, and that the cause be consolidated with the suit of the Farmers' Loan & Trust Company. Thenceforth all the orders entered were entitled in both causes. When the South Carolina Railway was sold, and the

receivership terminated, the agreement for the operation of the road from Aiken to Edgefield by said receiver was, by its terms, ended, and a new agreement between the South Carolina & Georgia Railroad Company, its successor, and Wilbur F. Herbert, was entered into, by a correspondence which is as follows:

"June 4th, 1894.

"Mr. W. F. Herbert, Jr., Receiver Carolina, Cumberland Gap & Chicago Railway Co., No. 6 Wall Street, N. Y. City—Dear Sir: Referring to our conversation this morning, I write to make the following proposition for the operation of your railroad, viz.: The old arrangement with the receiver of the South Carolina Railway Company, to pay a fixed rental, to continue until May 15th, 1894. From May 15th, 1894, to July 15th, 1894, the South Carolina and Georgia R. R. Co. to operate the Carolina, Cumberland Gap & Chicago Ry., without making any charge, under the head of general expenses, for the auditing of and keeping of its accounts. The present basis of divisions of earnings between the two roads to remain in force. The South Carolina and Georgia R. R. Co. to turn over to the Carolina, Cumberland Gap & Chicago Railway Co. all net revenue earned by said road, after deducting the actual cost of operation; the said cost of operation to consist of the maintenance of way and the structures for the road, cost of conducting transportation, and the cost of maintaining the machinery and equipment used in its operation. The terms, viz. 'general expenses,' 'maintenance of way and structures,' 'maintenance of equipment,' and 'conducting transportation,' being used as now applied to the distribution of expenses of the South Carolina and Georgia R. R. Co., or as applied by the interstate commerce commission in the distribution of expenses in 1893-94. Settlements of accounts to be made monthly, within thirty days after the close of each month, based on the monthly report of the operation of the road. The proportion of coaches used in running trains between Edgefield and Augusta to be furnished by each company on the basis of mileage. The South Carolina & Georgia R. R. Co. not to be responsible for any taxes or assessments of any character, either state, county, or municipal; nor is it to be responsible for any of the expenses which have been, or may hereafter be, incurred by the receiver of the Carolina, Cumberland Gap and Chicago R. R., or any of its officers, agents, or employés, nor for any of the expenses of the Carolina, Cumberland Gap & Chicago Ry. Co., or its officers, agents, or employés. The South Carolina & Georgia R. R. not to be held responsible to the said Carolina, Cumberland Gap & Chicago Ry. Co., or its receiver, or accountable in any way, for any accident or damages to either persons or property that may occur on the line of the Carolina, Cumberland Gap & Chicago Ry. in its operation, and to be held harmless and be indemnified from any suits, actions, or damages against said South Carolina & Georgia R. R. Co. by reason thereof. This letter (pending negotiations for a more permanent agreement), with your reply confirming the same, to constitute a temporary agreement or contract to July 15th, 1894. Yours, truly,

"[Signed]

Charles Parsons, President."

"Carolina, Cumberland Gap & Chicago Railway Company.

"Office, 6 Wall Street, New York.

"Wilbur F. Herbert, Jr., Receiver.

"June 5th, 1894.

"Charles Parsons, Esq., Pres. S. C. & G. R. R. Co., No. 96 Broadway, N. Y.—Dear Sir: Your proposition for the operation of this road, dated the 4th inst., is received; and the same is accepted, subject to the approval of the court, and to one or two minor provisions, to wit: That charges for labor, material, and supplies should be made at rates not to exceed those paid by your road; that extraordinary repairs to roadway, bridges, and rolling stock shall not be made until I have been advised thereof; and, lastly, that this company's accounts, as kept by your auditor, shall at all times be open to the inspection of the writer. I would request a statement of earnings and expenses for the month of May at as early a date as possible, and that a statement of the gross earnings be rendered to me weekly thereafter. Yours, truly,

"[Signed]

Wilbur F. Herbert, Jr., Receiver."

"Carolina, Cumberland Gap and Chicago Railway Company.

"Office, 6 Wall Street, New York.

"Wilbur F. Herbert, Jr., Receiver.

"July 9th, 1894.

"Mr. W. F. Herbert, Jr., Receiver Carolina, Cumberland Gap & Chicago Ry., No. 6 Wall St., City—Dear Sir: Referring to our conversation of this day, and to agreement with you by this company for the operation of the C., C. G. & C. Ry., as set forth in letter of our president to you under date of June 4th, 1894, and in your letter to our president dated June 5th, '94, I beg to state my understanding of the agreement which we made, which was that the agreement covered by the above-mentioned letters shall continue after July 15th, 1894, subject to termination by written notice made by either party to the other at least fifteen days prior to the termination under such notice; such notice to be made by you in behalf of the C., C. G. & C. Ry. Co., and by either the president of this company or myself in behalf of the S. C. & G. Ry. Co. Will you kindly reply; such reply, with this letter, to constitute the agreement? Yours, truly,
Charles Parsons, Jr., Vice President."

"No. 6 Wall St., Room 127.

"July 11th, 1894.

"Charles Parsons, Jr., Esq., V. P. S. C. & G. Ry. Co., 96 B'way, N. Y.—Dear Sir: Your favor of the 9th inst. is received, and the proposition therein contained for the further continuance of our present agreement concerning the operation of this road is accepted, subject to the approval of the court; your letter, with this reply, to constitute an agreement which may be terminated upon 15 days' notice by either of the parties therein. Yours, truly,

"[Signed]

Wilbur F. Herbert, Jr., Receiver."

And thereupon the receiver filed his petition in the state court, setting forth the correspondence, and praying that he be allowed to enter into the agreement therein set forth. An order was entered by the judge of that court, August 22, 1894, authorizing him to enter into said agreement, and ratifying and approving his actings and doings under said agreement up to that date. It appears from the report of receiver, filed April 1, 1894, that the gross earnings of the road for the year ending December 31, 1893, were \$40,215.84, and the expenses \$41,350.20.

On January 4, 1895, shortly after his appointment as receiver in the United States court, Wilbur F. Herbert filed his petition in that court, setting forth his previous appointment in the state court in the suit of Neil McDonald, the agreement with the receiver of the South Carolina Railway Company, and the termination thereof, and that thereafter he had entered into an operating agreement with the South Carolina & Georgia Railway Company, as of date May 1, 1894, a copy of which he annexed to his petition, praying that it be taken as a part thereof. The petition stated that the principal business of his road was the transportation of rock quarried along its line, and that during the past three months that business had decreased to about one-fourth of its usual volume, and greatly reduced the revenue of the road; and a statement was filed exhibiting the gross earnings and operating expenses for the seven months preceding, showing a considerable deficit, and that he needed "for present disbursement the sum of \$6,274.27, which included a deficit of \$524.27, due the S. C. & Ga. R. R. Co., which is the result of the operation of the defendant road by said S. C. & Ga. R. R. Co. for the four months ending November 30, 1894." The petition stated that one of the trestles over Pace's branch was in an unsafe condition, and set forth the proceedings in the state court wherein the judge of that court had ordered the receiver to obtain estimates and make contracts necessary for its repair and reconstruction; and authority was asked to issue notes to pay for such repairs, and to pay a deficit of \$524.27 due the South Carolina & Georgia Railroad Company, which was the result of the operation of the road by said company for the four months ending November 30, 1894. Upon this petition an order was entered in the United States circuit court authorizing the receiver to borrow \$7,500 upon his notes for the payment of the work done on Pace's trestle, and other expenses necessary to

be paid by the receiver; said notes to be payable out of the earnings of the road. Subsequently, upon petition of receiver, reporting that the notes in that form could not be negotiated, and after notice to counsel for the trustees, an order was entered allowing the notes to be issued, and to be first liens upon the road; the trustee filing an answer submitting the matter to the discretion of the court, and stating that it had no suggestions in opposition. The form of certificate, which stated that the money was borrowed for the payment of repairs on the Pace's trestle, and other expenses necessary to be paid for by the receiver, as set forth in his petition, was approved by the circuit judge May 23, 1895. On August 31, 1895, a petition was filed by the receiver stating that the roadbed was in such condition that further operation would be dangerous to life, limb, and property, unless several thousand new cross-ties were laid to replace those that were old and decayed. With this petition were filed the affidavits of the general superintendent and road master of the South Carolina & Georgia Railroad Company, which company, as therein stated, was "operating the Carolina, Cumberland Gap & Chicago Railroad for the receiver of said road," and thereupon an order was entered allowing the receiver to purchase 7,000 cross-ties. On September 6, 1895, the receiver filed a petition stating that on June 25, 1895, an engine was wrecked upon the line of the defendant road by means of a spike driven between two rail joints by some person unknown, whereby the engineer, Parker, and fireman, Cherry, were badly injured, and asked leave of the court to compromise, for an inconsiderable sum, which had been agreed upon, the claims of said engineer and fireman, which, as stated in the petition, would "relieve said defendant road and the receiver from any further claim for damages by reason of said accident"; and an order was entered allowing the receiver to make the compromise, which order was on September 17th, vacated. On October 28, 1895, the South Carolina & Georgia Railroad Company filed a petition reciting the terms of the operating agreement, claiming that it was entitled to be indemnified against any suits, actions, or damages, and asking that provision for its proper protection be made in the decree of sale; the petition setting forth in detail the nature of the claims and suits against it growing out of the operation of the road. A decree for sale was entered September 7, 1895, and on October 30th the master commissioner reported the sale of the road to John D. Reynolds, for and on behalf of a committee of bondholders, for the sum of \$67,000; and to the report of sale was attached a copy of a notice given on the day of sale by the general manager of the South Carolina & Georgia Railroad Company, that that company had claims against the receiver for the amount of about \$5,000, and had also claims for reclamation, if his company should be held responsible for certain damage claims then pending. On January 16, 1896, the circuit judge, passing upon a motion for a distribution of a part of the proceeds of sale among the counsel in the cause, which was resisted by counsel for the South Carolina & Georgia Railroad until the suits then pending against it were determined, held that these actions, being based solely upon the negligence of the petitioner, its servants and agents, any contract with the receiver intended to indemnify it against its own negligence would be void on the ground of public policy, and therefore there was no sufficient reason to withhold the distribution of the fund until the pending suits were decided. He accordingly ordered the payment of \$5,000 to counsel for the trustees, and \$3,950 to other counsel in the cause; and with respect to so much of the petition as claimed that, by the terms of the operating agreement, the expense of operating the road over and above the income thereof was to be borne by the receiver, this decree provides as follows: "The amount due to the South Carolina & Georgia Railroad Company on its contract for operating the road must be paid. Let that account be adjusted, and when so adjusted be paid." On January 18th the circuit judge ordered that so much of the opinion as adjudged the contract to be void on the ground of public policy be modified, and granted leave to the petitioner to make the question as to its right of indemnity under the contract made with the receiver, and ordered that the funds be held by the special master subject to the decision of that question. On April 13, 1896, the deed for the road was executed by the master to the purchaser upon a condition that the conveyance should be subject to the payment of any claims against the proceeds which might be legally estab-

lished, to the extent of \$42,000, the balance of the purchase money unpaid; and the purchaser subsequently organized the Carolina & Cumberland Gap Railway Company, which is the respondent in this case. On June 3, 1897, the South Carolina & Georgia Railroad Company filed its petition in accordance with the order of January 18, 1896, stating that three suits growing out of the accident on June 25, 1895, had been prosecuted against it, and although they were defended by counsel of the highest standing, and by counsel selected by the receiver, verdicts to the amount of \$9,500 had been recovered against it in the court of common pleas for Edgefield county, which had been affirmed by the supreme court, and that certain other claims, of which a detailed statement was given, had not yet been adjusted. A committee of bondholders, upon their petition filed, were allowed to intervene and contest this claim. On June 3, 1897, counsel for the Carolina & Cumberland Gap Railway Company gave notice of a motion to dismiss this petition, and, after the hearing thereof, a decree was entered dismissing the same; and the appeal from this decree brings the cause here.

Joseph W. Barnwell and William B. Hornblower, for appellant.
Augustine T. Smythe, for appellee.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

BRAWLEY, District Judge (after stating the facts as above). The parties interested in this controversy are certain holders of the first mortgage bonds of the Carolina, Cumberland Gap & Chicago Railroad Company and the South Carolina & Georgia Railroad Company, which will hereinafter be designated as the appellant. These two companies were entirely independent of each other,—each free to manage its own affairs, and neither owing any duty to the other, except such as the law prescribed with respect to interchange of business. Those duties to the public, which the law imposes upon all railroad corporations, could not be invoked by one as against the other; and, while the statute permitted one to lease the other, it did not impose it as a duty. In entering into an agreement, each party was free to consult its own interest or inclination. The receiver of the one, and the president of the other, were men of sufficient intelligence to understand the condition and interest of their respective roads. As to the receiver, the record contains evidence of his standing among men of business; for in March, 1894, when Croft and others made an effort to remove him, 10 or 12 citizens of New York, some of whom are readily recognized as men of substance, holders of 492 of the 550 first mortgage bonds, united in a petition, sworn to by each of them, in which they state their belief that Herbert was "fully competent to act as receiver, and that he could fully protect the interest of all in any way interested in the railway company, and that any change would be prejudicial to all concerned." Among these bondholders will be found the names of the members of the committee which intervened to contest this claim; and the same bondholders, when the motion for the removal of the receiver was renewed before Judge Simonton in March, 1895, again united in the request for his retention. In November of the same year, long after this agreement had been made, and while the road was being operated under it, the counsel for the trustee moved and secured his appointment as receiver in the United States court. That he had the confidence of the court appears from the fact that all

of his recommendations seemed to have met its approval, and nothing appears to impeach his character or capability. We have, then, as one of the parties to this contract, a person whom nine-tenths of the bondholders, the trustee, and the judges of the state court and of the United States court have selected as a fit and proper person to manage this road. When the contract with the receiver of the South Carolina Railway Company terminated, he had either to operate the road himself, or to have it operated by another, or to stop operations altogether. With its meager rolling stock and beggarly receipts, which in the year preceding the making of this contract were insufficient to pay operating expenses, it cannot be imputed to him as a fault that he did not undertake to operate the road himself; and, if it were to be kept as a going concern, he must, of necessity, make some operating agreement, either with the Southern Railway, which crossed it at Trenton, or with the South Carolina & Georgia Railroad Company, with which it connected at Aiken. As it appears from the petition of the receiver, filed January 4, 1895, the principal business of the road was the transportation of rock from a quarry on its line. This rock was used in building the jetties in Charleston. Naturally, therefore, the last-named company was the most likely to make a favorable arrangement with him. He had, it appears, made a satisfactory agreement with Mr. Chamberlain, the receiver of the South Carolina Railway Company. It is beyond our province now to go into that agreement. Whether Mr. Chamberlain made it with the expectation of so far encouraging the owners of the property as to lead them to extend their road, or whether its business at the time was better than it subsequently became, or whether it was simply an improvident contract on his part, it is not for us to determine. It is sufficient to say that Mr. Parsons was unwilling to enter into any such arrangement when he became the president of the new company, and in view of the earnings of the year before, as shown in the record, it is hardly to be conceived that any sensible business man, having due regard to the interests of his own company, would pay any such sum for the privilege of operating this road. That he had some interest in keeping the road going is obvious, for his road derived a certain amount of business from it, and this doubtless was the consideration that moved him. The contract was not made in haste, but apparently with due deliberation. The receiver had the benefit of the advice of counsel, for it appears from the itemized statement of the account of receiver's counsel in New York, contained in the record, that this agreement was the subject of long and frequent consultations between the receiver and his counsel. As this account was submitted to the circuit judge, and compensation was allowed for it, it is to be presumed that the judge considered the advice to be worth something.

The order of Judge Aldrich appointing Herbert receiver, December 1, 1893, provides as follows:

"Said receiver is hereby authorized and empowered to maintain and operate said railroad, and hold, preserve, and care for said property and assets, with power to do all such acts and make such contracts as are necessary or proper

to enable him to fully carry out and discharge the purposes of this appointment; and the said Willbur F. Herbert, as such receiver, shall succeed to all the rights and assets of said Carolina, Cumberland Gap & Chicago Railway Company."

And, after providing for his giving a bond and appointing a local attorney, it adds that he may apply to the court or judge thereof from time to time for such instructions and orders as may be deemed necessary.

In the nature of things, a receiver cannot, in person, perform the manifold duties required in the operation of a railroad. Engineers, firemen, conductors, trainmen, trackmen, a general manager or superintendent to supervise, and accountants to keep the accounts, are all necessary. In other words, he must have agents to do the physical work demanded in its operation; and whether he selects these various employes himself, or chooses a general agent who is charged with the duty, he himself keeping a general supervision over the whole, and reserving the right to terminate such general agency whenever dissatisfied with the conduct of the business, is a question of detail, resting in his sound discretion, subject always to the discretion and control of the court which appoints him. It is an elementary principle that an agent who exercises ordinary diligence and reasonable skill in conducting the business intrusted to him, conformably to the usages and customs applicable to the particular business for which he is engaged, is entitled to be reimbursed all expenses and advances properly incurred; and, unless guilty of fraud or misconduct or gross negligence, he will be reimbursed for all losses that are the immediate results of his employment. A request to undertake an agency or employment operates as an implied request on the part of the principal, not only to incur the expenditures necessary to its proper performance, but also as an implied promise to indemnify the agent for any losses or damages directly incurred in the proper discharge of the duties for which he is employed. Looking at the correspondence between Mr. Parsons and Mr. Herbert, it seems to be nothing more than what on its face it purports to be,—an agreement whereby the South Carolina & Georgia Railroad Company undertook, upon the terms therein stated, "to operate the Carolina, Cumberland Gap & Chicago Railroad Company." It is clearly not a lease, and the obligations growing out of that relation commonly implied by law, and which are binding unless expressly stipulated against, have no application. The record shows that the accounts were kept in the name of the receiver, and all the net revenue earned by the road was to be turned over to him, after deducting the actual cost of operation. No extraordinary repairs to roadway, bridges, or rolling stock were to be made until he was advised thereof; and charges for labor, material, and supplies were to be made at rates not exceeding those paid by the South Carolina & Georgia Railroad Company. The accounts were to be at all times open to his inspection, a statement of the gross earnings was to be rendered to him weekly, settlements were to be made monthly, and the agreement was terminable by either party upon 15 days' notice.

The particular clause which has given rise to this litigation is as follows:

"The South Carolina and Georgia R. R. not to be held responsible to the said Carolina, Cumberland Gap and Chicago Ry. Co., or its receiver, or accountable in any way, for any accident or damages to either persons or property that may occur on the line of the Carolina, Cumberland Gap and Chicago Ry. in its operation, and to be held harmless and be indemnified from any suits, actions, or damages against said South Carolina and Georgia R. R. Co. by reason thereof."

While it may be that, if this agreement had been drawn by lawyers, its different terms and conditions might have been expressed more artificially, it would be difficult to make plainer the true intent and meaning of it as it was understood by the plain men of business who entered into it. Every word chosen has a well-understood meaning among railroad men, and the obvious meaning of plain terms cannot be rejected because ingenious reasoning may give to them an interpretation involving consequences at which the legal mind may affect to be shocked. That Mr. Parsons, whom the learned judge below characterizes as a man of great ability and experience in railroad management, would enter into any agreement whereby all the profits were to go to another, and all the losses and risks were to fall upon him, is incredible. Every one at all acquainted with railroad management knows that accidents will happen, and that nearly every so-called accident can be traced back to some carelessness, some neglect, some inattention; that the most careful of men will sometimes slip, the most vigilant will sometimes sleep. Damages arising from negligence are so much the usual incident of railroad operation, that they are classed as operating expenses, and it is not to be believed that any one who undertook to make an agreement to operate a railroad should fail to take them into account. When, therefore, Mr. Parsons stipulated that he was not to be held responsible or "accountable in any way for any accidents or damages to either persons or property," and that he was to be "held harmless and be indemnified from any such suits, actions, or damages against the said South Carolina and Georgia Railroad Company by reason thereof," he must have had in mind such suits and damages as are the ordinary incidents of railroad management. Suits for damages to persons are always predicated upon negligence, and, if he did not intend to be indemnified against them, the words used would be meaningless and without effect. That Receiver Herbert so understood the agreement is equally plain; for, when the accident which gave rise to these claims occurred, he applied to the court for leave to settle them, which the court wisely ordered, but which order the counsel for trustees most unwisely caused to be vacated, and, when the suits were brought in the state court, the counsel for the receiver appeared and took part in the defense. If we bear in mind what was the real condition of this road at the time the agreement was made, we can well understand why it was made, and any suspicion that it was of such an improper and improvident character that it ought not to have been made will disappear. The accounts show that for the year ending December 31, 1893, when it was under lease to the receiver of the South Carolina

Railway Company, the gross earnings were less than the operating expenses. That the road was operated more economically by this receiver than it could possibly have been if operated independently, seems certain. So, when that agreement terminated, the receiver, Herbert, had on his hands a road that could not pay expenses. If he had undertaken to operate the road himself, there can be no doubt that any deficit in its operation would have been allowed by the court, and any damages recovered against him on account of the negligence of his servants would have been treated as operating expenses. As was said by the court in *Cowdrey v. Railroad Co.*, 93 U. S. 352:

"The allowance for goods lost in transportation and for damages done to property whilst the road was in the hands of a receiver was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid."

And in the later case of *Barton v. Barbour*, 104 U. S. 131, the court, after citing the above, says:

"The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while traveling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust and must be adjusted and satisfied in the same way."

Claims against the receiver in his capacity as a common carrier are on the same footing, precisely, as the salaries of his subordinates, or as claims for labor and material used in carrying on the business. If the South Carolina & Georgia Railroad Company was conducting the road for the receiver, it would seem that such claims would stand upon precisely the same footing as if he was operating it by other agents or servants; and was not that the true relation of the parties? He was to receive all the net income that was earned. The accounts were at all times open to his inspection. Statements of the earnings were to be furnished to him weekly, and settlements were to be made monthly. He was allowed by Judge Simonton's order of January 17, 1895, to issue certificates and to borrow money for the repairs of the trestle on Pace's branch, and to pay other expenses necessary to be paid by him, which included the deficit of \$524.27 due the South Carolina & Georgia Railroad Company for the four months ending November 30, 1894, as set forth in his petition upon which the order was predicated. He was also allowed, by order of August 31, 1895, to purchase cross-ties for the road. An order of September 6, 1895, made upon motion of his counsel and upon his petition, authorized him to compromise the claims which are in part the subject of the present controversy, and he had the right at any time to terminate the operating agreement upon 15 days' notice. These various petitions show that the receiver was keeping a proper supervision over the operations of the road, and the petition, in respect to the cross-ties, shows that he regarded himself as in a measure responsible for its safe operation. The fact that he did not seek to terminate the operating agreement, and that the notice of the termination came from the other party some time after the accident which is now imputed to the negligence of the appellant, leads to the infer-

ence that he had no reason to complain of the manner in which it was operated by the party charged by him with that duty.

The next question is, was this agreement one which the Carolina, Cumberland Gap & Chicago Railroad Company could lawfully make? The general rule is that a corporation possesses only such powers as are conferred by its charter, with such incidental powers as may be necessary to carry into effect those expressly granted. The general powers of this company were to construct, maintain, and operate a railroad, and no special provisions of its charter bearing upon the point have been cited; but, under the general railroad law of South Carolina (section 1624, 1 Rev. St. 1893), all railroad companies created by or existing under the laws of that state were empowered "to enter into contracts for the purchase, use or lease of other railroads upon such terms as may be agreed upon with the companies owning the same, and may run, use and operate such road or roads in accordance with such contracts or lease," provided that the roads so contracting are connected with each other. By the same general law (page 544, *Id.*), when a railroad is lawfully maintained and operated by trustees or receivers, they are subject to the duties, liabilities, restrictions, and other provisions attaching to the corporation for whose creditors they are trustees or receivers. These provisions of the general law plainly authorize one railroad company to make contracts for the lease or use of other railroads, and it may be considered as settled law that a receiver may be authorized by the court to do any act which the corporation of which he is receiver had the power to do. A receiver represents the court which appoints him, and the corporation itself, which, by the order appointing him, is divested of its rights, privileges, and franchises, all of which are for the time being vested in the receiver. If this agreement was one which the corporation could lawfully make, the receiver could likewise make it. He could not make any contract binding upon the corpus beyond the term of his appointment. And there are certain other limitations upon the powers of a receiver, that need not be discussed at this stage; nor will it be necessary now to determine precisely the measure of a receiver's powers to make contracts relating to the operation of the road in his hands without obtaining the approval of the court appointing him. As he is selected by the court from a presumed fitness, he is generally clothed with a large measure of discretion as to the details of the operation.

We have already stated our views as to the nature of the agreement in question, and will now state our conclusions upon the next point to be determined: Was it authorized by the court, and is it binding upon the parties to the controversy?

That the order of Judge Aldrich was regularly entered and valid, and binding upon all the parties then before the court, unless appealed from, cannot be denied. That court had had jurisdiction and possession of the res since December 1, 1893, when it appointed Herbert receiver in the suit of McDonald, in which the only parties were the plaintiff and the corporation. A petition subscribed and sworn to on March 28, 1894, by holders of about nine-tenths of the first mortgage bonds, was filed in that cause, praying the retention of the said

receiver. On April 27, 1894, an order was entered granting leave to join as party plaintiff the trustee of the bonds. On November 28, 1894, the trustee filed a petition in the cause, entitling it "Neil McDonald and the Farmers' Loan & Trust Company, Plaintiffs, against the Carolina, Cumberland Gap and Chicago Railroad Company, T. G. Croft, and others, Defendants," in which it states that "it is one of the plaintiffs in the above-entitled suit," praying a removal of the cause to the United States court, and filing at the same time a removal bond; but no order of removal was then taken. When the trustee thus became a party to the McDonald suit, the jurisdiction of the state court over all essential parties was complete; and there can be no doubt that the trustee was then in a position to appeal from Judge Aldrich's order, if it had been so advised. If the cause had not been subsequently removed to the United States court, this order would have been binding until reversed; and it is at least doubtful whether it can be impeached collaterally in another jurisdiction, but it is not doubtful that it was binding upon all the parties in the state court when the cause was removed. The removal of the cause to the United States court was somewhat anomalous, but it is not necessary to discuss the regularity of this proceeding. Judge Simonton's order of January 17, 1895, recited that, by consent of all the counsel, "the cause is removed" to the United States court, and consolidated with the suit of the Farmers' Loan & Trust Company, and thereafter all the orders are entitled as in both causes; and the record contains numerous illustrations of the fact that Judge Simonton regarded the orders in the state court as valid and binding. Among them may be cited the orders providing for the payment of counsel employed in that cause, and for the carrying out of the contracts for the purchase of cross-ties made in pursuance of orders there. In no respect, save as to the subject-matter of this controversy, is there anything in the record to show that the proceedings in the state court were regarded as a nullity; but, on the contrary, everything indicates that the United States court regarded the cause as regularly removed, and the proceedings therein as regular and binding. The petition of the receiver, filed January 4, 1895, wherein he asked leave to borrow money, informed the court of the existence of the operating agreement, and the correspondence with appellant was annexed to, and made part of, the petition; and some of the money to be borrowed was for the purpose of paying the indebtedness incurred under that agreement. Judge Simonton's orders of January 17, 1895, and January 22, 1895, allowed the receiver to borrow the money for the purposes set forth in the petition. The court and all the parties to the cause were then fully and formally advised of the existence of this agreement between the receiver and the appellant. The parties took no steps looking to its disaffirmance, and the court recognized its validity in so far as it authorized its receiver to borrow money, a part of which was to be used in the discharge of obligations incurred under it. There was no formal confirmation of this agreement, but we do not apprehend that that was necessary. Contracts made by a receiver of an insolvent corporation do not necessarily end with his resignation or dismissal. His successor may, in certain cases, disaffirm them, and a

reasonable time may be allowed him for that purpose; but, if he does not seek their disaffirmance, they bind him as they did his predecessor. They are not personal, but representative. So, when Herbert the receiver in the United States court succeeded Herbert the receiver in the state court, he could, within a reasonable time, have moved for a rescission or modification of the agreements of his predecessor. If he did not do so, he would be bound by them. He had had more than six months to observe the operations of his road under this agreement, and, although the result showed a deficit, the accounts and affidavits filed sufficiently accounted for the deficit, for they showed that the principal business of his road (the hauling of rock) had decreased to about a fourth of its former volume, and that the dangerous condition of the trestle at Pace's creek had necessitated the transportation of his freight over another road; and he asked leave of the court to borrow money to repair this trestle and to pay the deficit thus caused, and the court, with full knowledge of the condition of the road and of the existence of this agreement by which its receiver was operating its road, granted his petition. It would be difficult to have a more complete ratification by acts than this record discloses. The appellant here was not a party to that suit. He could not be heard in it. He was operating this receiver's road under an agreement which had received the formal approval of one court, which, after six months' experience, had been brought to the attention of another, with no sign of disapproval or dissatisfaction from the receiver, the trustee, the bondholders, or the courts; and, under these circumstances, he had the right to assume that, so long as he performed his part in good faith, the other party would be bound to perform its part; and, as this agreement was terminable on 15 days' notice, he could not be expected or required to appear in a court where he was not a party, and seek a formal ratification. It is fair to assume that all the parties interested were at that time satisfied that this operating agreement was the best method of securing the continued operation of the road.

The facts in *Vault Co. v. McNulta*, 153 U. S. 554, 14 Sup. Ct. 915, are very different from those here. In that case a receiver had taken a lease for a term of years of some rooms for general offices, paying rental monthly. His successor continued to pay the stipulated monthly rent until the road was sold, up to which date the rent was fully paid. The monthly reports of the respective receivers showed the payment of rent, but did not disclose the terms of the lease, which had never received the approval of the court. The petition asked for the payment of the rent during the whole term of the lease, which extended beyond the period of the receivership, which petition was dismissed upon the ground that a receiver could not make a contract extending beyond his receivership, without the approval of the court; that the mere approval by the court of the master's accounts, wherein the monthly payments of rent were allowed, could not be held to be a confirmation of the lease, because there was no knowledge on the part of the court that such a lease had been entered into by its receiver. The rent had been fully paid for the time when the premises were occupied for the benefit of the trust. Many of the cases cited before

us are referred to in that case, and it is unnecessary to cumber this opinion by reviewing them. They do not conflict with the general principles upon which our judgment rests. All that was decided was that a receiver cannot bind the trust property by a contract extending beyond his receivership, without the approval of the court. There is no contention in the case before us that he has such power. As to the general powers of the receiver in the operation of the road, the court says (page 561, 153 U. S., and page 918, 14 Sup. Ct.):

"It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liability for supplies, material, or labor needed in the daily administration of railroad property committed to his care as an officer of the court."

We cannot leave out of view for a moment that a railroad is a peculiar kind of property; that it is a matter, not only of public concern, but of private interest, that it should be kept going; that its franchises are liable to forfeiture if it stops running; that its property is specially liable to deterioration and decay; and that its business may be irrecoverably lost. Purchasers of its bonds take them with the knowledge of that infirmity; and when they ask a court to manage their property, and its receivers, in good faith and fair judgment, incur obligations for the ordinary expenses of its management and maintenance, courts of equity would be reluctant to sanction any repudiation of those obligations, even if incurred without their express authority.

It is claimed by the appellee that this agreement is ultra vires, in so far as it relates to the clause of indemnity. Counsel for the appellant, in their argument as to the proper interpretation of this clause, likened it to a contract for casualty insurance, which common carriers, in their dealings with each other, were not forbidden to make, to which appellee replies that any contract of insurance by a railroad corporation is ultra vires and void. It requires no weight of authority to illustrate the obvious and to demonstrate the evident. That a railroad corporation cannot engage in the insurance business is plain. That it cannot, unless the power is expressly given by its charter, enter into a contract of suretyship or guaranty, even if it result in gain or benefit to the corporation, is equally true, if it be beyond the scope of the business authorized by its charter. But we do not accept appellant's interpretation of this agreement as being "a contract of casualty insurance." The agreement, as we conceive it, was within the corporate power of both the railroad companies. Under the general railroad law of South Carolina, any railroad company was authorized to make a contract to run, use, or operate another road "upon such terms as may be agreed upon"; and the stipulation for indemnity is simply one of the terms upon which the appellant company agreed to run and operate the other road. It was a mere question of detail as to which company should pay the operating expenses, and whether, in the adjustment of the mutual accounts, one should refund to the other any sums that it may have been compelled to pay by reason of "any suits, actions, or

damages." Similar provisions will doubtless be found in every contract whereby one railroad company undertakes to lease or operate another. Suits, actions, or damages are incidental to the operation of every railroad, and provision must always be made whereby one or the other of the contracting corporations assumes such burdens. The cases cited in the brief of the appellee were upon facts easily distinguishable from those now being considered. *Davis v. Railroad Co.*, 131 Mass. 261, was upon a guaranty to contribute towards any deficiency that might arise in defraying the expenses of a jubilee and musical festival. *Louisville, N. A. & C. R. Co. v. Ohio Val. Improvement & Contract Co.*, 69 Fed. 431, was upon a guaranty, by a board of directors, of bonds of another railroad company, which, under the statute of Indiana, could be made only by stockholders. *Seligman v. Bank*, Fed. Cas. No. 12,642, was upon a guaranty by the bank of certain drafts, which was held to be beyond the corporate power of the bank. *Trust Co. v. Boynton*, 19 C. C. A. 118, 71 Fed. 797, was upon the right of the corporation to lend its bonds, to be used as collateral to secure the individual debts of parties with whom it was dealing. *Humboldt Min. Co. v. American Manufacturing Mining & Milling Co.*, 10 C. C. A. 415, 62 Fed. 356, was upon a guaranty by defendant company that the Variety Iron Company would perform its contract with the plaintiff company. *Pacific Postal Telegraph Cable Co. v. W. U. Tel. Co.*, 50 Fed. 493, was upon a contract whereby a railroad company undertook to give one telegraph company the exclusive right to construct a telegraph line upon its right of way. *Pennsylvania R. Co. v. St. Louis, A. & T. R. Co.*, 118 U. S. 308, 6 Sup. Ct. 1094, decided that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company, for a long period of time, its road, and the use of its franchises and the exercise of its powers. In that case the Illinois company had sufficient authority, but the Indiana company had not; hence the contract was held void as to it. In *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 54, 11 Sup. Ct. 478, a contract for 99 years was held unlawful and void, because it was beyond the powers conferred on the plaintiff by the legislature, was in unreasonable restraint of trade, and because it involved an abandonment by plaintiff of its duty to the public. *Navigation Co. v. Hooper*, 160 U. S. 515, 16 Sup. Ct. 379, held that it was within the chartered power of a railroad company, in the absence of legislative prohibition, to lease and maintain a summer hotel at its seaside terminus, and where the lessee had contracted to keep it insured, and failed to do so, it was liable to the lessor for its value when destroyed by fire during the term. In this case the court approves the language of Lord Chancellor Selborne in *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cas. 473, where, in declaring the importance of the doctrine of *ultra vires*, he said:

"This doctrine ought to be reasonably, and not unreasonably, understood and applied: and whatever may fairly be regarded as incidental to or conse-

quential upon those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires."

Mr. Justice Gray, who delivered the opinion in *Central Transp. Co. v. Pullman's Palace-Car Co.*, says (page 60, 139 U. S., and page 488, 11 Sup. Ct.):

"A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it."

We are of opinion that the defense of ultra vires is not sustained by principle, or by the authorities cited in support of it.

The following cases: *Woodruff v. Railway Co.*, 93 N. Y. 609; *Vanderbilt v. Railroad Co.*, 43 N. J. Eq. 669, 12 Atl. 188; *Trust Co. v. Cooper*, 162 U. S. 544, 16 Sup. Ct. 879,—go far to sustain the proposition that, when a contract has been fully performed in good faith, and the corporation has had the full benefit of its performance, even if it might appear improvident and unreasonable, in the absence of fraud or collusion the corporation could not avail itself of the defense of ultra vires.

The next objection is that this agreement, in so far as it is claimed that it indemnifies the appellant for damages arising from his own negligence, is void, as being against public policy. This is generally the last defense of desperate causes, but in this instance it has an air of reasonableness that entitles it to respectful consideration. Contracts that have in them some taint of immorality, or that tend to restrain competition or trade, or contravene any established interest of society, are held to be void; but, as there is no precise definition of "public policy," each case must be adjudged according to its peculiar circumstances, and courts can only justly exercise this delicate and undefined power in cases free from doubt. The only ground upon which this agreement can be held to contravene public policy is that it tended to cause the appellant to omit that care and duty which every railroad company owes to the public. In many of the states, railroad corporations are forbidden by statute to make any contract which exempts them from liability for negligence. The leading case on this subject in the federal courts is *Railroad Co. v. Lockwood*, 17 Wall. 359, where Justice Bradley states the reason for the rule, which is that a common carrier, in the carrying of passengers and freight, is performing a public duty; that the policy of the law demands that all of his dealings with the public should be reasonable, and, as the customer is largely in the power of the carrier, the latter cannot exact terms which would tend to relieve him of his duty to be careful. The following are extracts from this opinion.

"The carrier and his customer do not stand on a footing of equality. The latter is one individual of a million. He cannot afford to higgler or stand out,

and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper, the carrier presents,—often, indeed, without knowing what one or the other contains. In most cases he has no alternative but to do this or abandon his business.”

Again:

“If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair and no concern of the public.”

Again:

“Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness.”

In the case of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, Mr. Justice Gray thus sums up the doctrine of *Lockwood's Case*:

“This analysis of the opinion in *Railroad Co. v. Lockwood* shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself and of his servants, is unreasonable and contrary to public policy, and consequently void.”

It will be observed that the contract referred to by Judge Gray is not any contract by a common carrier, but “a contract of carriage.” In *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 17 C. C. A. 62, 70 Fed. 202, where a railroad company leased a part of its right of way upon a condition that the company should not be liable for any damage to buildings situated thereon resulting from the negligence of its officers or agents, or from fire communicated from its locomotives, Judge Sanborn distinguishes the class of cases wherein, owing to the inequality of the situation of the parties, which would, if permitted, enable the railroad company to obtain unfair contracts from passengers and shippers, and the fact that contracts with them which exempt the company from liability for negligence relieve it from an absolute duty imposed by law, thus increasing the danger to lives and property of the people from the operation of the railroad, and that class of cases where no duty to lease is imposed, where the companies have an option to lease or refuse to lease. In the latter class, he says:

“The condition excepting the company from liability for damages to the property of the lessees caused by fire set by the negligence of the company relieved the company from no duty it was required by law to perform, but simply provided that it should not assume the additional burden which it had the option to take or refuse.”

A railroad company does not assume, by such a contract, to relieve itself of any of its essential duties as a common carrier. He cites the case of *Railroad Co. v. Lockwood*, and shows clearly that the reason upon which it rests has no application in cases where

the parties are upon the same plane, and free to contract with each other, and says:

"The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy."

Stephens v. Southern Pac. Co., 109 Cal. 86, 41 Pac. 783, is a similar case, wherein the court, in discussing the agreement that such exemption from liability has a tendency to lessen the amount of care the defendants would exercise in preventing fire, and that one who is protected by an agreement against the results of his carelessness will not take the same care as he otherwise would, says that, while this line of reasoning is ingenious, it is not sound law:

"If the doctrine enunciated by respondent be sound, then a multitude of contracts, covering many and diverse subjects, and which are being entered into every day of the world, and recognized and acted upon both by parties and courts, must fall to the ground."

Among such are the ordinary contracts of fire insurance, which have a tendency to lessen the care which the owner would otherwise exercise in the protection of his property from fire.

Contracts which common carriers make with insurance companies, whereby property under their control and in transit is protected, undoubtedly would seem to have such a tendency to lessen the care which is ordinarily demanded of common carriers in the transportation of goods; yet such contracts are sustained by the courts. A very well considered case of this class is that of *Casualty Ins. Co.'s Case*, 82 Md. 535, 34 Atl. 778, wherein *McSherry, J.*, discusses the whole subject with great ability:

"But they are all, it is alleged, repugnant to public policy, because, by furnishing the carrier with a fund with which to reimburse himself for losses caused by his own negligence, their inevitable tendency or effect is to induce less vigilance or to promote greater carelessness on the part of the carrier."

He shows that precisely the same reasoning would invalidate every species of fire and marine insurance; that, because there may be temptation to negligence, such insurance does not necessarily beget negligence; that it cannot be assumed as a postulate that a carrier, solely in consequence of having such indemnity, will necessarily disregard his duty to exercise care.

That a railroad company may by insurance indemnify itself against loss or injury to property intrusted to its care, even when the loss or injury is caused by its negligence, is settled in this court by *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 324, 6 Sup. Ct. 750, 1176, and *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365. It is well-settled law, too, that a carrier may require a shipper, who has insured his goods in transit, to give him the benefit of his insurance. In all of this class of cases the carrier is protected against ultimate liability. So it is not enough to avoid a carrier's contract, as in contravention of public policy, to show that, because he is protected from loss, he may be tempted to violate his duty to the public.

The cases cited by appellee in support of his contention are, in the main, those where common carriers have endeavored to relieve themselves by special contract against their common-law liability. We have already referred to Lockwood's Case. Voight's Case, 79 Fed. 561, simply decided that the railroad company was not relieved of its liability for injury to the messenger of an express company, by a contract between the railroad and the express company. In Stevens' Case, 95 U. S. 655, it was held that the railroad company could not contract against its negligence, and the owner of a car company traveling on a pass was entitled to recover for injuries. It is not claimed that the appellant here is protected against its common-law liability to the public as a common carrier; and it does not seem necessary to review all the cases that fall within the rule in Lockwood's Case, from which this is so readily distinguishable. Contracts in derogation of the common-law responsibility of carriers must not only be plain, so that the unwary public may not be imposed upon, but must also be reasonable, because the carrier and his customer do not stand upon the same footing. They should therefore be construed strictly, and all ambiguities resolved against the carrier; but the reason for the rule ceases when the carriers deal with each other, each having equal opportunities of choosing the language in which to express their agreements, and neither being required to enter into any contract at all. The rights of the public in its relation to common carriers, and the reciprocal obligations flowing from that relation, have no place in this discussion; and this agreement should be construed as if it were between two individuals standing on the same plane, and the court should simply endeavor to carry out the true intent of the parties, as expressed in words and interpreted by their conduct. In so far as relates to this case, the alleged inability of the receiver is entirely foreign to the question whether the agreement is in contravention of public policy. We hold that it is not, and that the only question of public policy involved in it is the wholesome public policy that requires parties to perform their contracts.

The next question relates to the alleged displacement of vested liens, as to which the court below uses this language:

"The sanctity of vested liens has always been recognized by the court in the administration of property. They are never displaced, except to preserve the property and keep it from destruction."

The right of the court to preserve the property has already been exercised in this case by its order allowing the issue of receiver's certificates, that have priority to the claims of the bondholders, for the repairs of the trestle on Pace's creek. The act of February 9, 1882 (17 St. at Large, S. C. p. 791), provides that judgments recovered against railroad corporations for personal injuries "shall take precedence and priority of payment of any mortgage, deed of trust or other security given to secure the payment of bonds made by said railroad company," provided actions are brought within the 12 months from the time the injury was sustained.

The mortgage in this case, being subsequent to that act, is subject to its provisions. The court below uses this language:

"This is a contract between two common carriers,—one of these, the receiver, who owes a duty to the public to operate the road in his charge. This, perhaps, he could not do. At all events, he contracted with the other carrier, the South Carolina & Georgia Railroad Company, to perform this duty for him."

It will not be disputed that a court of equity, which puts property in the charge of its receiver for its preservation pending the litigation, will provide for the payment of all the necessary expenses incurred in the proper administration of the estate, before it orders distribution among creditors; and, if the receiver had operated this road himself, there can be little doubt that the court would have ordered the payment of all of these claims in priority to any claims of the bondholders. To what extent a receiver may incur obligations without the sanction of the court has not been precisely defined. That he may incur ordinary operating expenses is not disputed. This embraces all salaries of employes, ordinary supplies of material, and all expenses for keeping road and rolling stock in order; and the courts have held that claims for damage to either person or property are included in the general class of operating expenses. It is only when the receiver has undertaken to make contracts involving large expenditures, or for extraordinary purposes, or obligations extending beyond his term as receiver, that it has been necessary to obtain the sanction of the court. The case of *Vanderbilt v. Railroad Co.*, 43 N. J. Eq. 669, 12 Atl. 188, may be referred to, to show how far the courts will go to compel performance on the part of the receiver in cases where contracts have been made without their express approval or ratification. In a well-considered opinion this language is used:

"If the contract has been completely performed, and its performance accepted by the receiver, and the claim is merely for compensation, relief of that nature would seem necessarily to be awarded, unless the applicant should appear to have dealt fraudulently or collusively with the receiver, to the detriment of the trust. Even if, in the judgment of the chancellor, the contract was improvident and unreasonable, unless the contractor should appear to have contracted with notice of the improper character of the contract, no just reason could be given for debarring him from the agreed-on compensation, which the receiver might, for his negligence or misconduct, be required to repay to the fund."

And in *Vault Co. v. McNulta*, 153 U. S. 563, 14 Sup. Ct. 918, the supreme court of the United States says:

"In respect to contracts which have been completely performed by a party dealing with a receiver, and when the claim is merely for compensation, equitable relief is often granted, although there was no previous approval or subsequent ratification of the receiver's act. This is pointed out by the chancellor in *Vanderbilt v. Railroad Co.*, *ubi supra*."

"It may be laid down as a general proposition," says Mr. Justice Bradley in *Cowdrey v. Railroad Co.*, "that all outlays made by the receiver in good faith, in the ordinary course, with a view to promote and advance the interests of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the man-

agement and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may be properly referred, not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require; always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance, which may involve a considerable outlay of money in lump."

In *Smith v. McCullough*, 104 U. S. 25, referred to by the court below, the receiver had been authorized to borrow money upon receiver's certificates, to be expended in completing an unfinished portion of the road. He made a contract with the authorities of Sullivan county for municipal aid. It was this contract, which the court had never approved or ratified, that the supreme court held to be unauthorized.

The case is not before us in a shape which permits a final disposition of it. The motion to dismiss the petition was in the nature of a demurrer, and the statements in the petition, in that aspect, are to be taken as true. We are of opinion that, upon a fair construction of the agreement between the receiver and the appellant, the latter was operating the road as agent of the receiver, who was to receive all the possible benefits that would have followed from its personal operation by himself, with a saving of expense, and that inasmuch as appellant could derive no benefit therefrom, except that which followed indirectly as a feeder, the receiver should bear the direct burdens as if the same had been directly operated by him; that all the claims stated in the petition arose out of the operation of the road after it came into the hands of the receiver of the United States court; that that court was fully advised of the operating agreement; that it permitted its receiver to continue the arrangement which had been made first with the direct sanction of the judge of the state court; that, on the face of it, the agreement does not appear improvident; that, under the circumstances, it was probably the best arrangement that could be made; that with the experience of actual operation under it, for more than six months prior to the transfer of the road, the receiver, who could at any time have terminated it upon 15 days' notice, continued it, with the tacit acquiescence of all the parties and of the court. If, therefore, it should appear, upon the investigation which will be directed, that the appellant has fairly and in good faith performed the duties devolved upon it by the agreement, the same must be sustained as valid and binding. The learned counsel for appellee say that this construction leads to this result (using the language of their brief):

"It practically says: 'Take this road, run it as you please, be as reckless and extravagant in your expenditure as you are minded, conduct it as care-

lessly and negligently as you may choose; for the trust property will be made to refund you all amounts squandered, and shall indemnify you for, and keep you harmless from, all the damages resulting from your carelessness and negligence. Waste, ruin, imperil, and wreck, if you wish, for this contract will protect you from all."

It is scarcely to be conceived that such apprehension can be seriously entertained, but it may be as well to state briefly the principles that should govern the allowance of any claims made by the petitioner. If there is a deficit in operating expenses, and the petitioner shows that such deficit is not in any wise due to his fault or extravagance, and that he operated the road with care and diligence and economy, such deficit should be allowed. If there was any extravagance, recklessness, waste or betrayal, it should not be allowed. If the petitioner has been compelled to pay for damages to persons or property, and such damages are due to his recklessness or gross carelessness, he should not be reimbursed therefor; but if the damages are due to mere carelessness or negligence of the servants employed by him in the operation of the road, and he employed them without the knowledge that they were careless, exercising due care in their selection,—such care as he exercised in the selection of servants on his own road, provided the master shall find that his own road was managed with ordinary care,—then such damages fall within the class of operating expenses, and the petitioner is entitled to be reimbursed therefor. In other words, if the appellant can show that he operated the road of the receiver, while it was in his hands, with the same care, diligence, and economy that well-managed railroad companies ordinarily exercise in the operation of their own roads, he is entitled to stand in the place of the receiver, whose agent he was, and to be reimbursed for his losses and damages. The judgment of this court is that the decree below be reversed, and the case remanded, with directions to proceed in accordance with the principles herein announced. Reversed.

BALFOUR et al. v. HOPKINS et al.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

1. ESCROW—DELIVERY OF DEED IN VIOLATION OF AGREEMENT—PURCHASER WITH NOTICE OF ESCROW.

A prospective lender of money on a real-estate mortgage, who is advised that the intending borrower is without title, but that a deed conveying the property to him is deposited in escrow, is put upon inquiry as to the terms of the escrow; and if he neglects to ascertain them, when means are within his reach, but accepts the statement of the depository, and makes the loan, and the deed is delivered by the depository in violation of the escrow agreement, he cannot claim to be an innocent purchaser, as against the rights of the vendor secured by such agreement, but takes his mortgage subject thereto.

2. ESTOPPEL TO ASSERT RIGHTS UNDER ESCROW AGREEMENT—SUBSEQUENT MORTGAGEE.

A vendor, whose deed, deposited in escrow, together with a mortgage back for purchase money, was delivered by the depository in violation of the escrow agreement, and who has the right to assert the priority of his

mortgage over another given by the purchaser, and first recorded, is not estopped to insist on such priority by accepting and recording his mortgage, nor by any subsequent acts which in no way prejudiced the rights of the other mortgagee.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

In October, 1892, Charles Hopkins owned lot 7 in block D of A. A. Denny's addition to Seattle. The government meander line ran nearly north and south through the block. Lot 7 was upland, abutting on the shore. Lot 8, and the lots to the westward thereof, which were not platted, but which were called lots 9 and 10, were on submerged or tide lands, outside of the meander lines. The owner of lot 7 had, through an act of the legislature of the state of Washington passed in March, 1890, the preference right to purchase from the state the lots outside of the meander line, as soon as the tide lands should be platted and the harbor lines established. On October 20, 1892, Hopkins entered into a contract with J. Parkinson to exchange his said property for lots 5 and 8 in A. A. Denny's Broadway addition to Seattle, which then belonged to Parkinson. By the agreement the Parkinson property was valued at about \$60,000. There was a mortgage outstanding upon it for about \$34,000. Later the net value of the Parkinson property was ascertained to be \$28,497.85. The Hopkins property was valued at \$90,000. Parkinson was to pay Hopkins a balance of \$61,502.15. The agreement was delivered to Hopkins, and was withheld from record. By its terms, Parkinson purchased from Hopkins the property aforesaid, describing the same as lots 7 and 8 in block D of A. A. Denny's addition to Seattle, Wash., "together with all the riparian and littoral rights belonging or appertaining thereto, and consisting of lots 9 and 10, adjoining, and extending westward along the north side of Seneca street, across both West street and Railroad avenue, to deep water or ship's channel," for \$90,000, to be paid by the conveyance by Parkinson to Hopkins of the Parkinson property at a net value as above stated. For the balance of the \$90,000, Parkinson was to make Hopkins deferred payments,—two payments of \$12,500 each to be secured by mortgage "on all the lots denominated herein 9 and 10, and all superstructures, consisting of houses, wharves, and warehouses thereon," and the remainder to be secured by a mortgage on the same property, and also by a second mortgage on lots 7 and 8, conveyed by C. Hopkins to Parkinson, "and which are not to be mortgaged by said Parkinson, as a first mortgage, for a greater sum than sixty thousand dollars, which said sum, pursuant to said first mortgage, is to be placed into a brick structure on said lot 7, within one year from and after said 24th day of October, 1892, to cost not less than said sum of sixty thousand dollars when finished." On October 24, 1892, Parkinson and wife conveyed the Parkinson property to Hopkins; and on the following day Hopkins placed the deed on record, and at once took possession of the property, and has since held and owned the same. On November 2, 1892, a deed was executed from Hopkins and wife to Parkinson, conveying to the latter the Hopkins property. Four promissory notes from Parkinson and wife to Hopkins for the deferred payments were signed by Parkinson and wife. A mortgage from Parkinson and wife to Hopkins, as called for in the agreement, was signed, sealed, and acknowledged by Parkinson and wife. A bond running to Hopkins was signed by Parkinson and wife as principals, and by R. R. Spencer and M. D. Ballard, officers of the National Bank of Commerce of Seattle, as sureties, conditioned upon the expenditure of the whole of said sum of \$60,000 in the erection of the brick building. An escrow card was signed by Hopkins and wife and Parkinson and wife. The deed, the notes, the mortgage, the bond, and the escrow card were thereupon deposited in the National Bank of Commerce of Seattle, in escrow; and said Spencer, the cashier, wrote upon the escrow card a receipt, which reads as follows: "Received of Roger S. Greene, acting in behalf of the parties signing the escrow card of which the within is a copy, this 3d day of November, A. D. 1892, the instruments specified in said escrow card, to be held by the National Bank of Commerce of Seattle, Washington, as in said escrow card directed, and to be delivered, when and as in said escrow card directed, to the respective parties

entitled thereto, as intended in said escrow card." The escrow card reads as follows:

"This escrow card witnesseth that whereas, as of date 24th of October, 1892, pursuant to a certain memorandum of agreement made and entered into October 20th, 1892, by and between Charles Hopkins and John Parkinson, respectively, providing, among other things, for the sale and conveyance by said Charles Hopkins to said John Parkinson of lots seven (7) and eight (8) in block D of A. A. Denny's addition to Seattle, Washington, the following described instruments have been executed; that is to say: 1st. One deed of conveyance from said Charles Hopkins and wife to said John Parkinson of said lots seven (7) and eight (8). 2nd. Four certain promissory notes executed by said John Parkinson and wife, payable to the order of Charles Hopkins, namely: One for the sum of five thousand five hundred and two and $\frac{15}{100}$ (\$5,502.15) dollars, payable twelve months after date; one for twelve thousand five hundred (\$12,500.00) dollars, payable on or before ninety (90) days after date; one for twelve thousand five hundred (\$12,500) dollars, payable on or before six (6) months after date; and one for thirty-one thousand (\$31,000.00) dollars, payable on or before six (6) years after date. 3rd. One bond in the penal sum of seventy-five thousand (\$75,000.00) dollars, payable to said Charles Hopkins, his heirs, executors, administrators, or assigns, executed by said John Parkinson and wife and sureties. 4th. One mortgage, providing, among other things, for the mortgaging of said lots seven (7) and eight (8) in block D to said Charles Hopkins, and executed by said John Parkinson and wife. And whereas, in and by said memorandum of agreement it is, among other things, provided, in effect, that the said Parkinson is to place the sum of sixty thousand (\$60,000.00) dollars into a brick structure on said lot seven (7); and whereas, said Parkinson is to procure said sixty thousand (\$60,000.00) dollars, by loan or loans, from a party or parties in the eastern part of the United States: Now, said instruments are herewith deposited with the National Bank of Commerce of the City of Seattle, Washington, with the following instructions to said bank: Said bank is to retain the custody of said instruments until said sum of sixty thousand (\$60,000) dollars shall have arrived from the East, and be under the control of said bank, to the use of said Parkinson, for said brick structure; and, when said sixty thousand (\$60,000) dollars is so in possession of, or under the control of, said bank, said bank shall deliver said deed to said John Parkinson, upon his demand therefor, and shall deliver said bond, said promissory notes, and said mortgage to said Charles Hopkins, on his demand therefor.

"Dated at Seattle, Washington, this 2d day of November, 1892.

"Charles Hopkins.

"Lucy S. Hopkins.

"John Parkinson.

"Meta B. Parkinson."

The escrow papers were delivered in an unsealed package. The property which the deed from Hopkins and wife to Parkinson described was as follows: "Lots numbered seven (7) and eight (8) of block D in A. A. Denny's addition to the city of Seattle (being the same premises otherwise known as lots 7 and 8 of block D of that part of the town, now city, of Seattle laid off by A. A. Denny), and all littoral and riparian rights thereunto belonging and appertaining, and all houses, wharves, warehouses, and structures situated and being to the westward of lots seven (7) and eight (8), and extending across West street and Railroad avenue, in said city, to deep water,—subject, however, to all rights of the United States or of the state of Washington west of the government meander line, where the same crosses said premises." The mortgage from Parkinson and wife to Hopkins, which was deposited with the deed in escrow, bore the same date with the deed, and described the property exactly as the same was described in the deed. It reserved permission to the mortgagors to make a prior incumbrance upon a portion of the property, as follows: "And whereas, in and by a certain memorandum of agreement, dated the 20th day of October, 1892, made by and between the said Charles Hopkins and John Parkinson, it was agreed, among other things, in effect, that said John Parkinson might mortgage said lots seven (7) and eight (8), by

first mortgage, for a sum not greater than \$60,000, which sum, pursuant to said first mortgage, is to be placed into a brick structure placed on said lot 7 within one year from and after this 24th day of October, 1892, to cost not less than said sum of \$60,000 when finished: Now, therefore, these presents are intended to be, and the said first parties, their heirs, executors, administrators, and assigns, hereby covenant that these presents shall be, a first mortgage upon the property and premises hereby intended to be mortgaged, except only as against such first mortgage for sixty thousand (\$60,000.00) dollars, as is mentioned and intended in said memorandum of agreement; but said first parties shall be at liberty, pursuant to said memorandum of agreement, to place upon said lots seven (7) and eight (8) a first mortgage to secure said sum of sixty thousand (\$60,000.00) dollars, and such mortgage shall be a first mortgage, as against these presents."

Shortly after the papers were left in escrow, Parkinson applied to the agents of Balfour, Guthrie & Co., the appellants, for a loan of \$60,000. The appellants understood that the security offered them was all of the property which had been purchased from Hopkins. Parkinson testified that he never clearly stated or defined that lots 7 and 8, exclusively, and not any property to the west thereof, should be covered by the mortgage. The appellants instructed their attorney at Seattle to receive an abstract of title which was to be furnished by Parkinson, to make an examination of it, and to prepare a mortgage, which should contain the provision that the preference right to purchase the tide lands from the state should be covered thereby. The attorney found, upon the abstract, that the title rested in Hopkins. He called the attention of Parkinson to that fact, and was informed by him that a deed conveying the property to him, from Hopkins and wife, was in the custody of the National Bank of Commerce, to be delivered whenever the loan should be effected, and \$60,000 placed under control of the bank. The attorney went to the bank, repeated to the cashier what Parkinson had said, and inquired if it was correct. He was informed by the cashier that the statement was correct. The attorney then asked leave of the cashier to examine the deed. The deed was produced, and he examined it. Parkinson had informed the attorney that, after the loan was effected, Hopkins was to have a second mortgage upon the property for some unpaid amount of the purchase price. The attorney was not then informed of the existence of any of the papers that had passed between Hopkins and Parkinson, nor of any of the papers in escrow, except the deed. The attorney prepared a mortgage for \$60,000. On December 21, 1892, Parkinson and wife executed the notes and mortgage, and acknowledged the latter, and delivered them to the attorney. On the following day, the attorney, being authorized by Parkinson to accept the delivery of the deed, went to the bank, together with the agent of the appellants, and an arrangement was made whereby the sum of \$20,000 of the \$60,000 was to be deposited in the bank forthwith to the credit of Parkinson; the remainder to remain in the possession of the appellants, subject to draft by the bank, in installments, as the building should progress. The bank then delivered the deed to the attorney, who on the same day filed it for record, and immediately thereafter filed for record the mortgage to the appellants. On December 27, 1892, the appellants paid the bank the sum of \$20,000, but paid none of the remainder of said loan until on and after March 28, 1893. Hopkins knew nothing of the mortgage to the appellants, nor of the delivery of the deed, until January 2, 1893. He then went to Parkinson, and accused him of having departed from the agreement, and went to the bank, and accused the cashier of violating the escrow instructions. The same day he demanded and received from the bank the other escrow papers, the four notes, the mortgage, and the bond, and on the following day filed his mortgage for record in the office of the county recorder. On or about January 6, 1893, he sent his attorney to the appellants, to obtain, if possible, a release of the property lying outside of lots 7 and 8, which had been included in their mortgage. Up to this time the appellants had no notice of any of the rights reserved to Hopkins in the agreement, nor of the contents of the escrow card, or of any of the papers that were in escrow, except the deed. On January 7, 1893, the appellants wrote to Hopkins a conditional offer to release the submerged lands lying to the westward of lot 8, as soon as the building on lot 7 should be completed, free

from mechanics' and material men's liens, and complete title to lot 8 should be obtained from the state, to which, on January 10, 1893, Hopkins, by his attorney, answered that the proposition had been submitted to Capt. Hopkins, "and, after being duly considered, he thinks it not worth the while to give the same further attention at present; therefore declines the same." The appellants thereafter, in the spring and summer of 1893, proceeded to pay to the bank the remainder of the money due upon the mortgage; and the whole thereof went into the construction of the building, which was completed in September, 1893. In November, 1893, Hopkins obtained from Parkinson a mortgage upon property which the latter owned in the state of Oregon, which was intended as additional security for the debt which Parkinson owed Hopkins. The mortgage recited that its acceptance should not be construed as a recognition of the validity of the appellants' mortgage, and that Hopkins, by accepting it, should not waive his right to contest the validity of the appellants' mortgage. In May, 1894, Hopkins brought suit to foreclose his mortgage upon the property which he had sold to Parkinson. The appellants were not made parties to the suit. On the foreclosure sale the property was purchased by Hopkins; and he thereupon entered into the possession of it. Subsequently Hopkins commenced an action on the bond against Parkinson and wife and the sureties, Spencer and Ballard, alleging that but \$30,000 of the \$60,000 had been actually expended in the erection of the building on lot 7. After July 12, 1894, Hopkins paid interest to the appellants upon their mortgage, out of the rents collected by him from lots 7 and 8, amounting in all to \$5,750. The interest was not promptly paid to the appellants, and they postponed foreclosure of their mortgage, at the request of Hopkins, until the present suit was commenced. The circuit court found and decreed that the lien of Hopkins was prior to that of the appellants upon the property lying to the westward of lot 8, and that the appellants had a first lien, by virtue of their mortgage, upon lots 7 and 8. 84 Fed. 855. From that decree the appellants appeal, contending that their lien is first as to all the property.

Harold Preston, E. M. Carr, and L. C. Gilman, for appellants.
Thomas Burke and Thomas R. Shepard, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The deed which was placed in escrow with the cashier of the Commercial Bank was delivered to the attorney of the appellants in violation of the conditions stipulated in the agreement of the parties. The cashier had in his possession a writing referring expressly to the mortgage, the bond, and the preliminary agreement between Hopkins and Parkinson. The preliminary agreement was not deposited with him, but the mortgage, which was placed in his possession, was sufficient to advise him of the condition upon which he was to deliver the deed. The escrow card, it is true, did not clearly define the condition. It instructed the bank to retain the custody of the deed until Parkinson should procure a loan of \$60,000, and place that sum in the bank, subject to its control, and to be used in the construction of a building upon lot 7. By the agreement of the parties, however, the deed was not to be delivered unless Parkinson should procure the loan upon a first mortgage on lots 7 and 8, leaving Hopkins with a first mortgage on the property lying to the westward thereof. That condition was not fulfilled. But it is urged that the appellants stand in the attitude of innocent purchasers; that their attorney had no actual notice of the terms of the agreement, nor of the terms of the mortgage, which was with the papers in escrow, and that his only information was that which

he had received from Parkinson and from Spencer, which was to the effect that the deed was to be delivered whenever a first mortgage for \$60,000 should be obtained upon the property described in the deed, and that sum should be placed in the bank; and that the appellants acted in good faith, and without notice of the agreement between Hopkins and Parkinson, and without knowledge that the former was to have a first mortgage upon any portion of the property. The authorities are not in entire harmony as to the effect of the delivery of a deed which has been left in escrow, to be delivered to the grantee upon the performance of a condition, and which has been wrongfully delivered before the condition was performed. The decided weight of authority seems to sustain the view that such a delivery is inoperative to convey title, even in favor of an innocent purchaser without notice, unless the grantor has, by some act or conduct of his own, estopped himself to deny the delivery. The principle on which the doctrine rests is that a deed delivered in violation of the terms on which it has been placed in escrow is not in fact delivered, and that its possession by the grantee is no more effective to convey title than would be the possession of a forged or stolen instrument. *Everts v. Agnes*, 4 Wis. 343; *Berry v. Anderson*, 22 Ind. 36; *Jackson v. Lynn* (Iowa) 62 N. W. 704; *Whipple v. Fowler* (Neb.) 60 N. W. 15; *Smith v. Bank*, 32 Vt. 342; *Haven v. Kramer*, 41 Iowa, 382; *Tisher v. Beckwith*, 30 Wis. 55.

In *Provident Life & Trust Co. of Philadelphia v. Mercer Co.*, 170 U. S. 593, 604, 18 Sup. Ct. 788, 793, the supreme court distinguished between the case of a bona fide purchaser of negotiable paper which had been wrongfully delivered by a depositary and that of a purchaser of real estate under like conditions, and quoted with approval the language of Chief Justice Bigelow in *Fearing v. Clark*, 16 Gray, 74, as follows:

"The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it bona fide, without notice."

But it is not necessary to determine whether the title passed to Parkinson at the time of the delivery of the deed. When Hopkins placed his own mortgage upon record, he undoubtedly ratified the delivery of the deed, and acknowledged that the legal title to the property had vested in Parkinson. We are unable to agree with the earnest contention of counsel for the appellants that, in admitting the legal title to be in Parkinson, he admitted the priority of their mortgage over all the property. When he found that the deed had been delivered, and that a mortgage had been placed of record which violated the rights that had been reserved to him, it is evident that, by placing his mortgage of record, he sought only to protect his own interests, and to give notice of his rights. It does not follow that, by ratifying the delivery of the deed, he ratified the inequitable use which Parkinson had made of the title which he thereby acquired. He gave immediate and positive no-

tice to the contrary. The utmost that the appellants can predicate upon his ratification of the delivery of the deed is that he acknowledged the validity of their mortgage to the extent only that Parkinson was authorized to incumber the property. The whole case therefore resolves itself into a question of what were the rights, if any, which the appellants acquired as innocent purchasers. To constitute a bona fide purchaser, there must be want of notice, both at the time of the purchase and at the time of the actual payment of the purchase price. Notice before payment is equivalent to notice before the contract, even though the unpaid balance is secured. *Blanchard v. Tyler*, 12 Mich. 338; *Brown v. Welch*, 18 Ill. 342; *Kohl v. Lynn*, 34 Mich. 360; *Lewis v. Phillips*, 17 Ind. 108; *Boone v. Chiles*, 10 Pet. 211; *Everts v. Agnes*, 4 Wis. 343. At the time when the appellants received notice in this case, they had paid but \$20,000 of the \$60,000 which they had contracted to advance upon the mortgage. The \$20,000 so paid still remained in the bank, from which it was to be disbursed in the erection of the building. The appellants undoubtedly had the right, at this point, to rescind the contract; for both Parkinson and the bank had violated the escrow agreement, and Parkinson had executed a mortgage upon property which he had no right to incumber. Instead of rescinding, the appellants chose to pay the bank the remainder of the loan. This they did with full knowledge of the facts. By electing to proceed and pay over the remainder of the money, they must be deemed to have assented that their mortgage should stand as a lien upon the property only which Parkinson could rightfully mortgage to them under his agreement. It may be conceded that, if they were innocent purchasers to the extent of the \$20,000 which they had paid before notice of the rights of Hopkins, they had the right, while declining to make further payments on the mortgage, to hold the mortgage itself as security pro tanto for the amount already paid, provided that sum had been paid beyond their power to recall it. But it is not shown that the bank, which held the money, and had given a bond for its disbursement for a specified purpose, declined to surrender the money to the appellants, or that it was requested to do so. No ground is perceived upon which the bank could have resisted such a demand, since the money which it held had been obtained in violation of the escrow agreement of which it was the depository. The burden of proving all the facts necessary to constitute themselves innocent purchasers rested upon the appellants. Not only have they failed to show that they could not have rescinded the loan, and recovered the \$20,000 so paid to the bank, but the evidence in the record is insufficient to convince us that they were in fact innocent purchasers, even to the extent of said sum so paid to account upon the loan. In entering into the contract of loan, as it is disclosed in the record, the appellants were not in the attitude of dealing with one whom they found apparently clothed with the muniments of title. They had notice that Parkinson had no title. They found a deed which was in the possession of neither the grantor nor the grantee, but in the hands of a depository. They knew that the

depository was bound to deliver the deed only upon the performance of a condition, and that he was equally bound to withhold its delivery until performance. The depository was the agent of the grantor, but he was also the agent of the grantee. His authority, so far as he represented either, was not like the authority of a general agent. His agency was special, and for a single act. In procuring the delivery of a deed so held by him in escrow, the appellants were bound to know whether or not the conditions on which its delivery depended had been met. It was not sufficient that they were ignorant of the rights of the grantor, or that no special fact or circumstance came directly to their notice to suggest his rights. It was not sufficient that the depository voluntarily surrendered the deed, or stated that the terms of the escrow had been fulfilled. The circumstance that the deed was in escrow was of itself sufficient to require them to ascertain the facts. Their attorney had been informed by Parkinson that his trade with Hopkins was conditioned upon his borrowing \$60,000 upon the security of a first mortgage upon the property. He did not inquire of the bank upon what terms the deed was held in escrow. He did not see the escrow card, nor ascertain if the instructions were in writing. He had notice, however, from Parkinson's statement to him that Hopkins had not been paid the purchase price of his property, and that a mortgage was to be given to secure it. He had no right to rely upon Parkinson's statement of the terms of the escrow agreement. The facts which came to his knowledge were sufficient to put him upon inquiry. If he had read the escrow card, he would have been advised by its terms that a preliminary agreement had been executed, and that a mortgage from Parkinson to Hopkins was among the escrow papers. From the mortgage he would have discovered that the deed could not be delivered unless the grantee borrowed the \$60,000 without incumbering lots 9 and 10 with a first lien. In loaning money upon the whole property without further inquiry, the appellants acted at their peril.

The appellants point to various acts and conduct on the part of Hopkins which they contend establish against him an estoppel to deny that their lien is first upon lots 9 and 10, and amount to a ratification upon his part of their mortgage in all its terms. These are the fact that Hopkins received the bond of the bank, conditioned upon the disbursement of the money in the construction of the building upon lot 7, and subsequently sued the bank upon the bond, alleging that not more than \$30,000 of the \$60,000 loan had been thus used; the fact that he wrote the letter of January 10, 1893; the fact that he foreclosed his mortgage, and bought in all of the property which he had sold to Parkinson, in a foreclosure suit to which the appellants were not made parties; and the fact that he demanded of, and received from, Parkinson additional security upon property in Oregon for the unpaid balance of the purchase price which Parkinson owed him. All of these circumstances, except the delivery of the bond to Hopkins, and the letter of January 10, 1893, occurred after the appellants had parted with

the full amount of the \$60,000 loan. It is not shown that in pursuance of, or relying upon, any or all of said acts, the appellants changed their relation to the transaction, or that they have thereby been placed in any different position from that in which they would otherwise have been. The letter of January 10, 1893, rejecting their proposition, and declining to give the matter "further attention at present," was not inconsistent with an intention upon the part of Hopkins to rely upon his rights as he understood the same to be then defined and fixed by the antecedent facts; nor was it inconsistent with his present contention, that their mortgage upon lots 9 and 10 was, in equity, postponed to his. The fact that he demanded and obtained of Parkinson further security in no way affected their rights, nor were they injured by his foreclosure of his mortgage; nor can the fact that he failed to make them parties to his foreclosure suit, or that he paid interest upon their mortgage, or that he requested them to delay the commencement of their foreclosure suit, be construed to be a ratification of their mortgage, or an admission of the priority of their lien. He held a lien second to theirs upon a portion of the property, and claimed a prior lien upon the remainder. While so asserting his claim, he waived none of his rights by paying the appellants the interest on their mortgage, or by requesting them to delay their foreclosure, or by any other act of which the record advises us. We find no error for which the decree should be reversed. It is therefore affirmed.

RICHARDSON v. DENEGRE et al.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1899.)

No. 748.

BANKS—RECEIVING DEPOSITS WHEN INSOLVENT—RECOVERY OF UNCOLLECTED CHECKS BY DEPOSITOR.

Checks delivered to a bank by a depositor for collection and deposit at a time when the bank was insolvent, as must have been known by its officers, and which had not been collected when the bank closed its doors, remain the property of the depositor, and may be recovered by him from the receiver.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The case made by the pleadings and sustained by the testimony is as follows: On August 5, 1896, the appellees, regular depositors in the American National Bank at New Orleans, deposited therein, a few minutes after the bank closed at 3 o'clock p. m., the following checks:

"No. 8,935.

New Orleans, July 30, 1896.

"New Orleans National Bank, pay to the order of J. P. Blair, Esq., forty-one and $\frac{60}{100}$ dollars.

R. E. Craig, Vice President.

"Fergus G. Lee, Secretary.

"\$41.66."

On end: "Sun Mutual Ins. Co., 52 Camp St."

Indorsed: "Pay Denegre, Blair & Denegre. J. P. Blair.

"Pay to American National Bank for collection and deposit. Denegre, Blair & Denegre."

"No. 655.

Citizens' National Bank of Louisiana.
New Orleans, August 5, 1896.

"Pay to the order of Mess. Denegre, Blair & Denegre, Attys., twenty-one hundred and twenty-two $72/100$ dollars. Chas. J. Theard."

Indorsed: "For deposit. Denegre, Blair & Denegre, Southern Pacific Company, Atlantic System."

"New Orleans, August 5, 1896.

"Pay to the order of J. P. Blair five hundred dollars.

"Jno. B. Richardson, Local Treasurer.

"To the Citizens' Bank, New Orleans.

"\$500.00."

Indorsed: "Pay to Denegre, Blair & Denegre. J. P. Blair.

"Pay to American National Bank for collection and deposit. Denegre, Blair & Denegre."

These deposits were made in the usual course of business, for the purpose of having the checks collected, and the proceeds placed to their credit. At the time the deposits were made, while credit was given upon the bank book of appellees, the checks themselves were set aside like all other deposits received that day, and kept separate and apart from the funds of the bank, until after the meeting of the directors in the evening, at which meeting the said separation of that day's deposits was affirmed and ratified. Appellees were not indebted to the bank, but had over \$2,000 to their credit on deposit. The bank never opened its doors again for business after the receipt of the said checks, but was taken charge of by the bank examiners, and subsequently placed in the hands of a receiver, the appellant herein. For a long time the bank had been in such a condition of insolvency as must have been known to its managing officers. The appellees subsequently stopped payment of the checks, and they were never collected, and are still in the hands of the bank's receiver. Demand was made for their return, which was refused. The present suit was brought to recover possession of said checks in the court below, which gave judgment for the complainants, and perpetually enjoined Frank L. Richardson, as receiver, from making any other disposition of the said checks than to return the same to complainants; from which judgment said receiver appealed, and assigned said ruling as error, and contended: (1) The court erred in rendering a decree in favor of complainants; (2) in not holding that the relations of the complainants to the bank, as a depositor of checks in controversy, was that of debtor and creditor; (3) in holding that the check for \$2,122.76 drawn by Charles Theard, and then indorsed "For deposit," did not vest in said bank; and (4) that the court erred in holding that it appeared from the evidence that the bank was hopelessly insolvent, to the knowledge of its officers, at the time of the deposit of the checks in controversy.

Chas. S. Rice, for appellant.

E. B. Kruttschnitt, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts as above). While it is well established that the checks of depositors, in the ordinary course of business with the bank, do not become the property of the bank, and the relation of debtor and creditor is not established, but that of principal and agent prevails up to the time the check is collected, and money is received by the bank, yet we think the decision of this case need not rest upon that well-established proposition of law. It is true that the late president of that bank vigorously denied that he had any knowledge of the insolvency of the bank before the night in question. It is plainly evident, not

only from the conditions which the bank has since been shown to have been in,—conditions which he could not avoid knowing,—but also from the records of the president and cashier, of which this court will take judicial notice, he could not have been telling the truth. His action setting these checks and other deposits of the 5th of August aside, failing to mingle them with the moneys of the bank, is strong proof that he was aware that the bank was hopelessly insolvent. The testimony of the bank examiners shows that the bank had been hopelessly insolvent for months. The officers were where they could have known, they should have known, and must have known its actual condition. Of this insolvency, however, it is evident that the appellees had no knowledge or intimation, for they not only allowed their large deposit to remain in the bank, but sent that which is in controversy here, which they would not have done if they had had the slightest intimation that the bank was in trouble. The action of the bank in thus receiving said checks for collection was such a fraud upon the appellees as gave them the right to demand the return of the checks. We do not feel called upon to cite any authorities to establish the doctrine that the checks received under such circumstances did not become the property of the bank, but remained that of depositors, who have, under the circumstances, the right to recover the same; and the judgment of the lower court is therefore affirmed.

GIRARD POINT STORAGE CO. v. ROY.

(Circuit Court of Appeals, Third Circuit. February 28, 1899.)

No. 19, September Term.

WHARF—LIABILITY OF OWNER—NEGLIGENCE.

A wharf constructed in 1865 was from time to time thereafter repaired, and in the fall of 1893 some of the old posts were replaced, and all the new posts and those that were reset were fastened and braced in the wharf. The evidence was uncontradicted that the wharf, as repaired, including the mooring posts, was considered by wharf builders staunch and strong. After a storm of unusual violence had prevailed for several days, the river on which the wharf was situated became much swollen, and its current very rapid. Two ships moored side by side at the wharf broke adrift, by the pulling out, under the stress of the wind and tide, of mooring posts to which they were fastened, and struck a ship as she lay moored in the river, causing the damage sued for. *Held*, that the owners of the wharf were not negligent nor liable for the injuries received.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

John Hampton Barnes and Geo. Tucker Bispham, for appellant.
John F. Lewis, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from a decree against the Girard Point Storage Company on account of alleged negligence in the maintenance and management of a wharf, result-

ing in damage to the ship "Norwood." 79 Fed. 113. At the time of the collision hereinafter mentioned, and for a number of years prior thereto, the appellant was the owner of a wharf on the eastern side of the Schuylkill river at Point Breeze. On the morning of Monday, May 21, 1894, the Norwood lay moored to a wharf on the western side of that river nearly opposite Point Breeze. A storm of wind and rain of unusual violence had, with some intermissions, prevailed for several days, and the river was much swollen, and its current very rapid. About nine or ten o'clock on the same morning the ships Waterloo and Glenalvon, each about 300 feet long and of nearly 1,800 tons net registry, which had been moored side by side at the appellant's wharf, went adrift by reason of the pulling out and yielding respectively, under the stress of wind and tide, of mooring posts to which they had been fastened. The Waterloo thereupon swung across the river and struck the Norwood as she lay moored, causing the damage complained of in the libel. The condition of the river and wind was not such, in our opinion, as to justify a finding that the damage resulted from an act of God; but to warrant a recovery culpable negligence on the part of the appellant must be shown by a preponderance of evidence. The fact that the posts to which the mooring lines of the Waterloo and Glenalvon were fastened failed to hold those vessels does not of itself establish such negligence. The appellant, while held to a high degree of care, was not an insurer of the sufficiency of the posts or of the bracing or other fastening of them in its wharf. Nor has the doctrine of *res ipsa loquitur* any application to this case. There was nothing unusual in the mooring of the Waterloo and Glenalvon side by side at the wharf. Such mooring is a common practice. A charge of negligence clearly cannot be sustained on the ground that it was permitted or occurred on the occasion in question. The crucial inquiry is whether the appellant was guilty of negligence in permitting, under the circumstances, its wharf to be used for mooring purposes by the Waterloo and Glenalvon, lying side by side, the mooring posts not being so firmly fastened in the wharf as to withstand the strain of the mooring lines. It does not appear that any of the posts were broken by such strain, but that some were pulled wholly out of the wharf, and others were partially pulled out and so yielded to the strain as to incline toward the river and allow the lines to drag and slide over their ends. In determining the existence or nonexistence of negligence on the part of the appellant the test to be applied is, not whether the pulling out and yielding of the mooring posts could have been avoided if the appellant had anticipated such an occurrence, but whether, under the circumstances disclosed in the case, it failed to exercise reasonable precaution in not anticipating and providing against that occurrence. Applying this test, was the appellant guilty of negligence? Its wharf was originally constructed in 1865, and from time to time thereafter was enlarged, renewed and repaired by wharf builders who, it was reasonable for the appellant to assume, understood their business. It does not appear that at any time before the storm of May, 1894, any mooring posts in the

appellant's wharf had been pulled out or had yielded through the tension of mooring lines. The evidence fails to disclose anything which could reasonably have caused the appellant prior to the accident to anticipate such an occurrence. The wharf had been extensively repaired in October and November, 1893. In addition to other work, some of the old posts were replaced with new ones, and others were re-set, and all the new posts and those which were re-set were fastened and braced in the wharf. The wharf builders were instructed by the appellant's superintendent to do all that was necessary to make the wharf strong and sufficient for the purposes for which it was used. There is uncontradicted evidence of the most positive and satisfactory character that the wharf as so repaired, including the mooring posts, was considered by wharf builders constructed in the most approved manner, staunch and strong, and to compare not unfavorably with other wharves at which large vessels were accustomed to moor. The evidence on the part of the libellant as to the condition of the wharf is based upon its appearance after the accident, and is loose and unsatisfactory. It appears that during the storm and prior to the day of the collision two of the mooring posts were pulled out under the upward strain of the mooring lines. We think it may safely be assumed that it was impracticable then and before the time of the accident to replace those posts and re-set and brace the others. The fact that longer posts were subsequently placed in the wharf is immaterial on the question of negligence. We are satisfied under the evidence adduced that the libel should have been dismissed with costs. The decree below is reversed.

NOONAN v. CHESTER PARK ATHLETIC CLUB CO.

(Circuit Court of Appeals, Sixth Circuit. March 28, 1899.)

No. 668.

APPEAL—TIME FOR TAKING AND PERFECTING.

The allowance of an appeal by the trial court within six months from the entry of the decree is sufficient to save the case from the bar of the statute, as neither the filing of the bond nor the issuance of citation within the time is jurisdictional.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

George J. Murray, for appellant.

Wood & Boyd, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

PER CURIAM. A motion is made to dismiss the appeal in this case on the ground that it was not taken in time. It appears that the final decree was entered in the circuit court March 21, 1898. The appeal was allowed on the 20th of September of the same year. The bond was not given, however, until the 26th of September, or more

than six months after the decree was entered. The citation was duly issued, and the transcript of record was filed in this court in October following. The motion to dismiss is pressed on the ground that the appeal was not perfected within six months after the date of the decree appealed from. This is not necessary. The bar of the statute is saved by the allowance of the appeal. If the appeal is not subsequently perfected, either by the filing of the bond or issuing of the citation or the filing of the transcript in due course, the appeal may become inoperative, and the court will then dismiss it. *Altenberg v. Grant*, 54 U. S. App. 312, 28 C. C. A. 244, and 83 Fed. 980; *Railroad Equipment Co. v. Southern Ry. Co.* (a decision by this court at the present term) 34 C. C. A. 519, 92 Fed. 541. It has been expressly decided by the supreme court in a number of instances that it is the allowance of the appeal, and not the perfecting of all the steps necessary to a hearing of the appeal in the court above, which saves the appellant or plaintiff in error from the bar of the statutory period of limitation fixed for the bringing of appeals and writs of error. Neither the issuing of the citation nor the giving of bond is jurisdictional. *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. 493; *Dodge v. Knowles*, 114 U. S. 430-438, 5 Sup. Ct. 1108, 1197; *Pengh v. Davis*, 110 U. S. 227, 4 Sup. Ct. 17; *The Dos Hermanos*, 10 Wheat. 306-311. The motion to dismiss is denied.

RUBY et al. v. ATKINSON et al.

(Circuit Court of Appeals, Fifth Circuit. April 18, 1899.)

No. 693.

1. APPEAL—TRANSCRIPT—CERTIFICATE.

A certificate to a transcript is insufficient where it is limited to the correctness of the pleadings, and omits all reference to the decrees or orders of the court, and the proceedings to bring up the case on appeal, and only certifies the evidence as furnished by counsel for appellants, "which is said by him to have been agreed upon by counsel for both parties."

2. SAME—CITATION.

Where an appeal is allowed in open court, but is not perfected during the term, a citation to the other party is necessary, and should be issued and served within the return day for the appeal.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Scarborough & Scarborough, for appellants.

W. M. Sleeper, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. When this cause was first before this court (18 C. C. A. 249, 71 Fed. 567) it was disposed of as follows:

"The decree appealed from is reversed, and the cause is remanded to the circuit court, with directions to set aside all the alleged pleadings filed subsequently to the original bill, to grant leave to complainants to amend their original bill, so as to make it conform to the equity rules, and on such terms as may be just, and thereafter to proceed in the cause as the equity rules adopted by the supreme court of the United States provide, and as equity and good conscience shall require. Neither party to recover costs on this appeal."

The case came next on a motion to docket an uncertified transcript, and on February 23, 1898, the following order was entered:

"Alice L. Ruby et als. v. H. N. Atkinson et als.

"The motion of the appellants to file the transcript of the record and docket this cause having been submitted on a former day of this term, and it now appearing to this court that the transcript of the record presented with said motion is not certified, as required by the rules of this court, nor is there any agreement as to what should constitute the record in this cause, it is ordered that said motion be, and the same is hereby, denied. It is further ordered that the appellants be allowed forty days from this date within which to file in this court a duly-certified transcript of the record of this cause."

The case now comes on a motion to dismiss, as follows:

"Now come all the appellees herein (except appellee H. N. Atkinson), and move the court to dismiss the appeal in this cause for the following reasons, to wit: First. The certificate of authentication by the clerk to the transcript of the record in this cause is insufficient, and not in accordance with law: (a) Because said certificate is limited to, and only refers to and embraces, the pleading and evidence in the cause, and omits all reference to the decree and orders of the court and proceedings to bring the case up on appeal; (b) because the certificate does not show that all the evidence in the case is embraced in the record, and limits the evidence in the record to statement of same furnished by appellants' attorney, when there is no agreement of parties in the record showing that such statement of the evidence was agreed upon by them. Second. Because H. N. Atkinson, one of the defendants in the court below, and in whose favor judgment was rendered, and as against whom the decree of the court below is sought to be reversed, does not appear from the record to have been served with notice of the appeal, nor does he appear to have waived such notice in any manner whatever. Third. Because appellants have failed to file bond for appeal as provided by law, the bond in the record having been approved by the clerk of the court, instead of by one of the judges thereof, as required by law."

An inspection of the transcript as filed shows that a final decree was entered in the circuit court on the 24th day of June, 1897, dismissing the complainants' bill, with costs, and on the 30th day of June, the following entry was made:

"On this 30th day of June, 1897, came on to be heard plaintiffs' application for appeal, which, being by the court considered, is allowed, and the bond to be executed by the complainants is hereby fixed at the sum of \$250, sureties to be approved by the clerk of this court; and J. B. Scarborough, of counsel for complainants, is hereby allowed to become surety on said bond. And it is further ordered that complainants have 90 days from this date in which to file the record of this cause in the circuit court of civil appeals for the Fifth circuit, at New Orleans, La., and that only so much of the record herein as shall be necessary to a clear presentation of said cause shall be copied and sent up.

Chas. Swayne, Judge.

"We hereby waive the issuance and service of notice of appeal in this case.

"Jones & Sleeper,

"Attorneys for Defendants, except H. N. Atkinson."

Four months after, on the 2d day of November, 1897, an appeal bond was filed in favor of all the defendants in the sum of \$250, and the same was approved by C. A. Richardson, deputy clerk. The following certificate is attached to the transcript:

"The State of Texas, County of McLennan. I, J. H. Finks, clerk of the circuit court of the United States for the Northern district of Texas, do hereby certify that the above and foregoing thirty-four pages from 1 to 34, inclusive, contain a true and correct copy of all the pleadings filed in said cause numbered and entitled as follows, to wit, 'No. 97. In Equity. Alice L. and John

T. Ruby vs. H. N. Atkinson et al.," and, further, that it contains the statement of the evidence furnished by counsel for appellants, Alice L. and John T. Ruby, and which is said by him to have been agreed upon by counsel for both parties.

"Given under my hand and official seal this, the 14th day of March, 1898.

"[Seal.]

J. H. Finks,

"Clerk Circuit Court of the United States for the Northern District of Texas,

"By C. A. Richardson, Deputy."

There is no agreement in the alleged transcript as to what was the evidence adduced on the hearing, nor is there any citation of appeal to the defendant H. N. Atkinson.

"The clerk has no authority to approve an appeal bond, even though the court below had attempted to give him that authority." *Freeman v. Clay*, 1 C. C. A. 115, 48 Fed. 849. The clerk's certificate to the alleged transcript is insufficient. It is limited to the correctness of the pleadings, omits all reference to the decrees or orders of the court and the proceedings to bring the case up on appeal, and only certifies the evidence as furnished by the counsel for appellants, "which is said by him to have been agreed upon by counsel for both parties." See *Meyer v. Implement Co.*, 29 C. C. A. 465, 85 Fed. 874. The failure to have issued and served a citation of appeal to one of the principal defendants, H. N. Atkinson, is fatal to the prosecution of this appeal. Atkinson is a necessary party, the whole case being grounded on fraud charged against him, and the principal relief sought being to set aside a deed made in his favor. The allowance of an appeal in open court at the term in which the final decree is rendered will obviate the necessity of citation, if the appeal is perfected during the same term. If the appeal is not perfected during the term, citation is necessary, and it should be issued and served within the return day for the appeal, and certainly must be issued and served before the expiration of the period within which an appeal can be sued out. See *Sage v. Railroad Co.*, 96 U. S. 712, 715; *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319; *Radford v. Folsom*, 123 U. S. 725, 8 Sup. Ct. 334; *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159. The appeal is dismissed.

FARMERS' LOAN & TRUST CO. v. BOARD OF SUP'RS OF ALCORN
COUNTY, MISS., et al.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1899.)

No. 775.

ESCROW--CONTRACT TO CREATE--RIGHT OF DESIGNATED DEPOSITARY TO ENFORCE.

A legislative act granting a charter to a railroad company contained a provision authorizing any county through which the railroad might be located by a vote to subscribe to the stock of the company and pay therefor in bonds. It further provided that such bonds, when issued, should be deposited with a certain trust company of another state in escrow, to be delivered to the railroad company, as should be agreed upon between the company and the county. A county voted bonds under such provision, the proposition voted on also containing the same provision as to the deposit of the bonds in escrow. The bonds were prepared and signed, but retained by the county. *Held*, that the provision of the charter designating the depositary must be construed as the language of the corporators, and not a requirement of the state, which had no relation to

the trust company, and, until an escrow was created by the act of the parties in depositing the bonds, the trust company was a stranger to the transaction; that neither the statute nor the action of the county in voting the bonds created any contract relation between the county and the trust company, nor conferred on the latter any rights which would afford the basis for an action by it against the county to compel the delivery of the bonds.

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

By an act approved February 22, 1890, the legislature of the state of Mississippi granted a charter to the Greenville, Nashville & Chattanooga Railway Company, which, among other things, provides that any county through which the road may be located may subscribe to the capital stock of the road and pay therefor in bonds; that the question of subscription shall first be submitted to the qualified voters of the county; that, upon the petition of 20 legal voters and taxpayers who are freeholders, asking for such election, notice of the election shall be given, to be held in 20 days thereafter; that, at the appointed time and places, the electors shall assemble, and be registered, as required by law, and vote for or against the subscription; that, should two-thirds of the voters so qualified and voting at the election vote for the subscription, the same shall be made. The act also provides that, should the election result in favor of the subscription, the stock shall at once be subscribed and the bonds be at once issued. It further provides that when the bonds are issued the president of the board of supervisors shall at once deposit them with the Farmers' Loan & Trust Company, of the city of New York, to be held in escrow, to be delivered to the railway company at such time as said county and said railway company may fix.

On April 14, 1890, a number of persons, describing themselves as citizens and legal voters and taxpayers of the county of Alcorn and state of Mississippi, filed with the president of the board of supervisors of that county their petition, asking him to order an election to be held in that county on the 5th day of May, 1890, at which the legal voters and taxpayers should vote for or against a subscription by the county for \$60,000 of the capital stock of the railway company, in pursuance of, and by virtue of, its charter. On the same day the board of supervisors acted on this petition, and ordered that an election be held on May 5, 1890, at the usual polling places in the county, and that a registration of all persons entitled to vote upon the question of subscription to the stock, and payment thereof in bonds of the county, be had on the day, and at the places when and where, the election was held. The order submitting the question to the electors provided that, if the proposition was carried, bonds in the sum of \$60,000 should be at once issued and placed in the hands of the Farmers' Loan & Trust Company, of the city of New York, in escrow. It also provided that \$30,000 of the bonds should be delivered on the order of its board of directors to the proper officer of the railway company, attested by the president and secretary of the railway company, for the company, and by the chancery clerk and the president of the board of supervisors of the county, for the county, when the railway company had completed its line of road from a point within the limits of the city of Corinth to a point within 500 yards of the Tennessee river, and that the remaining \$30,000 of the bonds should be so delivered when the railroad should be completed to the western or southern boundary of the county of Alcorn. It provided, further, that the railway company should advance to the county the cost of printing the bonds, or should cause the same to be printed, the cost thereof to be refunded by the county to the railway company when it shall run a train of cars drawn by a locomotive the whole distance between the points before mentioned; the delivery of the bonds, and the refunding of the cost of printing thereof, to be upon the condition that the railway company shall complete its road from the Tennessee river to the city of Corinth on or before the 1st day of December, 1891, and shall complete its road to the western or southern line of the county by the 1st day of December, 1893. It provided, also, that the bonds should not draw interest until they had been

delivered to the railway company, or until the railway company became legally entitled to demand their delivery.

On December 12, 1890, the clerk of the board of supervisors certified the action of the board upon the return of the election substantially as follows: "In the matter of the special election held in the county of Alcorn, state of Mississippi, on the 5th day of May, A. D. 1890, submitting to the legal and qualified voters of the county the question of subscription or no subscription of the sum of sixty thousand dollars to the capital stock of the Greenville, Nashville & Chattanooga Railway Company; and it appearing to the satisfaction of this board, from the official returns made to this board by the board of election commissioners, that at the election so held, in pursuance of an order of this board bearing date the 14th day of April, 1890, and the further authority authorizing the same under the act of incorporation creating said railway company, passed by the legislature of the state of Mississippi, and approved the 22d day of February, 1890, that two-thirds of the legal and duly qualified voters of Alcorn county, as shown by the special registration provided for under the law, have voted in favor of the subscription: Therefore it is hereby ordered that the president of this board of supervisors be, and he is hereby, required to issue the bonds of said county, attested by the clerk of the board of supervisors, in pursuance of, and as required by, the order of this board, as aforesaid, and the charter of incorporation of said railway company as aforesaid." The record does not show whether this action of the board of supervisors was had on December 12, 1890, or on some earlier date subsequent to the date of the election.

On January 3, 1898, the Farmers' Loan & Trust Company made a demand in writing on the board of supervisors for the delivery in escrow to them of the bonds in question, and on February 18, 1898, filed its bill in the circuit court of the United States for the Northern district of Mississippi against the county of Alcorn, the board of supervisors of that county, the clerk of the chancery court of that county, and the Greenville, Nashville & Chattanooga Railway Company. After stating the names, residence, and citizenship of the parties, and averring that the matters involved, exclusive of interest and cost, exceeded in value the sum of \$2,000, it showed that the grant of the charter was promptly accepted by the incorporators of the railway company under the act, and the corporation was duly and legally organized prior to April 8, 1890; that it has ever since kept up regularly its organization as a railway corporation under its charter; that prior to April 8, 1890, it had located its road through the county of Alcorn, state of Mississippi, and that on or about that date, in strict compliance with the terms and conditions of the charter, there was presented to the board of supervisors of that county a petition signed by more than 20 of the legal voters and taxpayers of the county, all being freeholders therein, asking for an election to determine whether or not the county should subscribe for \$60,000 of the capital stock of the railway company at an election to be held on May 5, 1890; that the petition was filed with the president of the board of supervisors of said county on April 14, 1890, and that on that day the board adjudged that the petition was legally and regularly sufficient, and ordered the election to be held on May 5, 1890, to determine whether or not the county should subscribe for \$60,000 of said stock, and pay for the same in the bonds of the county in like amount; that the election was held as ordered, and that the proposition to subscribe for \$60,000 of stock, and to issue in payment therefor the bonds of the county in like amount, was carried by a vote of over two-thirds of the legal and qualified voters of the county; that the returns of the election were duly certified by the proper officers, and the board of supervisors, at a meeting held shortly after May 5, 1890, and prior to December 12, 1890, canvassed the election returns, and, by a resolution then adopted, adjudged and held that the election had resulted in favor of making the subscription, and in favor of the issuance of the bonds, and it thereupon resolved as follows: "Therefore it is hereby ordered that the president of this board of supervisors be, and he is hereby, required to issue the bonds of said county, attested by the clerk of the board of supervisors as aforesaid, and the charter of said railway company as aforesaid." A copy of the charter and of the petition, the order of the board calling the election, and the action of the board in de-

claring the result of the election, and ordering the issuance of the bonds, were made exhibits to the bill. The bill further averred that, after the board had ordered the bonds to be issued, the railway company and the board agreed upon the form of the bonds and coupons (a copy of which was made Exhibit C to the bill); that the railway company advanced several hundred dollars to the board of supervisors to pay for the preparation of the bonds, and the same were ready for the signature of the proper officials in June, 1890; that the railway company prepared certificates of shares of its capital stock, and caused the same to be properly executed, and held them ready for delivery to the board of supervisors whenever it became entitled to receive them, and still is ready and willing to deliver the same to the proper officers of the county whenever they are entitled to receive them; that the county officers signed and duly executed the bonds, but retained possession of them, and the complainant does not know whether the bonds are yet preserved or have been destroyed; that by section 12 of the charter of the railway company, and by the order for the submission of the question to the voters of the county, it was provided that the bonds when issued should be at once deposited with the complainant, which, however, the county had wholly neglected to do; that, having waited a long time upon the defendant county to perform its duty in the premises, the complainant, on December 29, 1897, for the first time, demanded of the defendant that it issue and deposit the bonds with the complainant as trustee; that this demand was made in writing, and was executed on the board of supervisors on January 3, 1898; that the defendant has continued to neglect so to perform its duty in the delivery of the bonds. The bill charges, on information and belief, that on July 2, 1895, the railway company formally made demand upon the county for the delivery of the bonds to the complainant, but that the board then declined and refused to do so, claiming that it had no power to issue the same, and on that day it adopted and spread on its minutes the following preamble and resolution: "In the matter of the application of the Greenville, Nashville, & Chattanooga Railway Company to issue bonds, the board of supervisors of Alcorn county made the following order, to wit: July 2, 1895. The board, after considering carefully the request of F. L. Bate to reissue the county bonds for the use and benefit of the Greenville, Nashville & Chattanooga Railway Company, decides that they have no right to and cannot comply with said request." The bill avers that the complainant is interested in this controversy, being entitled to commissions for its services as trustee from the railway company, for the care of the bonds and for attention to the matter, in an amount in excess of \$2,000, exclusive of interest and cost, all as fixed by contract made between the complainant and the railway company; that the only reason given by the defendant for its failure to deliver the bonds is that the railway company had failed to construct and complete the road within the time stated in the order of submission to the electors of Alcorn county. The bill avers that, as soon as the election was held, the railway company proceeded to the work of constructing its road from the Tennessee river to the city of Corinth, and up to the end of 1890 had expended on the construction about \$10,000, and by December, 1891, over \$20,000, and that since then, from time to time, the company has done additional work on the same costing about \$10,000,—making, in the aggregate, about \$30,000 expended on that division, which is in length about 18 or 20 miles; that the railway company has never abandoned the construction of the road, or in any manner released the defendant county from the subscription and agreement, but has persistently tried, in good faith, to complete its road from the Tennessee river to the western or southern line of Alcorn county; that the last work of construction on this part of the line was done in the year 1896, at a cost to the railway company of about \$5,000. Upon information and belief, the complainant charges that the railway company had its arrangements made and completed as early as the fall of 1890 for sufficient money to complete the line, as contemplated and contracted, from the Tennessee river to the western or southern boundary of Alcorn county, but that the failure of the defendant to deliver the bonds defeated these arrangements, and prevented the construction of the road within the time contemplated in the submission to the electors of the county; and the complainant submits, as a matter of law, that the time for the completion of the road

did not begin to run, or should not be construed as running, until such time as these bonds should be placed with the complainant, and that, in any event, as the defendant county was first in fault, it would be inequitable to allow the county to take advantage of its own wrong by insisting upon a forfeiture by reason of lapse of time. The complainant further charged that the railway company has now arranged for the completion of the road from the Tennessee river to the western or southern boundary of Alcorn county, provided the defendant is required by the court to deposit the bonds with the complainant as trustee and that the trustee is ready to execute the trust. The bill avers that the complainant has no adequate remedy at law. The prayer is that the court adjudge that it is the duty of the board of supervisors of Alcorn county to execute and deliver to the complainant the \$60,000 of bonds referred to in the bill, and that, if necessary, a mandatory injunction or other appropriate process shall be awarded to that end, and that all proper and necessary decrees shall be made to secure a proper execution of the trust; that, if said bonds have been destroyed, the defendant shall be required to re-execute and deliver the same to the complainant. On April 4, 1898, the Greenville, Nashville & Chattanooga Railway Company filed its answer, by which it admitted the material averments of the bill, and joined in the prayer that the court may settle and adjudicate all equities between all the parties to the cause. On the same day, the county of Alcorn, its board of supervisors, and the clerk, jointly filed a demurrer to the bill (specifying 16 grounds), which challenged the right of the complainant to maintain the suit, attacked the regularity and legality of the election at which the bonds were voted, invoked the doctrine of laches, and suggested other matters which do not require mention. On April 13, 1898, the circuit court sustained the demurrer, and ordered that unless the complainant did, within 30 days, amend its bill, the same should stand dismissed. The complainant declined to amend, and at the end of the 30 days the bill stood dismissed, from which decree this appeal is taken. The decree of the circuit court does not specify on what ground the demurrer was sustained. The complainant, construing the judgment on the demurrer to sustain the same on each of the grounds specified therein, has assigned, separately, that the court erred in sustaining each of the grounds submitted in support of the demurrer.

Josiah Patterson and George Gillham, for appellant.

J. M. Boone and E. S. Candler, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case, delivered the opinion of the court.

Looking through the technical pleadings, it is manifest that this suit is brought and prosecuted substantially in behalf of the appellee the Greenville, Nashville & Chattanooga Railway Company, nominal defendant below. Against it no relief is sought. Considered as a suit between the railway company and the county of Alcorn, the circuit court was without jurisdiction to entertain it. In this court distinguished counsel have submitted a printed argument on behalf of the railway company, in which they say, by way of preface, that the answer of the railway company admits the allegations of the appellant's bill. "Therefore we accept the statement of the case as made in the brief of the counsel for the appellant, and we rely upon the assignment of errors filed by the appellant, assuming that we have a right to be heard herein, the railway company being the principal party in interest." And the first paragraph of the printed argument of these distinguished counsel for the railway company is: "In addition to the elaborate brief already filed for the appellant, we feel that it is our duty to say

the following in regard to the appellant's rights. Though we appear formally on the side of the appellee, yet the railway company is the principal party in interest, and we are entitled to be heard." As already intimated, we fully concur with the distinguished counsel in the suggestion that the railway company is the principal party in interest in the bringing and prosecution of this suit and of this appeal. However, the view we have taken of the appellant's case renders it unnecessary for us to notice further these suggestions as to the real parties to this litigation, and its possible effect in the matter of the jurisdiction of the circuit court.

The statute which granted to the railway company its charter nowhere names the appellant, except in the twelfth section, which reads as follows:

"Sec. 12. That when said bonds are issued the president of the board of supervisors * * * shall at once deposit said bonds, or cause the same to be done, with the Farmers' Loan & Trust Company, of the city of New York, to be held in escrow by said trust company, to be delivered to the president or secretary of said railway company at such time or times as the said counties * * * by their proper officers and the railway company may agree upon."

Neither in this section, nor in any other section, of the act does it appear that the state was making any provision for drawing to itself any benefit from the selection of the appellant as the party to receive delivery of and hold the bonds in escrow. The language of this section, therefore, like any language used in such grants on which parties seek to rely in claiming benefits or exemptions from the state, must be construed, not as the language of the state, but as the language of the corporators. Nor is this well-settled doctrine averted or disturbed by the language of section 16 of the charter, which says that this act shall be liberally construed, so as to fully protect all the purposes and objects of this charter, the creation of this corporation, and the building of this railroad as herein provided, and the operation and use of the same. In the notice and order for the election issued by the president of the board of supervisors of Alcorn county, the charter of the railway is referred to, and the appellant is named as the depository of the bonds, to be held by it in escrow; but in the order of the board requiring its president to issue the bonds for the county, attested by the clerk, in pursuance of, and as required by, the order of election and the charter of incorporation of the railway company, the appellant is not named. The charter was approved February 22, 1890. The election was ordered on the 14th day of April, 1890, and the order for the issuance of the bonds was made on or before December 12, 1890.

In answer to the suggestion, on behalf of the county, that the appellant had been guilty of laches, counsel for the appellant in their printed brief say:

"The real point of this demurrer must be that the laches consists in the delay on the part of the trustee in its acceptance; but the manifest answer to this is that it was the duty of the defendant, primarily and first, to deliver the bonds or to tender them to the trustee. This the bill shows he [it] never did. Nor does the bill show that the trustee had any knowledge or notice

from any one of his [its] appointment and selection as trustee until shortly before, or some time before, his [its] acceptance, in December, 1897."

It thus appears, even to counsel for the appellant, that no delivery of the bonds was ever made, in escrow or otherwise, and that there is nothing in the charter of the railway company, or in the proceedings providing for conducting and resulting from the submission to the qualified voters of the county of the question as to whether the county should or should not subscribe to the stock of the railway company, to show or indicate that the appellant had any knowledge or notice of these dealings between the appellees until December, 1897, nearly eight years after the approval of the charter, and four years after the latest period allowed for the completion of the road.

The elementary idea of an escrow assumes that the obligatory writing has been delivered by the party executing it to a third person, to be held by him until the performance of a specified condition by the obligee, or the happening of a certain contingency, and then to be delivered by the depository to the obligee. Definitions vary somewhat in the adjudged cases and the text-books constructed on the adjudicated cases; but to become an escrow, as well as to become a deed or writing of present obligation, there must be delivery of the instrument. This delivery need not be in all cases manual, but, whether manual or symbolical, it must be actual, in order to raise the character of an escrow, and the delivery must be made to a stranger to the contract between the obligor and the obligee; for, if made to the obligee or to his agent, it would, with certain exceptions, at once acquire a present force as a deed or bond. The appellant in its bill styles itself a "trustee," and the brief of its counsel overflows with learning in reference to the powers and duties and rights of trustees. Being a citizen of New York, created and organized under the laws of that state, asking no license or privilege from the state of Mississippi, so far as this record shows, that state could impose no obligation upon the appellant in favor of the county of Alcorn or any other party. Hence the language of section 12 cannot be construed to raise a binding contract between Alcorn county and the appellant. The same is true of the proceedings had in the county before, at, and after the election herein alluded to. The reference to the charter had in these proceedings in no way adds to, or helps out, the language of the statute. The statute does not undertake to impose any duty upon the appellant, but expressly provides that the proper officers of the county and the railway company may agree upon the time or times when such bonds as the county shall issue in payment of subscriptions for stock are to be delivered to the president and secretary of the railway company. It seems to us that this clearly leaves the whole matter with the railway company and the county for adjustment, and that until these parties do agree, and complete their agreement by the delivery of the bonds to the appellant, it has not and cannot have any interest in their negotiations. It has done no service nor contributed anything of value that can support its claim to have an interest in the contract be-

tween these parties. The highest equity, as expressed in the Louisiana Civil Code, goes no further than to provide that a contract, in which anything is stipulated for the benefit of a third person who has signified his assent to accept it, cannot be revoked as to the advantage stipulated in his favor, without his consent. As already noticed, it is not claimed that the appellant signified its assent to accept any benefit under the contract between these parties prior to December, 1897. Therefore, up to December, 1897, it was competent for the parties, or for either of them, to modify or revoke their contract so far as it affected the appellant, and agree to make the deposit contemplated by the statute in the hands of some other person.

On the 1st day of November, 1890, the people of Mississippi adopted a constitution, to be in force and effect from and after that day. Section 183 of this constitution provides:

"No county, city, town, or other municipal corporation, shall hereafter become a subscriber to the capital stock of any railroad, or other corporation or association, or make appropriation or loan its credit in aid of such corporation or association. All authority heretofore conferred for any of the purposes aforesaid by the legislature, or by the charter of any corporation, is hereby repealed. Nothing in this section contained shall affect the right of any such corporation, municipality, or county to make such subscription where the same has been authorized under laws existing at the time of the adoption of this constitution, and by a vote of the people thereof had prior to its adoption, and where the terms of the submission and subscription have been or shall be complied with, or to prevent the issue of renewal bonds, or the use of such other means as are or may be prescribed by law for the payment or liquidation of such subscription or of any existing indebtedness."

It cannot be questioned that, in the instant case, the "terms of submission and subscription" required that the railway company should build its railroad from the Tennessee river to the city of Corinth, on or before the 1st of December, 1891, and should extend and complete the same from the city of Corinth to the western or southern bounds of the county by the 1st day of December, 1893. The bill alleges that on July 2, 1895, the railway company formally made demand of the board of supervisors that it issue the bonds, at which time the board declined and refused to do so, claiming that it then had no power to issue, or to direct or enforce the issuance, of the bonds. As it is clear that the road had not been built, and that no part of it has yet been completed, it may well be doubted whether the saving in section 183 will avail even the railway company, or now permit the county, were it ever so disposed, to issue the bonds in question. Whatever may be the effect otherwise of the alleged primary default on the part of the county, the fact that the terms of the submission and subscription had not been complied with was a matter deserving the grave consideration of the board of supervisors when a formal demand upon it was made in July, 1895, for the issuance of these bonds. Though the bonds may have been lithographed and duly signed, they cannot be said to have ever been issued; and therefore the provision in reference to renewal bonds is of doubtful application. However this may be, and whatever may be the rights of the railway company growing out of the default, if there has been a default on the

part of the county, it seems clear to us that the appellant has shown no right whatever to recover against the county.

In order to show that the matter involved in this controversy equals in value the sum of \$2,000, the complainant refers to a contract made, not with the defendant county, but with the defendant railway company, the date and terms of which are withheld from us, but to which the county was not a party, and by which it was not bound, and on which no relief is sought against the railway company. In our opinion, the matters to which we have alluded amply justify the ruling of the circuit court in sustaining the demurrer to the complainant's bill. Therefore the judgment of that court is affirmed.

THOMAS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, S. D. Ohio, W. D. April 19, 1899.)

RAILROAD LEASE—CONSTRUCTION—FRANCHISE TAX—PAYMENT—LESSEE'S LIABILITY.

A railroad lease provided that the lessee should pay all taxes, assessments, etc., imposed during the term by any governmental or lawful authority on the premises leased, or on any business, earnings, or income of the same, or "by reason of the ownership thereof"; that the intent of such clause was that all governmental charges on the property, or the income therefrom, capable of enforcement against the property of the corporation owning, or the party leasing, the same should be paid by the lessee, whatever the form of such charge. *Held*, that the interpreting clause did not limit the preceding one, so as to require payment by the lessees of charges on "the property or income thereof" only, but that it was bound to pay a tax imposed on the franchise of the lessor, it being a tax imposed "by reason of the ownership" of the road.

Application of Receiver to Compel Payment of Taxes.

Samuel M. Felton, the receiver appointed in this case, and now engaged in the operation of the railroad of the defendant company, has filed his intervening petition herein against the trustees of the Cincinnati Southern Railway. He avers that by lease of October 11, 1881, the trustees leased to the defendant company the line of railway known as the Cincinnati Southern Railway, extending from its terminus in Cincinnati, Hamilton county, Ohio, to its terminus in Chattanooga, Tenn. After setting out certain parts of the lease, the petitioner further avers that the board of valuation and assessment of Kentucky, on January 20, 1898, served notice on the petitioner, in conformity with the statute of Kentucky, to show cause why the franchise of the defendant company to use, maintain, and operate a railroad within the state of Kentucky should not be assessed for taxation; that the petitioner appeared, and showed cause against the assessment; and that the board, being of opinion that the franchise of the defendant company was of no value, because the earnings of the railway were consumed in the payment of operating expenses and rent reserved in the lease, refused to assess the franchise for taxation. The petitioner further says that on the 4th of February, 1899, the board of assessment and valuation, being of opinion that the right of the trustees of the Cincinnati Southern Railroad to own and lease the railway in Kentucky was a franchise subject to taxation in Kentucky under the statutes of that state, served notice upon the trustees, addressed to the Cincinnati Southern Railway at Cincinnati, calling upon them to show cause within 30 days thereafter why said franchise to own and lease said railway should not be assessed for the year 1896 in the sum of \$5,274,715, for the year 1897 in the sum of \$5,179,790, and for the year 1898 in the sum of \$5,256,994; that the trustees, without admitting the right of the state

of Kentucky to impose said tax, claim that, under and by virtue of clause 3 of said lease made to them by the defendant company, such taxes are required to be paid by the petitioner, and therefore demanded that he pay the tax. The petitioner says that, as receiver, he has paid all the taxes imposed by the state of Kentucky upon all the tangible property of said trustees in the state of Kentucky, and upon all rights, privileges, and franchises in any manner granted to the defendant company by the lease, and that there is grave doubt, as he is advised by his counsel, whether the proposed tax upon the franchise of the trustees is such that the defendant company, by the terms of the lease, is compelled to pay, and is such as the state of Kentucky has any authority to impose. The petitioner prays that the trustees may be made parties to the petition, and be required to show cause why the court should not adjudge that the defendant company, and consequently the receiver in this cause, is not required by the terms of the lease to pay the proposed tax.

The trustees make answer substantially admitting the facts averred in the petition, but setting them forth more in detail. They embody the entire lease for the trustees to the defendant company in their answer, and conclude the answer as follows: "The respondents say that, since the execution of the said lease, all taxes, charges, and assessments, of whatsoever kind, nature, or character, levied, assessed, or imposed in the state of Kentucky, by any governmental or lawful authority thereof, upon the premises leased, or any part thereof, or by reason of the ownership thereof, have been assumed and satisfied by the lessee company. Wherefore these respondents, without admitting the right of the state of Kentucky to impose said tax claim, yet say, as before, that, should said tax be rightfully and lawfully imposed by said board of valuation and assessment, the same is payable by the Cincinnati, New Orleans & Texas Pacific Railway Company, or by said receiver for the time being, under the provisions of the lease as herein set forth; and they pray that this court will order accordingly."

By the first clause of the lease, the trustees of the Cincinnati Southern Railway, with the approval of the trustees of the sinking fund of Cincinnati, grant, demise, and lease to the defendant company, for the term of 25 years from the 12th day of October, 1881, "the line of railway known as the Cincinnati Southern Railway, extending from its terminus in Cincinnati, Hamilton county, Ohio, to its terminus in Chattanooga, in the county of Hamilton, in the state of Tennessee, and which railway is now completed so as to admit of the passage of cars from one terminus to the other, together with all the works and conveniences of the said railway, including the offices, stations, shops, sheds, depots, car houses, and other grounds, buildings, bridges, viaducts, fences, culverts, tunnels, water stations, wharves, inclines, yards, telegraph posts, and wires, and the roadbed and superstructure of said railway, with the tracks, turnouts, turntables, and the rights of way belonging to, or hereafter acquired by, said party of the first part, whereon the said and other like works and conveniences used, or to be used, in constructing, maintaining, or operating said railway, may be placed, together with all such rights, privileges, and franchises appertaining to said road, held by said party of the first part, as may be necessary to enable the party of the second part to carry out and perform the provisions of this lease, and to maintain, operate, and conduct the business of said railway." The second clause is as follows: "To have and to hold to the said party of the second part for and during the full term of twenty-five years from the date first above written, the said party of the second part yielding and paying therefor unto the said party of the first part, their successors and assigns, every year, the rents, taxes, assessments, and charges hereinafter specified, and keeping and performing all and singular the covenants and agreements hereinafter set forth, and by said party of the second part to be kept and performed. The annual rent hereby reserved, which the party of the second part covenants and agrees for itself, its representatives and assigns, to pay to the said party of the first part, its successors and assigns, in lawful money of the United States of America, at the treasury of the city of Cincinnati, Ohio, payable quarterly on the 12th days of January, April, July, and October, in each and every year of said term hereby granted, shall be the sums following, to wit: During the first period of five years of the term hereby granted, the annual rental of eight hundred

thousand dollars (\$800,000); during the second period of five years of the term hereby granted, the annual rental of nine hundred thousand dollars (\$900,000); during the third period of five years of the term hereby granted, the annual rental of one million dollars (\$1,000,000); during the fourth period of five years of the term hereby granted the annual rental of one million and ninety thousand dollars (\$1,090,000); during the fifth period of five years of the term hereby granted, the annual rental of one million two hundred and fifty thousand dollars (\$1,250,000). Clause 3. And the said party of the second part further covenants and agrees to pay and discharge, as often as they shall become due, any and all taxes, assessments, duties, imposts, and charges whatsoever which may be levied, assessed, or imposed during the term hereby granted, by any government or lawful authority whatsoever, upon the premises hereby leased, or any part thereof, or upon any business or earnings or income of the same, or by reason of the ownership thereof; it being the true intent and meaning hereof that all governmental charges upon the aforesaid property or income therefrom, which may be imposed by any governmental authority capable of enforcing such charges, through, upon, or against said property, or the corporation owning or the party leasing the same, shall be assumed and satisfied by the party of the second part hereto, however the forms thereof may change during the term hereby granted."

The tax proposed to be assessed by the board of valuation and assessment is imposed under section 4077 of the Kentucky Statutes, which reads as follows:

"Sec. 4077. Every railway company, or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section four thousand and ninety-five of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require.

"Sec. 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this state a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income,

including interest or investments and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require.

"Sec. 4079. Where the line or lines of any such corporation, company or association extend beyond the limits of the state or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this state, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other state or government, or organized and incorporated in this state, but operating and conducting its business in other states, as well as in this state, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this state and out of this state, on business done in this state and the entire gross receipts of the corporation, company or association in this state and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: provided, that said board, from said statement, and from such other evidence, as it may have, if such corporation, company or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

"Sec. 4080. If the corporation, company, or association be organized under the laws of any other state or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company, or association in this state and elsewhere, the proportion which the gross receipts in this state, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed or liable to assessment, in this state, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this state.

"Sec. 4081. If the corporation organized under the laws of this state or of some other state or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this state, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which, such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in the state, less the value of any tangible property assessed, or liable to assessment, in any county, city, town or taxing district."

Harmon, Colston, Goldsmith & Hoadly, for receiver.

W. T. Porter and John R. Saylor, for trustees Cincinnati Southern Ry. Co.

TAFT, Circuit Judge (after stating the facts as above). The sections of the statute quoted above, under which it is proposed to levy the tax in this case, have been construed by the supreme court of the United States. In the case of *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, it was held that, taking the whole act together, and in view of the provisions of Ky. St. §§ 4078-4081, it was evident that the word "franchise" was not employed in a technical sense, and that the legislative intention was plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions. It is apparent, moreover, from a consideration of the opinion filed on the petition for rehearing in 166 U. S. 185-217, 17 Sup. Ct. 604, 607, that, in the judgment of the court, this intangible property consisted of privileges, corporate franchises, and obligations. Mr. Justice Brewer in that case, speaking for the supreme court, said:

"The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. The Southern Pacific Railway Company is a corporation chartered by the state of Kentucky, yet, within the limits of that state, it is said to have no tangible property and no office for the transaction of business. The vast amount of tangible property which, by lease or otherwise, it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the states and territories on the Pacific Slope. Do not these intangible properties,—these franchises to do,—exercised in connection with the tangible property which it holds, create a substantive matter of taxation, to be asserted by every state in which that tangible property is found?"

See, also, *Bridge Co. v. Dix*, 6 How. 541.

The trustees of the Cincinnati Southern Railway were given a right to construct, maintain, and lease a railway running from Cincinnati south through the state of Kentucky. They were vested, therefore, with the franchise to construct, own, and lease to an operating company an instrumentality for a public purpose, to wit, a railway. This is the intangible property on which the tax in the sections above quoted is levied, and the question is whether a tax upon such a franchise must be paid by the lessee (the defendant company) under the terms of the lease. Clause 3 is drawn in as general terms as possible. It was evidently the purpose to secure to the city of Cincinnati a net rent, without any deduction for taxation arising from its ownership of the Cincinnati Southern Railway. By clause 3, the lessee agrees to pay all taxes, assessments, duties, imposts, and charges whatsoever which may be imposed during the term, by any governmental or lawful authority, upon the premises leased, or any part thereof, or upon any business or earnings or income of the same, or by reason of the ownership thereof. And it is recited to be the true intent of this clause that all governmental charges upon the property or the income, imposed by any governmental authority capable of enforcing them, through, upon, or against the property of the corporation owning, or the party leasing, the same,

shall be satisfied by the party of the second part, whatever the form in which such charge may be. The tax against the trustees of the Cincinnati Southern Railway is a tax upon its franchise to construct, own, and lease the railway, and is therefore a tax imposed "by reason of the ownership" of the railway, and so is within the words of clause 3. The latter part of clause 3 (the interpreting part thereof) gives plausibility to the contention that it limits the meaning of the clause to charges "upon the property or income therefrom." Reading the whole clause together, however, I am convinced that the interpreting words were added for the purpose, not of cutting down what had gone before, but for the purpose of enlargement, by a specification that the obligation to pay should exist whether the tax was imposed on the property, or against the corporation owning it, or against the party leasing it; and that the words, "charges upon the aforesaid property or income therefrom," were not intended to limit the meaning, or diminish the scope, of the words, "or upon any business earnings or income of the same or by reason of the ownership thereof." For these reasons, I think the lessee is bound to pay the franchise tax levied against the trustees, if that tax is a valid tax. I do not pass upon the question whether it is a valid tax against the trustees, because that question has not been argued, and no issue is made upon it in the pleadings. If it is deemed by the receiver or trustees to be a question of sufficient doubt to justify litigation, he or they may take such course as they may be advised. Let an order be entered embodying this conclusion, and taxing the costs of this proceeding against the receiver.

MERCURIO v. LUNN et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 539.

1. MASTER AND SERVANT—INJURY TO EMPLOYEE.

In lowering a boom used in discharging vessel in order to remove the block from the end thereof, either of two methods is followed. The boom being at the time up, the fall that is around the drum of a winch which has been used to elevate the boom may be payed out either by altering the link motion of the winch by the reversing lever and admitting the steam, whereby the drum will revolve in a reverse direction to that in which it revolved when the boom was hoisted, or, the steam having been shut off when the operation of elevating ceases, the winch becomes stationary, and the fall, its bight being kept well in hand, is gradually surged off. A winchman, after the boom had been raised preparatory to lowering it, on being so directed, stopped the winch by turning off the steam. Thereafter one of the stevedores began slacking the line, so that it could be surged off, without the aid of the winch, and the winchman, after this operation began, believing that the rope would hold the boom, left the winch. He had been detailed only to act as such winchman. *Held* that, as there was no apparent necessity for the winchman remaining at the winch, and no lack of ordinary prudence in his leaving, such act was not negligence.

2. SAME—DEFECTIVE APPLIANCES.

After a boom used in discharging a vessel had been raised to the mast by the steam winch, the steam was shut off from the winch, and the

stevedores attempted to lower the boom, after taking turns of the fall around the drum of the winch, by "surging off." The boom became unmanageable, and fell, and injured libelant. One of libelant's witnesses testified that the fall was caused by the winch reversing. There was no evidence that any part of the winch gave way, or that any cog slipped, or that the reversing lever was moved after the operation of elevating the boom had ceased, or that the steam was turned on. Libelant's testimony, which was unsatisfactory, was to the effect that the weight of the boom caused the drum to revolve, and the machine to operate in a direction the reverse of that in which it was set to go. Experts testified that, when the steam had been turned off at the end of the hoisting operation, to disturb the mechanism of the winch many tons of weight would have to be placed upon it, unless some accident happened to the gear, and that nothing could cause the drum to turn in the opposite direction but the winch becoming ungearred, or some one shifting the brake in reverse order, and turning on the steam. *Held*, that the evidence failed to show any defects in the winch causing the injury, but that the accident happened because that in the process of surging off the rope got beyond the control of the men paying out the fall.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York, awarding to the libelant \$5,000 for personal injuries received by him on board the appellants' steamer *Cleveland* in the port of New York, July 1, 1897.

J. Parker Kirlin, for appellants.

Francis L. Corrao, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. A brief memorandum of the district judge states that, in view of the introduction of some additional testimony, an opinion, which had theretofore been handed down, was withdrawn, and is no longer a part of the proceedings in the action. The record therefore does not contain any findings of fact by the district court as to any one of the controverted questions of fact. In consequence, it will be necessary to review the evidence in some detail. *Stevens v. The City of New York*, 4 C. C. A. 268, 54 Fed. 181. The libelant was in the employ of a firm of stevedores who were engaged in discharging the vessel, and was injured by the fall of a derrick boom, which was being lowered to the deck, in order that a block, which was the property of the stevedores, might be removed. So much of the cargo as was to be left in the port of New York had been discharged, and there were on board at the time, in the vicinity of hatch No. 1,—where the derrick was located,—the libelant, two of his fellow servants (Totrona and Palese, gangwaymen), the first mate, and one of the sailors, who had been running the winch, and is spoken of in the testimony as the winchman. The method adopted for removing the block from the end of the derrick boom is concededly a proper one. The libelant contends that it is the better method. The course of procedure is as follows: A fall leads from the boom (near its end) to the mast (near its head), and through a block down to the winch. A sufficient number of turns are made around the

drum, and, the winch being set in motion, the drum turns so as to haul on the fall, thus elevating the end of the boom and slackening the chain span, which runs from the mast to the boom end. The boom being up, and the chain slack, one of the men climbs the rigging, and removes the pin from the chain. The boom is then supported only by the fall, and, as that is payed out, the boom descends. A fall that is turned around the drum of a winch, and which has been used to elevate the boom, may be payed out to lower the same in one or other of two ways; either the link motion may be altered by the reversing lever, and, steam being admitted, the drum will begin to revolve in a reverse direction to that in which it revolved when the hoisting was going on, or else, the steam having been shut off when the operation of elevating ceased, the drum ceased to move, and the fall, its bight kept well in hand, is gradually "surged off" as if the turns had been taken around a fixed cylinder. Libellant had climbed the rigging, and had drawn the pin from the chain span. He then returned to the deck, taking his position on the port side of the foremast on the bridge deck, to clear the rope for the man who was lowering the fall. The boom had descended but a little way, when its speed suddenly increased, and it came down with a run into the crutch. It was fastened to the mast with a gooseneck; and the effect of the fore-end striking so heavily into the crutch was to cause the heel to rebound, and lift the gooseneck out of the sockets. The boom struck the libellant, inflicting severe injuries. There is no controversy as to any of the facts above stated.

The negligence charged in the libel is:

"First, in that the said winchman negligently and carelessly left all of a sudden the said winch which he was operating, contrary to his duty, by reason of which the said winch, being left uncontrolled and unmanaged, made the boom * * * fall precipitately; * * * and, second, in that respondents * * * failed in their duty to securely and safely place and fasten the said boom," etc.

There is a conflict of evidence as to precisely what passed between the mate and the stevedore's men when the latter asked to be allowed to lower the boom in order to get the block. It may, however, be assumed that he allowed them to undertake the operation, and that he detailed the winchman, who, having finished his work, had left the winch, to render such service at the winch as the operation called for.

The first witness called for the libellant (first, not in point of time, but in logical order) is Totrona, the gangwayman. From his evidence it appears that he and the winchman took their positions at the winch; the former on the port side by the drum, the latter on the starboard side. Totrona took five turns of the fall around the drum, and when he was all ready told the winchman to heave up the boom. The winch was started, and the boom raised up along the mast, slackening the chain span, whereupon Totrona told the winchman to stop, and he stopped the winch by turning off the steam. He could stop it in no other way. This situation must have continued some little time, long enough for libellant to remove the pin, and return to the

deck. Indeed, libelant himself testified expressly that the boom did not begin to descend until he came on deck. The first half of the operation was now concluded,—a part of the operation which invariably required the running of the winch, since without the application of the steam power the heavy boom could not be raised. The other half—lowering the boom—might be performed, as was said before, either by reversing the winch, and running it in the new direction, or without its aid as a moving mechanism. Totrona settled the question by beginning to slacken the line (so that it could be surged off). The winchman waited till this operation began, and then went away. The witness Totrona says, “After we began to lower the derrick, the winchman left, believing that the rope would have held the boom.” We are unable to see any negligence on his part in so doing. He had been detailed to act as winchman, had so acted, discharging his duties properly, until the time came when it was determined that the operation of lowering should be concluded without further movement of the winch, which was at that time stopped, with the steam cut off. There was no further need for his services as engineer of the winch. He had not been assigned to assist in surging off the fall. No one supposed that with five turns on the winch it would require more than Totrona to keep it properly in hand during the descent. He had handled it unaided during the elevation. There was no apparent necessity for the winchman’s remaining at the winch, and no lack of reasonable and ordinary prudence in his leaving. Totrona testifies that he told the winchman to remain; “to stay at the winch, and not to leave it.” Witness further says that he so told him when there was as yet not much weight on the winch, and no indications of trouble; that it was usual for the winchman to remain at the winch; that he did not know the winchman intended to go. If Totrona did not anticipate any trouble, and had no expectation that the winchman was about to go, it is difficult to credit his statement that he told him to stay. Elsewhere Totrona says that, when the winch was moving the other way, the winchman being then somewhere forward, where he could not see him, he called to him to come back, and he also says that he gave the order only once. It is, of course, immaterial whether Totrona asked him to stay or not. If reasonable prudence required him to stand by the winch, he would be negligent in leaving it; if, on the other hand, his duties ceased when, after elevating the boom, he had stopped the winch, and it had been decided to lower by surging off, and not by any further motion of the winch, then there was no negligence in his leaving, although Totrona, for no explainable reason, asked him to stay. It may be remarked that the testimony of the three Italian witnesses is most unsatisfactory and unpersuasive, a circumstance due in part to their imperfect knowledge of English. They were examined without an interpreter. Libelant says that he understands English “little bit, not much,” and that he can speak it a little better than Totrona, for which reason he was spokesman in the interview with the mate. It is manifest from the answers that some of the questions were not comprehended. And many of the important questions on the direct examination were leading ones. Totrona, proceeding with his nar-

rative, testified that when the boom was at about an angle of 45 deg. with the mast, it "was too heavy"; that the "winch turned the other way [reversed], dragging him along with the line"; that he called to the winchman "to put on steam," and could not hold the line any more. There is no suggestion anywhere in the evidence that any part of the machine gave way, that any cog slipped, that it got out of gear, or that the reversing lever was moved after the operation of elevating the boom had ceased. The contention is that the weight of the boom alone (1,500 pounds, part of which was borne by the goose-neck) caused the drum to revolve, and the whole machine to operate in a direction the reverse of that in which it was set to go. The entire testimony of Totrona upon this question of a reverse turning is as follows: Direct. "Q: When it became too heavy, did the winch turn? A. Yes, sir. Q. What made the derrick come down after that? A. The winch made the boom fall down. * * * As soon as he [the winchman] went, the winch began to turn. Q. Did the boom come down because the winch was turning, and you could not hold the line any more? A. Yes, that is it. It was dragging me along the line." Cross: "Q. When you saw this winch turn around while you were holding the rope, did it turn towards the bow or towards the stern? A. Towards the stern." It is, of course, possible that the operation of "surging off" may be so conducted that at the critical point, when there is an increase of dead weight, some sudden jerk, caused by momentary carelessness, in conjunction with moisture or grease on the rope, may cause the load to get such an advantage of the man handling the fall that he cannot recover it. This was the case on *The Miami* (recently decided in this court; March 1, 1899) 93 Fed. 218. And when a rope is running off a drum with a constantly increasing rapidity it may well be that an observer, excited with the effort to prevent disaster, will find it difficult to determine whether the rope alone or rope and drum both are moving. The inherent improbability of Totrona's narrative is made clear by the testimony of claimant's witnesses. Townsend, a stevedore of many years' experience, who showed himself to be entirely familiar with the structure and operation of winches, testified that, when the steam had been shut off at the end of the hoisting operation, "to destroy or disturb all the mechanism of the winch you would have to place many, many tons of weight on it," unless it runs out of gear by any accident, or a cog becomes unshipped. He added, on cross-examination: "I don't think any experienced engineer would say that winch ever moved in an opposite direction unless it became ungeared, unless the cog flew out from the double-barrel spindle, and ungeared the winch, or unless somebody reversed the brake, and turned the steam on." And to a question by the court: "Nothing could cause the drum to turn in the opposite direction but the winch becoming ungeared, or somebody having shifted the break in reverse order, and turned the steam on." Mancor, an engineer and surveyor to *Lloyds' Register*, who has had special experience in the manufacture of winches, testified to the same effect.

To meet this expert testimony, libellant called Fitzsimmons, a longshoreman and foreman of the gang in which he and Totrona

had been working. This witness testified, "If the steam was tight, and the valve was tight, nothing could reverse the winch," but that, if the winch were old, and the steam valve were not tight, the weight of a boom would reverse the winch, where the steam was turned off. It is difficult to understand how this could be. If the steam valve leaked, one of two things would happen; either steam would pass from the storage side of the valve to the cylinder in which it was to do its work, or it would escape out of the machine altogether into the open air. In the first case the tendency will be to set the winch in motion,—forward if it be set that way, and backward if it be reversed. In the second case the pressure on the piston will be reduced, perhaps, if the leak be great enough, to such an extent that the winch will not lift its load. The proposition contended for here, however, is this: Steam admitted to the full extent of the valve aperture through the open valve will drive the machine so that it will lift; but if it comes through the same aperture in such scanty stream as may find its way through a leak it will operate, without any change of the reversing mechanism, to drive the machine in a reverse direction. No explanation of this singular phenomenon is found in the record. The witness Fitzsimmons, who was recalled subsequently, and then swore that this particular winch leaked (a fact he did not testify to when he was first examined), undertook to give an explanation, which serves only to disclose his evident lack of any intelligent conception of the structure of the machine. The following excerpt will sufficiently indicate the character of his testimony (he is describing the effect of a leak in the valve that is turned on to let steam to the winch): "You go ahead and hoist the draft up, and put on the steam. When your draft gets up,—the weight of the draft,—you have got to keep a little steam on. If you don't, the draft will come down on deck to you. You have to keep a little steam on to hold the draft, because, if you don't turn off the steam on a steam winch— I don't say the winch will come back because the piston rod,—but the barrel of the winch will come back by the weight that is on the boom; the barrel of the winch will reverse." We give greater weight to the testimony of Townsend and Mancor, and of Corbitt, second engineer of the Cleveland. The latter witness testified that a leak between the boiler and the stop valve would have no effect at all on the winch; that a leak between the stop valve and cylinder would tend to heave it up, if the winch had been put to heaving up, and the work had been stopped there, and the gear had not been altered; and that, if it was left geared to go down, it would go down if the steam leaked.

Totrona's statement that the barrel of the winch moved in a reverse direction, which is so utterly irreconcilable with the credible expert testimony, is wholly uncorroborated. The libelant, by affirmative answers to six successive leading questions, put by his counsel, testifies that from the place where he was standing when he was slackening the rope for Totrona he could and did see Totrona, and saw the winch turning the other way; but elsewhere he twice states that he was on the bridge deck, 10 feet from its edge,

with the winch on the main deck, 10 feet below; that he could not see the winchman nor Totrona (in one place he says he could see the upper part of the latter's body), and did not see the winch turning, nor Totrona paying off the rope. "The other man," said the witness, "see that, the man who was there." In reply to a question by the court, he said that the only way he knew Totrona was there (and in trouble) was because he heard him call out, "Stop the winch!" Palese, another member of the gang, said on the direct that he saw "when the winch began to turn around," but it appears from the rest of his testimony that he also was on the bridge deck, and knew the boom was moving when the winchman left the winch, because he was looking at the rope. The movement of the rope would be the same whether the winch were turning or the rope rendering. His testimony, like that of the other Italians, is very confused, and full of inconsistencies. In response to a leading question on the direct he says he heard Totrona say, "Stop our winch!" In response to a cross question he said he does not know Totrona told the winchman to stop the winch. At one time he says that where he was standing he could not see, and shortly afterwards that he could.

Upon the whole testimony we are not satisfied that there was any reverse movement of the drum of the winch, but are of the opinion that the accident happened because, in the process of surging off, the rope got beyond Totrona's control. Libellant, therefore, has failed to show any negligence of the winchman, or any defect in the winch contributing to cause the catastrophe,—a fault, be it noted, which is not charged in the libel.

The only remaining charge of negligence to be considered is that of "failing to securely and safely place and fasten said boom to said mast." The method of fastening was as follows: Two wrought-iron bands were fastened around the foremast, about 18 inches to 2 feet apart. These have round holes in them, to receive the gooseneck, about 2 inches in diameter and 2 feet long. At the top of the gooseneck is a double eye, which receives a single eye that is bolted on the heel of the derrick boom. A pin passed through double and single eye keeps them in place. There was no pin or collar in the lower end of the gooseneck, and libellant's witnesses testified that within their experience it was usual to have one. The witness Townsend, called by the claimant, explains that on the older type of steamers of 15 or 20 years ago, where the gooseneck was shaped as its name implies, and was comparatively short, it was customary to have a pin or a collar; but that on modern steamers, where the gooseneck is long and straight, no such pin or collar is ordinarily used. It is very plain from the evidence that the boom could not possibly have been lifted by the heel, except by some very extraordinary cause, against which the shipowners were not reasonably bound to provide. The witness Fitzpatrick testified, in response to a question by the court, that the weight of the boom would not hold it in place as ordinarily used; that, if it did not have this pin in the end, the boom would pull it out at any time. "The weight that is coming

out of the ship's hold," says the witness, "is on the end of the boom, not at the gooseneck. That chain has got all the weight on it. That would pull it out unless it had something to keep it in the gooseneck, and prevent it." The model introduced by libellant, and conceded to be correct, shows that the chain which supports the boom at a proper angle with the mast extends from the mast to an iron fillet which surrounds the boom very near its outer end, and that it is into an eye on the very same fillet that the block is hooked through which the fall for handling cargo is rove. Nothing could more clearly show the utter recklessness of this man's testimony. No negligence on the part of the vessel is shown. The decree of the district court is reversed, with costs, and instructions to dismiss the libel.

LLOYD v. CHAPMAN.

(Circuit Court of Appeals, Ninth Circuit. February 27, 1899.)

No. 467.

APPEAL AND ERROR—ASSIGNMENT OF ERRORS.

Under rule 11 of the circuit courts of appeal (31 C. C. A. cxlvi., 90 Fed. cxlvi.), on appeal from a decision of the district court in bankruptcy, the judgment will be affirmed when the record contains no assignment of errors except a document, filed in the court below three months after the judgment, purporting to be a "specification and assignment of errors," but which formed no part of the grounds on which the court acted in allowing the appeal, and was never under its consideration.

Appeal from the District Court of the United States for the Northern District of California.

This was a petition in the district court, sitting as a court of bankruptcy, by John Lloyd, as assignee in bankruptcy of James Linforth, John Bensley, and L. B. Benchley, co-partners under the firm name of Linforth, Kellogg & Co., against E. W. Chapman, a creditor of the bankrupts, to have the claim of such creditor expunged. From an order denying the petition, the assignee appeals.

Pierson & Mitchell, for appellant.

T. M. Osmont, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This is an appeal from an order made by the district court for the Northern district of California on the 14th day of May, 1898, denying the petition of the assignee of the estate of John Bensley, a bankrupt, for the expunging from the files of the estate the claim of one E. W. Chapman. 87 Fed. 386. On the part of the appellee it is contended, among other things, that the appeal should be dismissed, or the decree affirmed, for the reason that the only assignment of errors embodied in the record presented to the court and relied upon in the brief of the appellant is a so-called "Second Amended Specification and Assignment of Errors," filed in the

court below August 18, 1898. This document constituted no part of the grounds upon which the court below acted in allowing the appeal in question, and was never under the consideration of that court. Rule 11 of the circuit courts of appeal (31 C. C. A. cxlvi., 90 Fed. cxlvi.) declares, in plain terms, that the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged, and that no writ of error or appeal shall be allowed until such assignment of errors shall have been filed. The rule further declares that such assignment of errors shall form part of the transcript of the record, and be printed with it, and that, when this is not done, counsel will not be heard, except at the request of the court, and that errors not assigned according to this rule will be disregarded; reserving, however, to the court the right, at its option, to notice a plain error not assigned. The filing of an assignment of errors is thus made an essential condition to the granting of a writ of error or the allowance of an appeal, and its purpose has been many times stated by the courts. In *Doe v. Mining Co.*, 17 C. C. A. 196, 70 Fed. 456, this court said its purpose is "to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court"; and, further, that "the attempt to make the assignment of errors more particular in a brief is not proper." "It is in fact," said the court, "an attempt to amend the record in this particular without the permission of court." In *McFarlane v. Golling*, 22 C. C. A. 23, 24, 76 Fed. 24, the circuit court of appeals for the Seventh circuit said:

"The requirement of rule 11 (11 C. C. A. cli., 47 Fed. vi.), that the assignment of errors shall be filed 'with the clerk of the court below, with the petition for the writ of error or appeal,' was designed to bring into the record at that time a separate and particular statement 'of each error asserted and intended to be urged'; and to a large extent the rule is a nullity if, under general and indefinite specifications like those quoted, the appellant may be able afterwards to bring forward objections to the decree or judgment, which, when error was assigned, had not been thought of."

In *Dufour v. Lang*, 4 C. C. A. 663, 54 Fed. 913, the court said:

"The purpose of the rule is two-fold,—to advise the adversary as to what he is to defend, and to aid the appellate court in reviewing the case."

In the case last cited the court showed that rule 11 of the circuit courts of appeal is based on the provisions of sections 997 and 1012 of the Revised Statutes, the first of which declares "there shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party"; and the second of which provides that "appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error."

The assignment of errors, being, as thus seen, essential to the allowance of an appeal or the granting of a writ of error, becomes an im-

portant part of the record, and is one of the things upon which the trial court acts in granting the writ or allowing the appeal. It is plain, therefore, that such assignment constitutes an essential part of the record to be presented to this court, and that it cannot be superseded by a subsequent assignment of errors,—certainly not by one filed without leave of the court. In *U. S. v. Goodrich*, 4 C. C. A. 160, 54 Fed. 21, the circuit court of appeals for the Eighth circuit held that it “will not consider errors the assignment of which is not made and filed in the court below when the appeal or writ of error is allowed.” In *Insurance Co. v. Conoley*, 11 C. C. A. 116, 117, 63 Fed. 180, the circuit court of appeals for the Fourth circuit held that it would not consider an assignment of errors not filed in the trial court by the plaintiff in error at the time he filed his petition for the writ, though the trial court, at the time such petition was filed and the writ of error was allowed, granted additional time for filing assignments of error, and notwithstanding they were filed within the time granted. See, also, *Flahrity v. Railway Co.*, 6 C. C. A. 167, 56 Fed. 908; *Crabtree v. McCurtain*, 10 C. C. A. 86, 61 Fed. 808; *Grape Creek Coal Co. v. Farmers’ Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891; *Van Gunden v. Iron Co.*, 3 C. C. A. 294, 52 Fed. 838; *Railway Co. v. Reeder*, 22 C. C. A. 314, 76 Fed. 550; *City of Lincoln v. Sun Vapor Street-Light Co. of Canton*, 8 C. C. A. 253, 59 Fed. 759; *Deutsch v. Wiggins*, 15 Wall. 539.

Upon the ground that the record does not contain, and the brief of the appellant does not rely upon, any assignment of errors filed in the court below at the time of the allowance of the appeal, the judgment is affirmed.

MAYER v. FT. WORTH & D. C. R. CO. et al.

(Circuit Court, S. D. New York. April 8, 1899.)

REMOVAL OF CAUSES—TIME FOR FILING PETITION.

Under rule 24 of the general rules of practice of New York adopted January 1, 1896, which provides for the extension of the time for serving a pleading “by stipulation or order,” a stipulation extending the time to answer until a date named may be regarded as fixing the time when the defendant is required to answer “by the rule of the state court” within the meaning of the removal act, and a petition for removal filed previous to that date is in time.

On Motion to Remand.

A. J. Dittenhoefer, for plaintiff.

Noah H. Swayne, for certain defendants.

LACOMBE, Circuit Judge. It is contended that the cause was removed too late, because, although there had been a stipulation between counsel that time to answer might be extended to a date subsequent to that on which petition for removal was filed, no order of court to that effect had ever been obtained. Such contention is in accordance with the decision of this court in *Schipper v. Cordage Co.*, 72 Fed. 803, and in subsequent cases. As the rules of the state court then stood, it was thought that a mere stipulation to extend (without order) could not be construed as requiring answer to be served on the

day named, "by the rule of the state court," which is the phrase used in the federal statute. Attention is now called to the revised phraseology of rule 24 (general rules of practice of the state), adopted January 1, 1896, which reads as follows:

"Rule 24. * * * When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order except upon two days' notice to the adverse party of the application for such order."

This rule, coupled with the stipulation, may fairly be held to make an extension "by rule of the state court," and the removal should be held to be in time. The defendant Dodge, who, it is alleged, is a citizen of New York, does not seem to be a necessary party. Motion to remand denied.

SCHOOL DIST. OF CITY OF SEDALIA, MO., v. DEWEESE.

(Circuit Court, W. D. Missouri, C. D. March 28, 1899.)

No. 2,204.

LIMITATION OF ACTIONS—AVOIDANCE OF BAR—PLEADING.

A mere allegation that plaintiff "had no knowledge or notice" of an alleged fraudulent conversion of property, on which the action is based, until a later date, is insufficient to avoid the bar of limitation; no facts showing either concealment by defendant or diligence on the part of plaintiff being alleged.

On Demurrer to Petition.

John H. Bothwell and Chas. E. Yeater, for plaintiff.
William S. Shirk, for defendant.

PHILIPS, District Judge. This cause has been submitted on a general demurrer to the petition. It is not deemed necessary that the court should pass upon other questions raised by the demurrer, in view of the fact that the demurrer must be sustained on the ground that the cause of action, on the face of the petition, is barred by the statute of limitations. Waiving the consideration of the question as to when plaintiff's cause of action first accrued, as against James C. Thompson, it certainly accrued, as against the First National Bank of Sedalia, not later than the month of July, 1893; and, as this suit was not instituted until the 20th day of January, 1899, more than five years had elapsed after the cause of action accrued when the suit was filed. The only attempt on the part of the plaintiff to avoid the operation of the statute is the following amendment to the petition, admitted at the hearing of this demurrer, to wit:

"And, further, plaintiff states that it had no knowledge or notice of the fraudulent conversion or sale of said bonds by said Thompson as aforesaid, and did not discover the same until after the failure of said bank, in May, 1894."

This is wholly insufficient to avoid the statute of limitations in an action for money had and received. *Wood v. Carpenter*, 101 U. S. 141; *Foley v. Jones*, 52 Mo. 64; *Wells v. Halpin*, 59 Mo. 92; *Moore v. Smelting Co.*, 80 Mo. 86; *Hoffman v. Parry*, 23 Mo. App. 20. The

demurrer is therefore sustained, with leave to plaintiff to amend its petition, if it so desires, on or before the 20th day of April, A. D. 1899.

MASURY v. ARKANSAS NAT. BANK et al.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1899.)

No. 1,110.

1. CORPORATIONS—TRANSFER OF STOCK—STATUTORY PROVISIONS.

A provision in the charter or by-laws of a corporation, or in a general incorporation act, that stock shall be transferable only on the books of the corporation, is intended to prescribe a mode of transfer as between the corporation and a stockholder, in all matters relating to the internal government and management of the corporation, rather than between the stockholder and third parties; and, notwithstanding such provision, a stockholder may divest himself of all beneficial interest in his stock by an assignment and delivery of his certificate, although no transfer is made on the books of the corporation.

2. SAME—PLEDGE OF STOCK.

Where a stockholder in a corporation has pledged his stock as collateral security, by the indorsement and delivery of his certificate, a creditor, by the levy of an attachment or execution, can only reach the interest of the pledgor therein, and is not aided, except in favor of purchasers at a sale under execution who purchase for value and without notice, by a statute providing that stock shall be transferred only on the books of the company.

3. SAME—PUBLIC RECORD OF STOCK TRANSFERS—CONSTRUCTION OF ARKANSAS STATUTE.

The provision of the Arkansas statute (Sand. & H. Dig. 1894, § 1338) that, on the transfer of any stock in a corporation, a certificate of such transfer shall be deposited for record with the county clerk, and that "no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been so deposited," is not intended to comprehend cases where stock is pledged as security for a debt by a simple indorsement and delivery of the stock certificate, but applies only where the stockholder parts with his entire legal and equitable title by an absolute sale; the purpose of the statute being to afford a record for the benefit of the taxing authorities, or those interested in or dealing with the corporation, and who may be entitled to proceed against the stockholders in case of its insolvency, for which purposes a pledgee is not a stockholder.

4. SAME—USE OF STOCK CERTIFICATES AS COLLATERAL.

In view of the large commercial use made of corporate stock certificates as collateral security, it is to the public interest that such use shall be simplified and facilitated by placing such certificates as nearly as possible on the plane of commercial paper.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This case grows out of the following facts: On January 12, 1891, Ed. Hogaboom, who was the owner of 400 shares of stock in the Park Hotel Company, an Arkansas corporation, of the par value of \$25 per share, assigned the certificate therefor to Grace Masury, the appellant and the complainant below, as collateral security for a loan of \$10,000 which was that day made by her to said Hogaboom. The pledge of the stock was made in the state of New York. On May 1, 1896, the Arkansas National Bank, one of the appellees, brought a suit by attachment against said Ed. Hogaboom in the circuit court for Garland county, Ark., and caused the writ of attachment to be levied on the aforesaid stock, which stood in the name of Hogaboom on the stock book

of the hotel company; it never having been formally transferred on the books of the company, although the stock certificate was then held by the appellant in pledge to secure the aforesaid indebtedness, which has never as yet been paid. In said attachment suit an order for the sale of the stock to satisfy Hogaboom's indebtedness to the Arkansas National Bank was subsequently made, and the stock was sold by the sheriff of Garland county, Ark., on December 17, 1896; but previous thereto, on November 20, 1896, the appellant had applied to the Park Hotel Company for the transfer of the stock to her upon the books of the company. Such request was not complied with, for the alleged reason that the stock had been previously attached by the Arkansas National Bank. Prior to the sheriff's sale on December 17, 1896, the appellant gave notice to all persons present at the sale, as well as to the attaching creditor, that the stock certificate had been assigned to her in pledge, as aforesaid, prior to the levy of the attachment.

The laws of Arkansas (Sand. & H. Dig. 1894, pp. 474, 475, c. 47) contain the following provisions relative to the transfer of stock, which provisions appear to have been in force at the date of all of the transactions aforesaid:

"Sec. 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February or of August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose.

"Sec. 1338. Whenever any stockholder shall transfer his stock in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk aforesaid who shall note the time of said deposit and record it at full length in a book to be by him kept for that purpose; and no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been so deposited. * * *

"Sec. 1342. The stock of every such corporation shall be deemed personal property and be transferred only on the books of such corporation in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation."

This action was brought by the appellant against the appellees to compel the Park Hotel Company to permit a transfer to her upon the books of the corporation of the aforesaid stock, and to compel the corporation to issue to her the proper stock certificate upon such transfer. The bill alleged, in substance, the foregoing facts. A demurrer was interposed by the defendants, which was sustained, and the bill was dismissed for want of equity. 87 Fed. 381. The case comes to this court on appeal from such decree.

Claire E. More (Almon W. Bulkley, Edward E. Gray, W. E. Hemingway, U. M. Rose, and G. B. Rose, on the brief), for appellant.
Jacob Trieber (George G. Latta, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The claim of the Arkansas National Bank, the attaching creditor, to the 400 shares of stock in controversy, derives little or no support from the Arkansas statute (section 1342, *supra*), which declares that stock in a corporation shall be deemed personal property, and shall be transferred only on the books of the corporation in such form as

the directors shall prescribe, and from the further fact that such a transfer on the books of the stock in controversy had not been made when the attachment was levied. In a great number of cases it has been held, and such must be regarded as the prevailing rule, that such a provision, when found either in a special charter or in a general incorporation act, or in the by-laws of a corporation, is intended to prescribe a method of transfer which shall be deemed effectual, as between the corporation and its stockholders, in all matters relating to the internal government and management of the corporation, rather than to prescribe a method of transfer which must be observed as between a stockholder and third parties. Notwithstanding such a provision in the charter of a corporation, a stockholder thereof may divest himself of all beneficial interest in his stock by a written assignment of the same and a delivery of his stock certificate, or by the indorsement and delivery of his stock certificate, or, as some authorities hold (Cook, Stock & S. §§ 308, 375), by the delivery of his stock certificate without indorsement, although no transfer is made on the books of the corporation. A transfer of his stock in either of the two ways first above indicated, although such transfer is not registered on the corporate books, estops the stockholder from claiming any further title to the stock so transferred, as against subsequent bona fide purchasers thereof for value. Bank of Commerce v. Bank of Newport, 27 U. S. App. 486-489, 11 C. C. A. 9, and 63 Fed. 898; Horton v. Mercer, 36 U. S. App. 234, 18 C. C. A. 18, and 71 Fed. 153; Johnston v. Laffin, 103 U. S. 800-804; U. S. v. Cutts, 1 Sumn. 133, Fed. Cas. No. 14,912; Continental Nat. Bank v. Elliott Nat. Bank, 7 Fed. 369-372; McNeil v. Bank, 46 N. Y. 325; Lund v. Mill Co., 50 Minn. 36, 52 N. W. 268. See, also, Cook, Stock & S. §§ 378, 379, 465, and the numerous cases there cited; also Mor. Corp. § 197.

In view of the doctrine last stated, and in view of another rule of very general application, namely, that a creditor, by the levy of a writ of attachment or execution, merely succeeds to the rights of his debtor in the attached property, whatever the same may be, it follows that the attaching creditor in the case at bar cannot maintain its right to the stock of the Park Hotel Company as against the appellant, to whom the certificate representing the stock had been indorsed and delivered as collateral security long prior to the attachment, merely because no record of the transfer to her had been made on the books of the corporation when the attachment was levied. The pledge of the stock being valid as between the pledgor and the pledgee, the attaching creditor, under and by virtue of the statute requiring registration on the books of the corporation, and by virtue of its purchase of the stock at the execution sale, could at most only assert a right to redeem the stock, inasmuch as it was duly notified of the pledge prior to the execution sale, and bought with full notice of the fact that the stock was then held by the appellant as collateral security for an unpaid debt.

It is claimed, however,—and this is the principal contention on the part of the attaching creditor,—that it acquired a valid title to the stock because the general incorporation law of the state of Arkansas also provides (section 1338, *supra*) for the registration of stock trans-

fers on the books of the county clerk of the county where the corporation transacts its business, and declares, in substance, that no transfers of stock shall be valid, as against any creditor of a stockholder, until a certificate has been deposited with such county clerk. It is insisted that by virtue of this section of the statute the appellant has no lien on the stock in controversy, as against the attaching creditor, because a certificate of the transfer to her was not lodged with the county clerk prior to the attachment. This contention leads us to inquire, in the first instance, whether section 1338 of the general incorporation law was intended to comprehend cases where stock in a corporation is pledged as security for a debt by a simple indorsement and delivery of the stock certificate, as well as those cases where a shareholder in a corporation parts with his entire legal and equitable title by an absolute sale of his stock. This question has never been considered by the supreme court of the state of Arkansas, and is therefore *res integra*.

Sections 1337 and 1338, above quoted in the statement, originally formed section 12 of an act entitled "An act to provide for the creation and regulation of incorporated companies" (Laws Ark. 1868-69, pp. 179-183, c. 92), which was approved on April 12, 1869. The section as originally enacted is quoted below in a footnote.¹ The division of the original section into two sections, as they now appear in Sandels & Hill's Digest of the Laws of Arkansas, was the work of the compilers. Looking at the two sections in the form in which they were originally enacted, the inference is a reasonable one that the legislature had in mind transfers whereby a shareholder parted with his entire legal and equitable title to the stock transferred, when it declared, in the concluding clause of the section, that whenever a stockholder transferred his stock a certificate of such transfer should be deposited with the county clerk. While the act does not in terms prescribe by whom the certificate of transfer shall be filed, whether by the corporation or by the person receiving a transfer of stock, nor what the certificate shall contain, yet it is fair to presume that the lawmaker intended to say that a person purchasing stock should obtain a certificate from the proper corporate officer to the effect that he had acquired certain shares of stock from a certain person or per-

¹ Sec. 12. The president and secretary of every corporation, organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or July, next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February, or of August, with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose; and whenever any stockholder shall transfer his stock in any such corporation a certificate of such transfer shall forthwith be deposited with the county clerk, as aforesaid, who shall note the time of said deposit, and record it at full length in a book to be kept by him for that purpose; and no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been deposited.

sons, and cause the same to be deposited with the county clerk as one of his muniments of title. The object of the legislature in requiring the county clerk to receive and record semiannual reports from the officers of corporations, showing their financial condition and who were their shareholders, and to register transfers of stock made in the meantime in a book kept for that purpose, would seem to have been to provide a convenient record which might be consulted for the purpose of taxation, or for the purpose of ascertaining who had control of a corporation and were responsible for its management, or who might be proceeded against as shareholders to enforce a stock liability in case a corporation became insolvent. All of these objects will be substantially subserved by holding that the section of the act now in question has reference to absolute sales of stock, and that it does not comprehend transfers which are effected by a simple indorsement and delivery of stock certificates as collateral security, inasmuch as creditors who thus hold stock in pledge which has not been transferred on the books of the corporation are not entitled to vote the stock, or take part in the management of the corporation, and ordinarily cannot be proceeded against as stockholders to enforce a stock liability. *Bank v. Allen*, 33 C. C. A. 169, 90 Fed. 545-552; *Vowell v. Thompson*, 3 Cranch, C. C. 438, Fed. Cas. No. 17,023; *Brewster v. Hartley*, 37 Cal. 15-25; *Cook, Stock & S.* § 468, and cases there cited.

Moreover, if the section of the act now under consideration is construed so as to embrace a pledge of stock certificates, as well as absolute sales of stock, such a construction will needlessly embarrass and restrict the circulation of such securities, and prevent their use for legitimate business purposes. It is a well-known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper. In the state of Massachusetts, where a different rule once obtained and was for a long time adhered to,—*Fisher v. Bank*, 5 Gray, 373; *Newell v. Williston*, 138 Mass. 240,—a law has recently been enacted which makes the delivery of a stock certificate, with a written assignment indorsed thereon, effectual to convey a title to the stock as against all parties, thereby conforming the law of that state to the law as it has been established by the great weight of judicial opinion in most of the other states. In view of the premises, we are of opinion that section 1338

does not require transfers of stock to be registered with the county clerk when, as in the case at bar, the transfer consists in a pledge of stock certificates by a simple indorsement and delivery of the same to the pledgee. The statute on which the attaching creditor relies will accomplish the objects which the legislature probably had in view by confining it to cases where stock is sold. It does not in express terms require transfers of stock by way of pledge to be registered with the county clerk, and, in view of the extent to which such a construction of the statute would prevent the use of stock certificates for legitimate business purposes, it ought not to be so construed, without a clear expression that such was the legislative intent.

In conclusion it may be said that it has been very forcibly argued in behalf of the appellant that, even if section 1338 does embrace transfers of stock by way of pledge, and require such transfers to be registered with the county clerk, nevertheless, a holding to that effect would not enable the attaching creditor to appropriate the stock in controversy, inasmuch as actual notice of the pledge of the stock to the appellant was given to the attaching creditor prior to his purchase of the stock at the execution sale. Counsel urge with great force that actual notice to an attaching creditor of a prior pledge or transfer, before the stock is actually sold, should be held tantamount to registration with the county clerk, and a decision by the supreme court of Arkansas (*Byers v. Engles*, 16 Ark. 560), construing an analogous statute, is cited in support of such contention. However, as we have reached the conclusion that the case at bar is not within the provisions of section 1338, we have not deemed it necessary to consider the latter contention, or to express any opinion thereon. The decree of the circuit court is accordingly reversed, and the case is remanded for a retrial.

ERWIN v. PEREGO et al.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1899.)

No. 1,107.

1. MINES AND MINERALS—CONFLICTING CLAIMS—VENUE.

Under Const. Utah, art. 8, § 5, requiring all actions to be tried in the county where they arose, an action to try title to a mining claim, located on land included in another claim on which defendant entered, arose in the county where the land was situated and the entry made, and not in that where the land office in which the defendant's claim was filed was situated.

2. ACTIONS TO TRY TITLE—COMPLAINT.

An averment, in an action to try title, that plaintiff was the owner of the land from a date prior to the commencement of the action, is sufficient to warrant proof of his ownership at any time within that period.

3. MINES AND MINERALS—CLAIMS—LOCATION.

Rev. St. §§ 2319, 2320, 2324, require that, before the locator of a mining claim on public lands shall be entitled to same, he shall have discovered on unappropriated land a mineral-bearing lode, and shall have distinctly marked the boundaries of his claim, so that they may be readily traced. *Held*, that the finding of the lode need not precede the staking of the claim, and hence, where a claim was located, and the locator thereafter discovered a lode thereon before the claim had been appropriated by another, he had a valid claim thereto.

4. SAME.

That part of land on which a miner located a claim was patented to another without his objection did not prevent him from including the part unappropriated in another claim located on adjoining land, and obtaining a valid title to the claim so established.

Appeal from the Circuit Court of the United States for the District of Utah.

Edward S. Ferry, Arthur Brown, and Henry P. Henderson, for appellant.

George Westervelt and J. T. Richards, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Sections 6 and 7 of the act of congress of May 10, 1872, now sections 2325 and 2326 of the Revised Statutes, provide that any one who has located a mining claim under that act may file an application for a patent to it, together with a plat and certain field notes, notices, and affidavits; that for 60 days the register of the land office with whom this application is filed shall publish and post a notice that it has been made; that, if no adverse claim is filed at the expiration of the 60 days, it shall be assumed that the applicant is entitled to his patent and that no adverse claim exists; that, if an adverse claim is properly filed, proceedings in the land office shall be stayed until the trial and decision by a court of competent jurisdiction of the question who is entitled to the right of possession of the claim; and that the patent shall issue to the party who is adjudged by the court to have that right. There was a conflict between the lode mining claim Kate F., which was owned by the appellant, David D. Erwin, and the lode mining claim Star, which was owned by the appellees, William Peregó and Michael F. Clark. Erwin applied for a patent to the Kate F. under the act of congress. Peregó and Clark, as owners of the Star, which included the entire area covered by the Kate F., filed an adverse claim, and then brought this action in the district court in the county of Summit, in the state of Utah, to determine who was entitled to the possession of the area in conflict between the two claims. The case was removed to the United States circuit court, and that court heard it, and rendered a decree in favor of the appellees. 85 Fed. 904. The appellant asks a reversal of this decree on three grounds: (1) Because the court below had no jurisdiction of the suit; (2) because the appellees' petition was insufficient to sustain the decree; and (3) because Peregó, who located the Star claim, did not make his discovery until after he had marked the boundaries of his claim. These objections to the decree will be considered in their order.

1. The constitution of the state of Utah provides that "all criminal and civil business arising in any county must be tried in such county unless a change of venue be taken in such cases as may be provided by law." Const. Utah, art. 8, § 5. The supreme court of that state has held that, under this clause of its constitution, the courts of that state have no jurisdiction to try any action brought in any other county than that in which the cause of action arose. *Konold v. Railway Co.*, 51 Pac. 256. The register of the land office before whom

the application for the patent to the Kate F. was filed in this case held his office in Salt Lake county, in the state of Utah, while the land in controversy is situated in Summit county, in that state. The appellant insists that the court below had no jurisdiction of this suit, because the cause of action upon which it is founded arose in Salt Lake county, where the application for the patent was filed, while the action was brought in Summit county, where the land was situated. But the filing of the application for the patent did not create the cause of action. Its only effect was to limit the time within which, under the act of congress, the action could be advantageously brought. The subject of the action was the right to the possession of the land. The cause of action arose—it was created—when, in 1895, the appellant entered upon the appellees' claim, disturbed their possession, made a discovery of ore, and located the Kate F. upon it. From that time forward the appellees' cause of action existed, and the acts which had given rise to it were done in Summit county and upon the land in controversy. Actions of ejectment, trespass, forcible entry and unlawful detainer, and, indeed, all actions in which the real issue is which party is, or was at a certain time, entitled to the possession of the land, are local in their nature, and necessarily arise where the land is situated. This action was properly brought in Summit county, where the real estate, the right to the possession of which was in controversy, was located. *Mosby v. Gisborn* (Utah) 54 Pac. 121, 126.

2. Another objection to the decree is that the petition of the appellees was insufficient to sustain it, because it alleges that Perego was the owner, or Perego and Clark were the owners, of the Star claim from and after September 5, 1888, while the proof was that their title to it did not vest in Perego, who subsequently conveyed an interest to Clark, until some time in the autumn of 1890. This objection was not made to the evidence in the court below, and it is too trivial and frivolous to merit consideration. An averment that one was the owner of land from an earlier date to the time of the commencement of the action is certainly ample to warrant proof of his ownership at any time within that period.

3. It is contended that the decree which sustains the location of the Star mining claim made by Perego in 1889 is erroneous because he made no discovery of a mineral-bearing lode within his claim until a year after he had located and marked its boundaries. It is insisted that there can be no valid location of a mining claim unless the locator discovers the lode or ledge within the limits of his claim before he marks its boundaries. Perego marked the boundaries of the Star claim, which is sustained by this decree, in 1889; but he made his discovery of a mineral-bearing lode within it in the fall of 1890. It was not, however, until October, 1895, that the appellant made the discovery and marked the boundaries of the Kate F., upon which he relies to maintain his claim to a portion of the land covered by the Star. It is not claimed that either of these locators failed to comply with any of the requirements of the acts of congress, or of the statutes of the state of Utah, or of any of the rules and customs of miners, unless the fact that Perego did not make his discovery until after he located his claim constituted such a failure; and the entire case turns

upon that question. If the location which Perego made in 1889 became valid at any time before October 5, 1895, when the appellant made his discovery, that discovery was not made upon unappropriated public land, and was void; and if Perego's location was void in 1895, the land was unappropriated, and Erwin's location was valid. The acts of congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode-mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-bearing lode, and the distinct marking of the boundaries of his claim, so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but when these requirements have been complied with the land is no longer public, but the possession, the right to the possession, and the right to acquire the title are irrevocably vested in the locator. Rev. St. §§ 2319, 2320, 2324; 1 Lindl. Mines, §§ 273, 328, 350; Book v. Mining Co., 58 Fed. 108; Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 666, 680; Zollars v. Evans, 5 Fed. 172, 175; McGinnis v. Egbert (Colo. Sup.) 5 Pac. 652, 655. Now, Perego had complied with both these requirements five years before the appellant had made his discovery and location on the property in dispute. How can the order in which he fulfilled them be material to Erwin? He marked the boundaries of his claim in 1889, and he made his discovery in 1890. If he had again marked these boundaries on the day he made his discovery, or on the day following, it is not claimed that his location would have been unlawful or invalid. But those boundaries were already marked. Why should he be required to do the useless act of designating them again? Such an act would not enable them to be more readily traced, and no better notice of his claim, or of its nature or extent, would have been given by pulling down and again establishing the monuments which already designated its limits. It cannot have been necessary to pursue this course, since the law never requires the performance of an idle and futile ceremony. Moreover, there is no requirement in the legislation of congress that the discovery shall be made before the location, or that the location shall precede the discovery. The Revised Statutes simply provide that both acts shall be completed before the right of possession vests. There is no reason to be deduced from the acts of congress or from the nature of the case why a claim upon which the location was made before the discovery should be held void, while one upon which the discovery was made before the location should be held valid; and the rights of these locators should be left where the congress established them, valid and vested when both acts have been done, regardless of their order, but void and ineffectual when the rights of others have intervened before either act has been completed. The order in which the statutory requirements for securing a lode mining claim are complied with is immaterial, so long as the rights of others do not intervene before they are complied with. The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both

are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. 666, 676; 4 *Morr. Min. R.* 411, 423; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522, 531; *Zollars v. Evans*, 5 Fed. 172, 175; *Strepy v. Stark* (Colo. Sup.) 5 Pac. 111, 114; *Thompson v. Spray*, 72 Cal. 528, 533, 14 Pac. 182; *Erhardt v. Boaro*, 113 U. S. 527, 536, 5 Sup. Ct. 560. This conclusion is decisive of the case. The location of 1889 inured to the benefit of Perego as of the date of his subsequent discovery in 1890, and vested in him and his grantee the right to the possession of the property in dispute from the latter date.

It is urged in the brief of counsel for appellant that the acts of Perego in 1890 did not amount to a discovery, but were the mere development of a vein upon which he had made a void discovery on September 5, 1888. An examination of the record, however, has convinced us that there is no merit in this suggestion. Perego did make a discovery of the lode in question on September 5, 1888, but he made this discovery within the limits of a prior location known as the "Gopher Claim," and a part of the Star claim was then located on the Gopher claim. In the summer of 1889 the owners of the Gopher applied for a patent to their claim under the act of congress, and Perego made no claim adverse to that application. He thereby lost all that portion of the original Star claim which was within the limits of the Gopher. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 66 Fed. 200, 208, 13 C. C. A. 390, 398, 32 U. S. App. 75, 87; *Eureka Consol. Min. Co. v. Richmond Min. Co.*, Fed. Cas. No. 4,548, 4 Sawy. 302; *Kannaugh v. Mining Co.*, 16 Colo. 341, 27 Pac. 245. As his discovery of September 5, 1888, was on the Gopher claim, it was not on the unappropriated public land of the United States; and hence his entire claim based upon that discovery was void. *Rev. St.* § 2319; *Belk v. Meagher*, 104 U. S. 279, 284; *Gwillim v. Donnellan*, 115 U. S. 45, 51, 5 Sup. Ct. 1110. The result was that all that portion of the Star claim within the limits of the Gopher claim went to the owners of the Gopher, and all that portion without the boundaries of the Gopher became unappropriated public land, and subject to relocation. Thereupon, in 1889, Perego caused the Star claim to be surveyed again, marked its boundaries, and located it on that portion of his first claim that was not within the boundaries of the Gopher. In 1890 he made a new discovery of the lode, and sunk a new shaft, within the limits of his claim and without the limits of the Gopher. When it was determined, in 1889, that his location of 1888 was void, Perego undoubtedly had the same right to discover a lode and locate a claim upon that portion of his former claim which remained unappropriated that any other competent locator had. His failure to secure a valid claim by his location of 1888 did not deprive him of the right to try again. It is not necessary that a locator shall make the first discovery of a vein or lode within his claim. All that the statutes require is that he shall discover the lode within his claim. The evidence in this record is clear and uncontradicted, not that Perego was developing in 1890 the lode which he had discovered in

1888 and had subsequently abandoned, but that he then made a new discovery of that lode within the limits of his relocated claim, and that he thereby perfected his possessory title to the premises in dispute. The decree below is affirmed.

UNITED STATES v. TENNANT et al.

(District Court, D. Washington, N. D. March 25, 1899.)

CONDEMNATION OF LAND BY UNITED STATES FOR FORTIFICATIONS—PROCEDURE
—NEW TRIAL.

The statutes of Washington which prescribe a special procedure for the condemnation of land by the state for public use (Ballinger's Ann. Codes & St. tit. 31, c. 5, § 5616 et seq.), to which the general practice in civil actions is not applicable, do not authorize the trial court to set aside the verdict of a jury awarding damages to the landowner, but provide that the amount of the award shall be subject to review by the supreme court on appeal; and under 1 Supp. Rev. St. (2d Ed.) pp. 601, 780, requiring proceedings by the United States for the condemnation of land required for fortifications to conform, as near as may be, to the state practice in such cases, a district court, in such a proceeding, has no power to set aside a verdict and grant a new trial on the ground that the amount awarded a landowner is excessive.

On Motion to Set Aside a Verdict and for a New Trial.

Wilson R. Gay, U. S. Atty.

Ellis De Bruler and Scott & McNeny, for defendants.

HANFORD, District Judge. This is a proceeding for the condemnation of land necessary as a site for fortifications to protect the government dry dock at Port Orchard. A special jury was impaneled, and the question as to the compensation to be rendered by the government to each separate owner of the several tracts of land required was fixed by a separate verdict, after hearing the testimony of witnesses called by the government and by the owners, respectively. In favor of Mrs. Theresa Wood, the owner of several tracts of land, containing in the aggregate about 118 acres, the jury rendered a verdict for the sum of \$4,600, and the United States attorney has moved to set aside the verdict, and for a new trial, on the ground that the compensation awarded is excessive. Considering the testimony as to the character and value of Mrs. Wood's land, and the comparative value of other land in the vicinity, I consider that the sum of \$4,600 is largely in excess of the present market value of the land, and is more than she is justly entitled to receive from the government as damages for the taking of her property, and, if I believed that the law authorized the granting of a new trial and the resubmission of the question of compensation to another jury, I would not hesitate to grant the motion of the United States attorney. But the laws of the United States provide that proceedings for the condemnation of land required for fortifications shall conform, as near as may be, to the practice in condemnation proceedings in the courts of the state in which the land is situated, prescribed by the laws of the state. 1 Supp. Rev. St. U. S. (2d Ed.) pp. 601, 780. Therefore, the form of procedure prescribed by the laws of this state in cases of appropria-

tion of property by the state furnishes a guide which the court must follow, as near as may be, in the proceedings for acquiring titles from private owners to real estate required by the United States government, and fixing the compensation to be paid therefor. See Ballinger's Ann. Codes & St. Wash. tit. 31, c. 5, § 5616 et seq. This chapter of the Code prescribes a special proceeding, and the general rules of procedure governing the trial of civil actions is not applicable in condemnation cases. *Railway Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835. The chapter contains no provision expressly conferring power upon the trial court to set aside the verdict of a jury or grant a new trial, and a strong implication that such power is denied by the legislature arises from section 5624, relating to appeals, which provides that an "appeal shall bring before the supreme court the propriety and justness of the amount of damage in respect to the parties to the appeal." I consider that since the law requires the appellate court to review the decision of the jury as to the justness of the amount of damages awarded, and as the proceeding is of a summary character, it would be an unwarranted assumption of power for the trial court to interpose by calling a second jury to try again the issue between the government and the property owner as to the amount to be rendered as compensation to the owner. The provisions of the chapter throughout are consistent with the theory that the determination of the jury as to the amount to be awarded to an owner of property taken for public use may be reviewed by the appellate court, but not by the judge presiding at the trial, and that there is to be no second trial. Section 5620 seems to be mandatory in providing that:

"Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested for taking such land, real estate, or premises."

The most significant provisions, however, are in section 5622. The last clause of this section seems to require the appellate court to finally determine the matter in issue as to the amount of damages, instead of remanding cases which have been appealed for retrial. The language of this clause is as follows:

"Provided, that in cases of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by the state as aforesaid, shall remain in the custody of said court until the final determination of the proceedings by the said supreme court."

The section also plainly provides that upon an appeal by the owner he may "recover a greater amount of damages," and presumably the damages may be reduced if the government appeals, as it may. In the absence of anything more explicit, it is my opinion that this section must be construed as a direction to the appellate court to finally determine the question as to the amount of damages, and, if the damages assessed in the court of original jurisdiction appear to have been unjust, it is to fix definitely and finally the amount of the damages, and render a final judgment. Consistently with this opinion, the motion of the United States attorney for a new trial in this court must be denied.

HOBBS v. NATIONAL BANK OF COMMERCE OF KANSAS CITY.

(Circuit Court of Appeals, Second Circuit. April 25, 1899.)

No. 157.

1. CIRCUIT COURT OF APPEALS—AMENDMENT OF BILL OF EXCEPTIONS.

The circuit court of appeals has no power to amend the bill of exceptions.

2. SAME—RECORD ON APPEAL—EXHIBITS.

Exhibits marked on the trial are theoretically filed with the clerk, and become a part of the record; and, if they are omitted from the transcript, the circuit court of appeals will direct them to be returned, under Rule 14, subd. 3 (31 C. C. A. clvii.; 90 Fed. clvii.), providing that no case will be heard, except on a record complete in itself.

In Error to the Circuit Court of the United States for the Northern District of New York.

On motion by Edward A. Hobbs, plaintiff in error, to amend the bill of exceptions, to insert matter in transcript of the record, and for other and further relief.

Alpheus Bulkeley, for the motion.

Omar Powell, opposed.

Before LACOMBE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

PER CURIAM. This court has no power to amend the bill of exceptions. It appears, however, that the transcript of record does not contain all the exhibits filed with the clerk of the circuit court. In practice, upon the trial of a cause exhibits are marked, and then returned to the party offering them, and retained by him; but, theoretically, when marked they are filed with the clerk, and become part of the record in the circuit court. It is not disputed that among the exhibits thus filed in this cause there should be found a document marked "Exhibit 3," and purporting to be the articles of association of the Western Farm Mortgage Trust Company, of Lawrence, Kan. Rule 14, subd. 3 (31 C. C. A. clvii., 90 Fed. clvii.) provides:

"No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed."

The plaintiff in error may therefore take an order directing the clerk of the circuit court to return such exhibit to this court, and directing the clerk of this court to print the same as a part of the record in this cause.

DWYER et al. v. UNITED STATES, to Use of ALLENTOWN ROLLING MILLS.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 142.

1. ACTION ON BOND—DAMAGES.

The rule that damages in an action on a bond cannot be recovered, in excess of the penalty thereof, does not apply to the costs which plaintiff incurs by the obligor's failure to pay on demand, and subsequent defense of the action.

2. INTEREST—DEMAND.

A summons and complaint served in an action on a bond, where the damages are unliquidated, constitute a demand sufficient to start interest running.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the circuit court, Southern district of New York, in favor of defendant in error, who was plaintiff below. The action was on a bond conditioned to pay for labor and materials furnished in the erection of a lighthouse in Portland harbor. The cause was tried at circuit, and a verdict rendered by the jury (June 24, 1898) for \$11,525.38. Entry of judgment was suspended for nearly six months, apparently to allow defendants to prepare and serve a bill of exceptions. This they failed to do, and judgment was entered December 17, 1898, for the amount of the verdict, \$11,525.38, interest thereon from rendition to entry of judgment, \$336.30, and costs, \$953.32; making in all \$12,815.

Charles J. Hardy, for plaintiff in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. There being no bill of exceptions, the writ of error brings up only the judgment roll, and whatever questions may arise thereon. Two assignments of error only have been presented in argument.

1. It appears that the bond was in the amount of \$12,000, and defendants contend that there can be no recovery in excess of that sum. It is well settled that no damages can be recovered in excess of the penalty named in the bond, but the costs which plaintiff is made to incur by the obligors' failure to pay on demand, and subsequent defense of the action, are within neither the letter nor the spirit of the rule. The total amount of the recovery in this case, exclusive of costs, is \$11,861.68,—a sum less than the penalty.

2. It is further suggested by plaintiff in error that a party is not entitled to interest on an unliquidated claim until after demand. The proposition is undoubtedly sound, but we fail to see its application here. Conceding that the plaintiff's demand was unliquidated, it appears that the verdict was "for the plaintiff for \$10,924⁵⁰/₁₀₀, with interest from July 16, 1897, amounting to \$600⁸³/₁₀₀, making a total of \$11,525³⁸/₁₀₀." It further appears that the summons and complaint were served on July 16, 1897. This was certainly a demand sufficient to set interest running. The judgment is affirmed.

WHEELING BRIDGE & T. RY. CO. v. FRANZHEIM.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1899.)

No. 277.

DIRECTING VERDICT.

In an action by a corporation against its late president to recover a sum alleged to be due, defendant pleaded a set-off and counterclaim, but died before trial. Plaintiff, to establish its claim, produced an account rendered by defendant after he had ceased being president, showing a balance due him to a large amount. The account had been voluntarily furnished, and was the only evidence offered to support the claim of plaintiff, or to impeach the items claimed by defendant. *Held*, that it was the duty of the jury to act upon and consider the whole account, as they could not arbitrarily discredit the part showing a balance due defendant; and an order of the court directing a verdict for defendant, where the counterclaim was not urged, was not error.

In Error to the Circuit Court of the United States for the District of West Virginia.

This was an action of assumpsit in the circuit court of the United States for the district of West Virginia, brought by the Wheeling Bridge & Terminal Company against Robert H. Cochran, who, up to March 18, 1892, had been president of the plaintiff corporation. The suit was instituted August 27, 1892, and the plaintiff filed as its cause of action an account of debts and credits between it and the defendant, showing a balance in its favor of \$2,147.22. The defendant pleaded non assumpsit and payment, and filed a bill of offsets, and afterwards an amended bill of offsets, showing a large balance due the defendant. A trial was had, resulting in a verdict on the defendant's set-off in favor of the defendant, Cochran, against the plaintiff corporation for \$1,784.98. Upon writ of error to this court, the judgment was reversed, and a new trial directed upon the ground that the defendant had been improperly allowed as part of the verdict for coupons upon bonds of the plaintiff corporation which matured after the receiver was appointed. 15 C. C. A. 321, 68 Fed. 141. Subsequently Cochran, the defendant, died, and Franzheim was appointed his administrator in West Virginia, and on April 9, 1897, the case was revived as against him in favor of the plaintiff, and was also revived in his favor as against the plaintiff. On April 6, 1898, Charles O. Brewster, who, pending this suit, had been appointed receiver to take charge of certain property mortgaged by the plaintiff corporation, applied to be admitted as a plaintiff, claiming that the funds sued for were covered by the mortgage, and by order of April 6, 1898, he was made a party plaintiff, and he moved the court to dismiss the suit on the ground that the administrator, Franzheim, had no property of his intestate in West Virginia, and that a judgment against him would be worthless, which motion the court denied. On April 7, 1898, the case was tried a second time with a jury, the only evidence to support plaintiff's claim being an account, furnished to plaintiff by the defendant, showing a balance in defendant's favor: and upon motion of the defendant the court instructed the jury to find for the defendant. The plaintiff, by writ of error, brings the rulings of the trial court here for review.

Melville D. Post, for plaintiff in error.

Henry M. Russell and Thayer Melvin, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge. The first error assigned is that the trial court denied the motion of the receiver to dismiss the case. We think this ruling was clearly right under Code W. Va. c. 126, § 9, which provides that a defendant who pleads a set-off or demand against the plaintiff shall be deemed to have brought an action against the plain-

tiff, and that the plaintiff thereafter shall not dismiss his case without the defendant's consent. The assignment of error principally urged and relied upon by the plaintiff is that the evidence required the court to submit the case to the jury, and that it was error to direct a verdict for the defendant. This raises the question of the legal effect of the evidence. The defendant, Cochran, had been, from a period prior to 1889 up to March 18, 1892, the president of the plaintiff company. On March 18, 1892, he ceased to be its president, and on June 29, 1892, he mailed from Wheeling, W. Va., to R. B. Ferris, its secretary in New York City, a statement of his account with the plaintiff company in which he charged himself with a balance due by him as per an account which had been rendered as of February 19, 1892, and cash items received by him subsequently, amounting in all to \$4,046.80. He claimed credits for items of cash expended and for his salary as president at \$5,000 a year to March 18, 1892. These items amounted to \$1,899.58, and are admitted by the plaintiff to be correct. He also claimed as due him the sum of \$7,500 "for services rendered generally and as president of the Martin's Ferry Terminal Railroad Company from October 6, 1888, and for closing up the affairs of the Wheeling & Eastern Improvement Company with the Martin's Ferry Terminal Railway, and for other services rendered the Wheeling & Eastern Improvement Company, taking care of its affairs at Wheeling since September, 1890, in the absence of its president, George P. Bissell, and for services rendered the Wheeling Bridge & Terminal Railway Company after March 18, 1892, as counsel and agent." The account thus rendered showed a balance due to Cochran of \$5,352.78, and by the letter in which the account was sent Cochran demanded of the plaintiff company payment of that balance. At the trial the plaintiff, to prove its claim, produced the account thus rendered to it by Cochran, together with the deposition of Ferris, its secretary, proving the receipt of the account and Cochran's letter by him. It also gave in evidence the deposition of Ferris, in which he testified that he had met Cochran in 1890, and subsequently in Wheeling, and in January, 1892, and in March, 1892, in New York, at stockholders' and directors' meetings, and that at none of these meetings did Cochran make claim for compensation for the services for which in the account he charged the \$7,500. It also offered in evidence a mortgage, dated December 2, 1889, from the plaintiff corporation to the Washington Trust Company to secure certain bonds, and under which Brewster had been appointed receiver of all the mortgaged property. The plaintiff then rested its case, and the defendant, as shown by the record, offered no testimony.

The question is whether, upon this state of proof, it was error of which the plaintiff can complain to direct a verdict for the defendant. The contention of the plaintiff is that the account rendered by the defendant, Cochran, in which he admitted that he had received the money of the plaintiff company to the amount of \$4,046.80, was an admission against interest by which he was bound, and that the charges and claim in his favor on the other side of the same account were items which required affirmative proof to support them, or at least that the question should have been submitted to the jury for them to pass upon,

so that the jury, having the whole statement before them, and regarding it as a statement made by Cochran, might give such weight to his statement as to the different items as they thought they were entitled to. The plaintiff contends that the statement of Cochran which is put in evidence, so far as it was an admission that Cochran had received moneys of the company, was conclusive evidence charging Cochran with those sums; and the other part of the statement was a bare claim of Cochran's, unsupported by any proof whatever. The plaintiff conceded at the trial that the items for salary as president, and the cash items claimed by Cochran, were correct, but as to the claim for various services it contended that the account was no evidence to support that claim, and that it was entitled before the jury to urge that the plaintiff was entitled to a verdict for at least the balance in plaintiff's favor if the jury should find that the \$7,500 item was unsupported by proof. The trial court, by its direction to the jury, would seem to have regarded the plaintiff as bound by the account which it put in evidence, at least to the extent that, although it was an admission by Cochran that he had received certain moneys, for which he was accountable to the plaintiff corporation, the admission was accompanied with the assertion that there were sums due him which more than counterbalanced the sums so received, which, for the purposes of the suit, nullified that part of Cochran's admission favorable to the plaintiff, and left the plaintiff without any proof upon which the jury could find a verdict for it. It would appear from the record that there was no substantial evidence before the jury except the account which Cochran had rendered to the company. The other testimony of Ferris was not such as had any probative force, either for or against the plaintiff, so that the question is narrowed down to the effect of the account rendered by the defendant containing credits and debits. Without evidence of any kind to guide them, would the jury have been justified in ignoring the part of the account which made for the defendant, and in accepting as true only that part in which the defendant charged himself? Is it true, with regard to admissions, that the jury can reject the part which is in the declarant's interest, and believe only that which is against his interest? Greenl. Ev. § 201; 2 Tayl. Ev. §§ 725, 726. But the present question is whether, without any direct or indirect evidence as to the truth, except the account itself, and with no inherent improbability in the claim made by the declarant, the jury can arbitrarily believe one part of his statement, and reject the other, and make that arbitrary discrimination the basis of a verdict. In 2 Tayl. Ev. § 726, speaking of the rule that the whole statement must be given in evidence, and that the jury must consider how much of the entire statement they, under the circumstances, consider worthy of credit, it is said:

"Simple as this rule appears, its practical application is not without difficulty. It will therefore be convenient briefly to refer to a few leading decisions. First, such rule applies equally both to written and to verbal admissions. Consequently, where a defendant has rendered a debtor and creditor account to the plaintiff, which the latter produces in proof of his demand, it will be equally admissible in evidence of the defendant's set-off, though the plaintiff will be generally at liberty, while relying on the creditor side of the account, to impeach items which appear on the debtor side."

In the present case, the plaintiff merely produced the account, and offered no evidence either to support the creditor side or to impeach the items claimed by the defendant. The defendant had died, and in this second trial it would appear from the record that no attempt was made by his administrator to support his offset by proof, and obtain a judgment in his favor against the plaintiff, such as he did obtain in the first trial. If, at the second trial, Cochran had been living, the fact itself that he did not testify in support of his claim, and submit himself to cross-examination, might have been a circumstance for the jury to consider as turning the scale against him. Or, if the account had not been furnished by Cochran of his own motion, and it appeared that, after having been pressed for an account of moneys in his hands, he had rendered an account charging this large item for services, this might have been said to be a circumstance against him. But the deposition of Ferris, put in evidence by the plaintiff, shows that Cochran promptly rendered this account, taking the initiative, and demanding payment of the balance claimed by him to be due him. The testimony of Ferris that at the meeting spoken of Cochran failed to say anything about this charge for services is of no import, because it is not shown that the subject was under consideration, or that the time had arrived for him to demand compensation. There was, in fact, nothing for the jury to act upon except the account, and the whole of that was before them, and it was their duty to consider the whole of it; and we have not been able to discover from the record any evidence or any circumstances of any probative force from which the jury could rationally determine that the credit side of the account was true, and the disputed debtor side was all false. In this failure of proof to guide the jury, it does not appear to us that it would have been right for the trial judge to have said to the jury that, while they were to consider the whole account, they were at liberty arbitrarily to discredit the part they thought least deserving of belief, when there was nothing to guide them to a rational conclusion as to which part they should believe. The burden was upon the plaintiff to the end to prove its case by a fair preponderance of evidence. We have not arrived at our conclusion without some hesitation, but, upon the whole, we think that the trial judge was right in deciding that the plaintiff had failed, and that there was no sufficient evidence upon which the jury could reasonably find for it.

It is also further urged that the funds of the plaintiff corporation which had come to the hands of Cochran were covered by the mortgage, and were properly recoverable by the receiver, but in support of this we find no evidence in the record.

It is further urged that Cochran could not, as against other creditors of the plaintiff corporation of which he was president, pay his own debt with funds in his hands, but that other creditors were entitled to share with him *pro rata*. This cannot be conceded, but, if it were, this is an action of *assumpsit* by the corporation itself, and not a proceeding by creditors, and the defense is nonavailable.

We find no error, and the judgment is affirmed.

COMMERCIAL TRAVELERS' MUT. ACC. ASS'N OF AMERICA v.
FULTON et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 28.

1. APPEAL—REVIEW.

That the appellate court may be inclined to a conclusion different from that expressed by the jury in their verdict is no ground for disturbing it, if there is evidence sufficient to warrant the court in sending the case to the jury.

2. ACCIDENT INSURANCE—CAUSE OF DEATH—QUESTION FOR JURY.

In an action to recover on an accident policy, the evidence showed that insured suddenly fell, striking on a water spout, which left external marks on his head and face, and that he died a few minutes thereafter. It appeared that deceased was troubled with disease of the heart. Certain physicians testified that the phenomena attending deceased's death were characteristic rather of an injury to the brain, than heart disease; and one expert testified that the injuries to the head and brain described by the evidence would have been sufficient to cause death even in the case of a healthy heart. *Held* sufficient to take the case to the jury.

3. HARMLESS ERROR—EVIDENCE.

Error in allowing an expert witness to testify as to his opinion, based upon the facts included in the hypothetical question, and on reading the evidence in a former trial, was harmless, where, on an extended examination, there could be no doubt in the jury's mind that the professional opinion of the witness was based on the facts involved or testified to on the second trial.

4. OBJECTIONS WAIVED.

An exception to a refusal to dismiss the complaint at the close of plaintiff's case was waived when defendant put in his own evidence.

5. TRIAL—RECEPTION OF EVIDENCE.

Permission to plaintiff to examine expert witnesses after defendant has rested is within the discretion of the trial judge.

In Error to the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon a writ of error to review a judgment of the circuit court, Northern district of New York, entered upon the verdict of a jury in favor of defendants in error, who were plaintiffs below. The action was brought by beneficiaries under a policy of insurance, to recover \$5,000 for the death of Thomas K. Fulton. The cause has been twice tried. The opinion of this court reviewing the first trial will be found reported in 24 C. C. A. 654, and 79 Fed. 423.

W. A. Matteson, for plaintiff in error.

Chas. A. Talcott, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Reference may be had to our former opinion for an elaborate analysis of the contract. It is sufficient here to state that the conclusion then reached, and still adhered to, was that if the assured under such policy sustained an accident, but "at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused the death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the

effects of the accident," there could be no recovery. On January 1, 1895, the insured, a man weighing from 180 to 190 pounds, while on the sidewalk, waiting for a street car, suddenly fell, striking upon an iron water spout which projected a few inches above the sidewalk, and which left external, visible marks upon his head and face, in the form of abrasions or bruises, not supposed at the time to be of a serious character. He died from 15 to 20 minutes after the accident, and was buried without any careful examination into the cause of death. Three months after interment the body was exhumed and an autopsy made. It is not disputed that, at the time of his fall, Fulton was affected with a diseased heart. The primary question in the case is whether the fall produced such an effect upon the brain that he died in consequence of the blow thus received, or whether the fall caused his death only by producing such an acute aggravation of the disease of his heart that he died, when a man with a reasonably healthy heart would have lived. The medical testimony is voluminous, and we have carefully examined it. That we may be inclined to a conclusion thereon differing from that expressed by the jury in their verdict is no ground for disturbing such verdict, if there can be found anywhere in the record evidence sufficient to warrant the court in sending the case to the jury. That there was sufficient to take the case to them, we have no doubt. Two, at least, of the physicians testified that, in their opinion, death was caused by an injury to the brain; such opinion being founded in part upon the assumption in the hypothetical question, which elicited such opinion, that immediately after the fall Fulton "was unconscious, only exclaiming, 'Oh!' as he was turned over; breathing hard, as if he was blowing something, and with a rattling noise; his face not pale, but fresh-looking; and died within fifteen minutes to half an hour, without having regained consciousness." These phenomena, they testify, are characteristic rather of a death from injury to the brain than from heart disease. It is true that when, upon cross-examination, the condition of deceased's heart was disclosed to them, they both concede that the organic disease of the heart may have had something to do with the death; but one of them, at least, at the very close of his testimony, testified that the injuries to the head and brain described in the narrative of the post mortem would have been sufficient to cause death, even in the case of a healthy heart. In view of this evidence, and of the testimony of those who saw him fall, and picked him up, that his condition, as to color, breathing, and apparent unconsciousness, was such as is described in the hypothetical question, it would have been error to direct a verdict for defendant.

Certain exceptions to the admission or exclusion of evidence have been presented on the argument, and may be briefly disposed of:

Plaintiffs, as part of their prima facie case, called a doctor, to whom they put a hypothetical question, which was objected to on the ground that "certain facts proven are omitted from the question, and certain other facts not proven are included in the question." The witness answered it, stating that he believed death resulted from some injury to the brain. In reply to the very next question, on cross-examination, he stated that this opinion was based upon the facts included in the

hypothetical question, "and upon reading the evidence in the former trial." Defendant's counsel thereupon moved that the answer expressing his opinion be stricken out, upon the ground that it was based upon some record he had read, as well as upon the question put to him. The motion was denied. Manifestly, this was error. The jury knew nothing about the evidence in the former trial. There was therefore nothing to indicate to them upon what assumed facts the witness predicated his opinion, nor whether his assumptions as to such facts were warranted by the evidence or not. We are of the opinion, however, that the error was harmless. The same witness was recalled in rebuttal, and an extended direct and cross examination fully displayed the grounds upon which he based the opinion, which he reiterated. There could have been no doubt in the jury's mind that the witness' professional opinions were based upon the facts proved or testified to on the second trial. For a similar reason, it will not be necessary to discuss the objections to various other hypothetical questions. All the experts were subjected to such extended examinations that their opinions, under every hypothesis possible under the testimony, were elicited.

The exception reserved to the refusal to dismiss the complaint at close of plaintiffs' case was waived when defendant put in its own evidence. The exception to exclusion of part of an answer by Dr. Boggs, examined on commission, is unsound. The part excluded was hearsay. The questions put to the same witness as to his own statements made in the death certificate were objectionable in form, inasmuch as they assumed the existence of a document not proved; but the witness' answers showed precisely what statements he did include in that document, and it was legitimate cross-examination to ascertain what statements the witness had made on the subject out of court. The permission accorded to the plaintiffs to examine expert witnesses after defendant had rested, in the peculiar circumstances of this case, was within the discretion of the trial judge.

Of the remaining exceptions to rulings upon questions of evidence, some have been covered by what has been said as to hypothetical questions, some refer to matters within the discretion of the court, and the remainder are either unsound, or trivial and unimportant.

A number of exceptions were reserved as to the charge, and as to refusals to charge. None of them need be discussed. The charge most carefully conformed to the opinion of this court upon the first appeal, and could have left no doubt in the jury's mind as to what it was necessary to find in order to give plaintiffs a verdict. That their finding in favor of the plaintiffs was, as defendant contends, against the weight of evidence, is a matter not open for discussion here. The judgment of the circuit court is affirmed.

SARRAZIN v. W. R. IRBY CIGAR & TOBACCO CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1899.)

No. 788.

1. JUDGMENT AS EVIDENCE—PROOF OF ASSIGNMENT IN INSOLVENCY.

Under the law of Louisiana, a judgment accepting a cession of a debtor's property in insolvency proceedings is final, and can only be set aside by an appeal, or in an action of nullity.

2. EVIDENCE—ADMISSIBILITY OF PART OF JUDICIAL RECORD.

It is the settled rule in Louisiana that the production of the entire record in insolvency proceedings is unnecessary, where it is sought only to prove a single fact, or a certain part of such proceedings.

3. GENERAL ASSIGNMENT BY INSOLVENT—PROPERTY INCLUDED.

The insolvency law of Louisiana requires the cession of all the property of a debtor seeking to avail himself of its provisions; and an acceptance of such cession by the court vests all the debtor's property in his creditors, whether enumerated in his schedule, or whether he so intended, or not. Such a cession and an acceptance carry with them the property in a trade-mark, unless it is strictly personal, so as not to be assignable.

4. TRADE-MARKS—ASSIGNABILITY.

A registered trade-mark for a brand of smoking tobacco, the only essential feature of which is the name of the brand, is not personal to the individual registering it, but may be transferred.

5. SAME—REGISTRY ACT—EFFECT ON TRANSFER.

The registry of a trade-mark under the act of March 3, 1881, confers no property rights similar to those acquired under the patent or copyright laws, which are grants by the United States, but merely brings pre-existing rights which the proprietor may have at common law within the cognizance of federal courts in cases wherein it is alleged in the pleadings that such trade-mark is used in connection with commerce with foreign countries or Indian tribes; otherwise, suits relating to trade-marks, whether registered or not, involve no federal question; nor does their registry bring them within the provisions of the patent laws, as to the formalities required for their transfer.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This action was brought by Cheri E. Sarrazin, a citizen of Mississippi, against the W. R. Irby Cigar & Tobacco Company, Limited, a corporation organized under the laws of the state of Louisiana, and domiciled in the city of New Orleans, to recover damages for the alleged infringement of a trade-mark ("King Bee," etc.) for smoking tobacco. The infringement is alleged to have been committed in the years 1896, 1897, and 1898. The plaintiff avers in his petition that he registered his said trade-mark in the United States patent office as provided by the act of congress of March 3, 1881, and that on the 14th day of December, 1886, a certificate of registry was issued to him. It is further averred that, prior to and since the registration of said trade-mark, he has been placing the same upon smoking tobacco and cigarettes, which have a well-known reputation and sale through the United States and Mexico and Central America. The location of the defendant's infringement is nowhere set forth in the petition, except in giving the domicile of the defendant corporation in the city of New Orleans, and there is no averment that the defendant corporation has ever infringed the said trade-mark in trade and commerce with Indian tribes or in foreign countries. The defendant filed three exceptions to the plaintiff's demand, as follows: "(1) This honorable court is without jurisdiction, as a court of law, to hear and determine the case made by plaintiff, and that this action must be dismissed for want of jurisdiction. (2) That the plaintiff's petition fails to disclose any cause of action

against this defendant. (3) That if the said Cheri E. Sarrazin ever had any title to the said trade-mark subsequent to May 26, 1893, which title this defendant denies, the said Cheri E. Sarrazin on the 20th day of the month of June, 1894, took the benefit of the insolvent law of the state of Louisiana, and by proceedings duly filed in the civil district court for the parish of Orleans, styled 'Cheri E. Sarrazin v. His Creditors' (No. 43,051 of the docket of said court), he made a surrender of all of his property to his creditors, and cannot now be heard to maintain this suit, because whatever title he has passes by the said surrender to his said creditors under and by virtue of the proceedings aforesaid." On the trial of the exceptions a jury was waived by stipulation in writing, and the matters of law and of fact contained in the exceptions were submitted to, and tried by, the court. The court found, as a matter of fact, "that on June 20, 1894, the plaintiff, C. E. Sarrazin, made a cession of all his property, under the insolvent laws of the state of Louisiana, in the civil district court for the parish of Orleans, in said state, and that on said day the said cession was accepted by the Honorable F. D. King, judge of said civil district court, for the benefit of the creditors of said plaintiff," and, as matter of law, "that by reason of said cession of property, and the nature and character of the alleged trade-mark set out in the plaintiff's pleadings, and as shown by the exhibits thereof, said plaintiff cannot maintain this suit," and thereupon entered a judgment that the third exception of the defendant be sustained, and the suit be dismissed at plaintiff's cost, without prejudice. On the trial of the case, as shown by the bill of exceptions found in the record, counsel for the defendant offered in evidence, to be read before the court, a certified copy of the petition of the plaintiff, Cheri E. Sarrazin, offering a cession to his creditors in his insolvency proceedings, and a copy of the order of the court accepting the same, to which counsel for plaintiff objected on the ground that the same was only a part of the record, and that the entire record should have been offered, and not a part thereof.

In this court the errors assigned are as follows: "(1) Because the court erred when he permitted only a part of a record to be introduced in evidence, to wit, the petition of the plaintiff in insolvency proceedings before a court of the state of Louisiana. (2) Because the court erred when he ruled that a syndic of an insolvent has control of property not within the borders of the state of Louisiana. (3) Because the court erred when he permitted an infringer of a trade-mark to set up title in an assignee or syndic of an insolvent. (4) Because the court erred when he ruled that a trade-mark registered under the act of congress of 1881, used among foreign nations and Indian tribes, was subject to the laws of the state of Louisiana. (5) Because the court erred when he ruled that a trade-mark registered under the act of congress of 1881 could be transferred in the manner decided, being a violation of a contract and section 8 and articles 3, 6, and 8 of the constitution of the United States. (6) Because the court erred when he ruled that a general assignment in insolvency operated as a transfer of the trade-mark, if said property was not placed upon the schedule of the insolvent, and never claimed by the syndic or creditors of the insolvent, nor in any manner disposed of under the assignment. (7) Because the court erred when he ruled that a debtor was obliged to comprehend in his surrender any property that is not subject to be seized and sold in execution against him. (8) Because the court erred when he ruled that an assignee or syndic in insolvency, or a receiver of all the property of a debtor, appointed under the laws of a state, by virtue of a general assignment or appointment, acquired title in a trade-mark or patent right. (9) Because the court erred when he ruled that personal property of any description could be claimed by a syndic for the benefit of the creditors of an insolvent, until there had been a delivery of said personal property as is required under the laws of the state of Louisiana. (10) Because the court erred when he ruled that a trade-mark of which the name of plaintiff in error formed a part could be assigned, for it is openly trading in the name of another. (11) Because the court erred when he ruled that an assignment would vest the syndic of an insolvent with title to a trade-mark, unless signed in writing in the presence of two witnesses, conveying the specific property or right in said trade-mark, and duly recorded in the United States patent office."

W. R. Stringfellow and T. M. Gill, for plaintiff in error.

E. H. Farrar, E. B. Kruttschnitt, B. F. Jonas, and Hewes T. Gurley, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). Where there is an issue of fact in the circuit court, and a jury is waived, and the cause submitted to the court, as permitted in sections 649, 700, Rev. St., there is nothing to review in the appellate court, except (1) rulings of the court in the progress of the trial, if excepted to at the time, and duly presented by a bill of exceptions; and, (2) when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment. Under the jurisprudence of the state of Louisiana, the judgment accepting the cession in insolvency proceedings is a final decree, which can only be set aside by an appeal, or in an action of nullity. *State v. Green*, 34 La. Ann. 1027. Under the same jurisprudence, it has been settled that the production of the entire record in mortuary and in insolvency proceedings, in order to prove a single fact or date, or a certain part of the proceedings, is not necessary. *McIntosh v. Smith*, 2 La. Ann. 756; *Succession of Stafford*, Id. 886; *Price v. Emerson*, 14 La. Ann. 141; *Succession of Broom*, 14 La. Ann. 67; *Henderson v. Maxwell*, 22 La. Ann. 357. It is difficult to see what injury could result to the plaintiff from the introduction of only part of the record, or what advantage would result to either party from the introduction of the whole record. The bill of exceptions does not show what particular issue the certificate was offered to prove, and we can only infer the relevancy of the certificate for any purpose from the issues between the parties. The fact found by the trial judge is to the effect that the plaintiff, Sarrazin, had sold, assigned, and transferred all title and ownership to his trade-mark, if, as a matter of law in the state of Louisiana, such trade-mark was embraced within the property ceded. The law of Louisiana requires a cession of all the property of the insolvent debtor, and, upon acceptance of the cession by the court, vests such property immediately in the creditors. Rev. St. La. § 1791. It seems to be now settled beyond dispute that both in the state and federal courts a cession does include all the property of the debtor, whether the same is mentioned in the schedule of his property, or whether the debtor intended to surrender it, or not. The cession offered, and accepted by the court, vests the property of the debtor in the creditors, in any and every event. *Muse v. Yarborough*, 11 La. 521; *Dwight v. Simon*, 4 La. Ann. 490; *Bank v. Horn*, 17 How. 157; *Geilinger v. Philippi*, 133 U. S. 246, 10 Sup. Ct. 266.

Every trade-mark is assignable, together with the business in which it is used, unless it is strictly personal. *Kidd v. Johnson*, 100 U. S. 617; *Chemical Co. v. Meyer*, 139 U. S. 547, 11 Sup. Ct. 625; *Warren v. Thread Co.*, 134 Mass. 247; *Nervine Co. v. Richmond*, 159 U. S. 302; 16 Sup. Ct. 30. If a trade-mark belongs to the class of assignable trade-marks, it is transferred, by the operation of an insolvency or bankrupt law, to the assignee, as part of the bankrupt's assets. There is nothing in the petition to show that the plaintiff's trade-mark was

anything but the name "King Bee," which could be in no sense personal. In an appendix to the bill of exceptions, there appears to be an application for the registry of the plaintiff's trade-mark, wherein the plaintiff states that his trade-mark consists of the words "King Bee." After describing minutely the medals, rosettes, and other details, including his own name as the manufacturer, he adds, "The medals may be omitted and changed at pleasure without materially altering the character of my trade-mark, the essential features of which are the words 'King Bee.'" This does not describe a trade-mark requiring the skill of a particular individual to be exercised in the manufacture or selection of the goods upon which it is to be used. See *Warren v. Thread Co.*, supra.

The plaintiff in error, laying great stress upon the registry of his trade-mark, has presented his case as though, because of the alleged registry, it is one arising under the laws of the United States, and as though patents and copyrights and trade-marks are in some wise identical as property rights, and in any assignment and transfer the same statutory rules prevail. His assignments of error therefore cover a number of propositions which are so well answered in the brief of the learned counsel for the defendant in error that we quote therefrom as follows:

"The plaintiff's counsel attempted in the lower court, and are attempting here, to confound a trade-mark with a patent, and to liken the registry law of March 3, 1881, to the patent acts. There is no analogy whatever between them. Patents and copyrights are specific grants made by the congress to inventors and authors under a special clause in the constitution, and the authority of the congress over the same is exclusive. The congress has no authority over trade-marks, as such, and for this reason the original trade-mark laws of July 8, 1870, and August 14, 1876, were declared unconstitutional and void by the supreme court in *The Trade-Mark Cases*, 100 U. S. 82. The court in that case declined to decide whether the congress, under the power to regulate commerce with foreign countries, etc., might, as to such commerce, regulate the trade-marks used in such commerce. Judge Miller, in deciding the case, used this language on the nature of a trade-mark: 'The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is has long been recognized by the common law, and the chancery courts of England and of this country, and by the statutes of some of the states. It is a property right, for the violation of which damages may be recovered in an action at law; and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement. This exclusive right was not created by the act of congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property, and the civil remedies for its protection, existed long anterior to that act, and have remained in full force since its passage.' In 1881 the congress adopted a law relative to the registry of trade-marks used in foreign commerce and with the Indian tribes. If this law is constitutional, it must be pitched on the power to regulate commerce. We have no desire to contest this question here, as it does not pertain to this case. The statute is extremely narrow, and it does not attempt to cover the infringement of trade-marks used within the United States in state and interstate commerce; and the federal courts have no jurisdiction to enforce any rights or claims under said law, unless it is averred by the plaintiff that the defendant is infringing in the matter of foreign commerce or with the Indian tribes. *Luyties v. Hollender*, 21 Fed. 281; *Schumacher v. Schwencke*, 26 Fed. 818; *Graveley v. Graveley*, 42 Fed. 265; *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145; *Manufacturing Co. v. Ludeling*, 22 Fed. 823. The registry of a trade-mark under this law adds nothing to the right of ownership therein (except jurisdiction in the United States court, of doubtful constitutionality), and takes nothing

away from such ownership (see language of Wheeler, J., in *Schumacher v. Schwencke*, supra, and of Bond, J., in *Graveley v. Graveley*, supra). In a suit not pitched upon the statute (i. e. in a suit between citizens of different states, alleging infringement generally, covering state and interstate commerce), the fact that the trade-mark in question is registered, vel non, is a matter of utter irrelevance. The counsel are laboring under the error of confounding the trade-mark, or the right to the same, with the registry thereof, or, rather, with the mere certificate of such registry. Sections 10 and 11 of the act make it as clear as possible that the act does not in any manner 'prevent, lessen, impeach or avoid,' any remedy or right, or 'unfavorably affect any claim to a trade-mark' either before registry, after registry, or even after the term of registry has expired. Nor does this act make registry anything but prima facie evidence of ownership, so that one may be the registered owner, and another the actual owner. It thus appears that trade-marks do not lie in the sphere of patents and patent rights. The latter are governmental grants of exclusive privileges, and the federal government is given sole and exclusive legislative authority over them. The other are mere common-law rights of property in devices used in trade to designate origin, quality, grade, or source of manufacture of certain articles. These rights of property depend on the general fundamental rights of individuals, and the statutes of the different states. If they can be affected by federal legislation at all, it is only within the sphere of commerce between the states, with foreign nations, and with the Indian tribes."

None of the assignments of error are well taken, and the judgment of the circuit court is affirmed.

BREWSTER v. EVANS.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1899.)

No. 731.

APPEAL—TIME FOR TAKING.

Where a writ of error was not sued out until more than six months after the expiration of an extended time allowed after judgment for preparation of a bill of exceptions, nor within that time after the bill of exceptions was actually signed and filed, it is too late to give the circuit court of appeals jurisdiction, and cannot be aided by a showing that the bill was not returned promptly to counsel after being signed by the judge.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

T. M. Miller, for plaintiff in error.

J. M. Stone, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The judgment sought to be reviewed in this cause was entered on the 14th day of June, 1897, and the court adjourned for the term on the same day. A bill of exceptions was signed by the judge on the 1st day of September, 1897, and was filed in the clerk's office on the 1st day of October, 1897. The record does not show any order of the court nor agreement of counsel extending the time within which a bill of exceptions might be taken, nor does it show any other excuse for failure to seasonably present a bill of exceptions. As the case is presented by the record, the trial judge had no authority to sign and allow a bill of exceptions after the term at which

the judgment was rendered. *Muller v. Ehlers*, 91 U. S. 249; *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230. Counsel for the defendant in error, however, admits that the court gave an order allowing the plaintiff in error 60 days within which to present his bill of exceptions. The bill was not filed within 60 days. Counsel for plaintiff in error tenders his affidavit "that the bill of exceptions in said cause was presented to the judge of said district within the time prescribed by law and the order of the court; that the same was not returned for quite a long while to counsel for appellant for examination, and this, and this only, delayed the suing out of the writ of error,—the same being sued out promptly upon the receipt of the bill of exceptions by counsel." The writ of error was sued out on April 28, 1898,—more than 6 months after the bill of exceptions was signed by the trial judge, and more than 10 months after the entry of the final judgment. Whether an order by the trial court giving time within which to prepare and have allowed a bill of exceptions has the effect of a motion for a new trial, held under advisement by the court, in determining when the time within which a writ of error may be sued out under the act of 1891, need not be decided, because the 6 months allowed by said act had elapsed in this case, whether we count from the actual date of entry of the judgment, or from the expiration of the 60 days allowed by the court, or even from the day when the bill of exceptions was signed by the trial judge. We are clear that the writ was sued out too late to give this court jurisdiction. See *City of Waxahachie v. Coler* (recently decided) 92 Fed. 284. Writ of error dismissed.

IRVINE v. ANGUS et al. ¹

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 438.

1. MONEY PAID—VOLUNTEER—PAYMENT MADE BY CLAIMANT TO PROTECT PROPERTY DURING LITIGATION.

A decree adjudged that the defendant in the suit held certain mining stock as trustee for the complainant, and directed its transfer on payment by complainant of a sum found due the defendant for disbursements, and which was made a lien on the stock. The defendant appealed from the decree to the supreme court, claiming the stock as absolute owner. Pending the appeal, assessments were made on the stock, the payment of which was necessary to prevent the stock from being sold, and which the defendant paid. The decree below was affirmed, after which, for the first time, the complainant tendered payment of the sum thereby found due the defendant. *Held*, that the appeal taken by the defendant was only an exercise of a legal right, and could not be regarded as wrongful, although a repudiation of the trust; and as, in any event, he was entitled to protect his lien on the stock, his payment of the assessments was not officious nor the act of a volunteer, and that on the complainant's taking advantage of the decree after its affirmance, and obtaining from the court a transfer of the stock, he at once became liable as upon an implied promise to repay to the defendant the amount of such assessments, as having been made to his use and benefit.

2. LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION.

A cause of action to recover the money paid on such assessments did not arise until the complainant in the suit availed himself of the decree

¹ Rehearing denied May 23, 1899.

by taking a transfer of the stock, and thus obtaining the benefit of such payments; and an action thereon would not be barred under the California statute until two years from that time.

3. EVIDENCE—ADMISSIONS BY RECORD.

When it appears from the bill of exceptions that the evidence upon the trial consisted of admissions of fact made by the parties in open court, the circuit court of appeals will treat such admissions as equivalent to a formal case agreed, and thereupon direct the circuit court to render a proper judgment upon such undisputed facts.

In Error to the Circuit Court of the United States for the Northern District of California.

George W. Towle, Jr., for plaintiff in error.

Pierson & Mitchell, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This was an action at law to recover from the defendants, as executors of the will of James G. Fair, deceased, the sum of \$15,190.60, paid by plaintiff on account of assessments on certain shares of stock alleged to have been held by him, at the time of such payment, in trust for said Fair. The complaint further alleges that the money paid by plaintiff on account of said assessments was so paid at the special instance and request of Fair, and to his sole use and benefit. It appears that on March 28, 1874, the plaintiff executed an instrument in which he declared that he was the owner of an undivided half of certain mining property, known as the "Morgan Mine," and held said half interest equally for himself and one R. H. Sinton, and therein promised that, whenever said mine should be sold or otherwise disposed of, he would account to said Sinton, his heirs or assigns, for one-half of the proceeds of such sale or other disposition of the property, after the payment of all necessary expenses theretofore or thereafter to be incurred "in and about the property up to the time of such sale or other disposition thereof." The plaintiff, on April 9, 1875, conveyed the property mentioned to the Morgan Mining Company for 9,997 shares of the stock of that company, and by mean assignment one Dunham became the owner of the interest of Sinton in the property described in the trust instrument, and entitled to the shares of stock for which such interest had been exchanged. Thereafter, on June 29, 1875, Dunham applied to the plaintiff for an accounting, and offered to pay whatever expenses had been incurred by him in relation to such trust property, and demanded an assignment of the stock for which such trust property had been exchanged. The plaintiff refused to render an account, denied the trust, and claimed to own all of said shares of stock. Dunham thereupon commenced an action in the circuit court of the United States, Ninth circuit, for the Northern district of California, against Irvine, the plaintiff herein, in which he asked to have the trust declared and for an accounting, and on May 3, 1876, he assigned to James G. Fair all of his interest in the shares of stock and matters involved in said action of Dunham v. Irvine, and the action was thereafter prosecuted by Fair in the name of Dunham. Such proceedings were had therein that on December 24, 1879, a decree was entered in that action to the

effect that this plaintiff held 4,998½ of the shares of the stock of the Morgan Mining Company under the trust declared in the instrument hereinbefore referred to, subject, however, to the payment of the sum of \$14,221.76, found by the decree to be due him on account of the payment by him of necessary expenses as contemplated by said declaration of trust; and it was further adjudged that upon the payment to this plaintiff by Dunham, or his assigns, of the sum of \$14,221.76, within 60 days after the date of the decree, with interest, he should transfer to Dunham, or assigns, said stock. On the day when this decree was entered, the plaintiff herein took an appeal therefrom to the supreme court, and the decree was subsequently affirmed by the supreme court. 4 Sup. Ct. 501. It was admitted upon the trial that on April 30, 1884, James G. Fair tendered to the plaintiff herein the whole amount found to be due him by the said decree of the circuit court of the United States, with interest thereon, but no tender of any part thereof was made prior to the determination by the supreme court of plaintiff's appeal from that decree. This tender was refused by plaintiff, and Fair thereupon paid the amount so tendered to a commissioner appointed to receive the same by the final decree in the action of Dunham v. Irvine, and the shares of stock in controversy in that action were by the commissioner, acting under the power vested in him by such decree, transferred to Fair. It was also admitted that between the date of taking the appeal from the decree of the circuit court in Dunham v. Irvine, and its final determination by the supreme court, on April 4, 1884, the plaintiff herein paid \$15,190.60 on account of assessments duly levied by the Morgan Mining Company upon the shares of stock in controversy in said action, and which, by the decree of the United States circuit court therein, he was adjudged to hold in trust for Dunham or his assigns; that, if these assessments had not been paid, the stock would have been sold; and "that each of said assessments was paid by Irvine from his own funds at the last moment that the same could be paid before the said shares would otherwise have been lawfully offered for sale and have been lawfully sold to satisfy such several assessments, and that such payments were each and all made by said Irvine to protect said shares from being sold." There was, however, no evidence given upon the trial tending to show that such assessments were paid by plaintiff upon the express request of Dunham or Fair. Upon the foregoing facts, which are not disputed, the circuit court found that, at the time of paying the assessments referred to, the plaintiff claimed to hold the shares in his own right, and not in trust for James G. Fair, and that each and all of the assessments upon the said shares of stock so paid by the plaintiff were paid by him for his own use and for the protection of his own interests, and not at the instance or request of James G. Fair, nor for his use or benefit; that the payment of said assessments was not necessary to be made by the plaintiff to protect or preserve the interest of James G. Fair in the shares of stock, or in or to any part thereof, nor was such payment made "by the plaintiff as trustee of said shares of stock, or for account thereof or of said James G. Fair"; that, at the time of paying such assessments, plaintiff did not hold the shares

of stock as trustee of James G. Fair, "but held the same wrongfully and without the consent of said James G. Fair, and was, as to the holding of the same, an involuntary trustee, and by operation of law solely." And it was further found that, during the whole time referred to in the complaint, "the said James G. Fair, as the plaintiff well knew, was the owner of said shares and desired to have the possession thereof, and to have the same transferred to his own name upon the books of said corporation, and to pay all the assessments levied thereon, but the plaintiff, wrongfully and in disregard of the rights of said James G. Fair, at all times held said shares of stock adversely to said James G. Fair, and claimed the same to be, and treated the same as, his own individual property." As a conclusion of law from these and other findings not necessary to be here stated, and for the reasons given in its opinion, reported in 84 Fed. 127, the circuit court held that the plaintiff was not entitled to recover, and judgment was thereupon entered in favor of the defendants. The case is brought here by the plaintiff in the action on a writ of error to reverse this judgment.

The errors assigned present the general question whether the findings of the circuit court above referred to are not opposed to the admitted facts as hereinbefore stated, the assignment of errors setting forth that upon such admitted facts the court ought to have found as facts that, at the time of paying the assessments thereon, the plaintiff in error held the shares of stock referred to in the complaint and findings as the trustee of Fair, upon the express trust established by the decree in *Dunham v. Irvine*; that the payment of such assessments was necessary in order to protect the interest of Fair in said shares; and that the amount paid by the plaintiff in error on account of such assessments was paid for the use and benefit of Fair. The conclusion of the circuit court that, in making the payments which are the foundation of this action, the plaintiff in error was not acting as the trustee of James G. Fair under the trust found to exist by the decree in *Dunham v. Irvine*, is clearly correct. He was, at the time when such payments were made, actively engaged in repudiating that trust, and was prosecuting an appeal to the supreme court for the purpose of securing a reversal of the decree by which it was established. The fact, however, that, in paying the assessments referred to, the plaintiff was not acting as the trustee for James G. Fair and solely for his benefit, is not sufficient to defeat this action, if there is any other independent ground upon which it can be maintained; and whether or not such other ground exists will now be considered. The complaint may be construed as containing a count for money paid by the plaintiff in error for the use and benefit of Fair. The right to maintain an action for money paid to the use of another is based upon equitable principles, and it was said by Chancellor Walworth, in *Wright v. Butler*, 6 Wend. 284:

"These actions on the money counts are resorted to as substitutes for bills in chancery, and ought to be encouraged whenever the law affords no other remedy, and where a court of equity would compel the defendant to repay to the plaintiff a sum of money which the latter had been compelled to pay for his benefit."

See, also, *Hunt v. Amidon*, 4 Hill, 345, 348.

To sustain such an action, the plaintiff is required to prove a payment of money, or the transfer of property of value, to the use of the defendant, and, where the payment or transfer was made without previous request, the proof must also show either a subsequent express or implied promise to repay, or that the payment was not officiously made by the plaintiff.

"Where no express order or request has been given, it will ordinarily be sufficient for the plaintiff to show that he has paid money for the defendant for a reasonable cause, and not officiously." 2 Greenl. Ev. § 114.

And in Keener, Quasi Cont. p. 388, the author says:

"No one officiously paying the debts of another can maintain an action either at law or in equity to recover from the debtor the money so paid. To hold otherwise would be to hold that a person has a right to thrust himself officiously upon another as his creditor. If, however, the payment made, though made without request, is not regarded in law as having been officiously made, the party so paying is entitled to be reimbursed by the debtor to the extent that the debt, as between the debtor and himself, should, in equity and good conscience, have been paid by the debtor."

This is only the statement of very familiar and well-settled principles of law. A mere volunteer is not entitled to be repaid money which he has expended for the benefit of another. Who is a "volunteer," within the meaning of this rule? A volunteer is one who has paid the debts of another without request, when he was not legally or morally bound so to do, and when he had no interest to protect in making such payment. One who pays the debts of another under such circumstances officiously intrudes himself into business which does not concern him, and his right to compel reimbursement is not recognized by law in the absence of a subsequent promise upon the part of the debtor to repay. But neither a previous request to pay nor a subsequent promise to reimburse need be proved to warrant a recovery in an action like this, when it is shown that the plaintiff was, for the protection of his own property, or the preservation of a lien held by him on property, compelled to pay what the defendant himself ought to have paid. The payment under such circumstances will not be deemed to have been officiously made, nor will the plaintiff be looked upon as a mere volunteer or intermeddler in matters in which he has no interest or concern. Let us now consider the application of this general rule of law to the admitted facts of this case. When plaintiff in error paid the assessments mentioned in the complaint, Fair was the real owner of the shares of stock upon which such assessments were levied, subject, however, to a lien thereon held by plaintiff in error, and which lien Fair, as the assignee of Dunham, was required to satisfy as a condition precedent to his right to receive from plaintiff in error a transfer of the legal title to such stock. These were the respective rights of plaintiff in error and Fair at that time, as such rights had been previously determined by the decree of the circuit court in the case of *Dunham v. Irvine*, and thereafter affirmed by the supreme court upon appeal. See *Irvine v. Dunham*, 111 U. S. 327, 335, 4 Sup. Ct. 501. There can be no doubt that, if the plaintiff in error had acquiesced in the decree of the circuit court in that case, and it had then become necessary for him to pay assessments upon such stock in order to preserve the lien thereon given to

him by that decree, such payment by him would not be regarded as officious, and he would, under the law, as already stated, be entitled to recover the amount so paid from the owner of the stock.

Was this right to protect his ascertained lien upon the stock, and to look to Fair for reimbursement in the event that Fair should finally be adjudged to be the owner of the stock, lost or affected by his appeal from that decree? We do not think the appeal can be given such effect. The plaintiff in error was not bound to accept the decree of the circuit court as final, and, in submitting the question involved in the action of *Dunham v. Irvine* to the final and decisive judgment of the supreme court, he only exercised a legal right, and such action of his cannot be regarded as wrongful, nor did he thereby become a wrongdoer. By taking the appeal he rendered himself liable, in the event of the affirmance of the decree, to answer such damages and costs as are provided by law for the failure to prosecute an appeal with effect, and he subjected himself to no other risk or liability. The lien given him by the decree was not destroyed by the act of taking such appeal, and his right to such lien was affirmed by the subsequent judgment of the supreme court. This being so, it would seem to follow that he had precisely the same right to make payments to protect the title of the property in controversy in that action, while the appeal was pending, as if such appeal had not been taken. He was not simply an adverse claimant to the stock without any right or title to protect at the time of paying the assessments referred to. The entire controversy between the parties at that time related only to the nature and extent of the interest of the plaintiff in error,—he claiming to be the absolute owner of the stock, while Fair was contending for the affirmance of the decree of the circuit court, which gave to plaintiff in error a lien upon the stock; and although the claim of the latter, that he was the owner of both the legal and equitable title, was not finally sustained by the court, still the law will not treat him as an officious volunteer in making payments necessary to protect the title to the property in litigation in that action, and in which he had a conceded interest to the extent of the lien finally established in his favor. There can be no presumption that the payment of the assessments, under the circumstances we have stated, was intended by the plaintiff as a mere gratuity to Fair, and as such payments were not officiously made, when Fair availed himself of the benefit arising therefrom by taking a transfer of the legal title to the stock, under the decree of the circuit court, he at once became liable, as upon an implied promise, to repay the plaintiff in error the amount thus paid, such payments being, in legal effect, to his use and benefit; and this should have been the finding of the circuit court upon the admissions contained in the bill of exceptions.

The case of *Homestead Co. v. Valley R. Co.*, 17 Wall. 153, is clearly distinguishable from this. That case was an equitable action involving the title to certain lands, and, pending the litigation, the Homestead Company, complainant in the action, paid taxes on the property in dispute; and, in passing upon the question of the right of that company to be reimbursed on account of such payment, the court in that case said:

"It seems that the appellants, during this litigation, paid the taxes on a portion of these lands, and claim to be reimbursed for this expenditure in case the title is adjudged to be in the defendants, on the ground that they paid the taxes in good faith and in ignorance of the law. But ignorance of the law is no ground for recovery, and the element of good faith will not sustain an action where the payment has been voluntary, without any request from the true owner of the land, and with a full knowledge of all the facts. * * * It is true, in accordance with our decision, the taxes on these lands were the debt of the defendants, which they should have paid; but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them, without being requested so to do."

The language quoted shows that in that case the party seeking reimbursement on account of taxes paid was an adverse claimant, having no interest whatever in the land in litigation therein, and upon which such taxes were levied, and the decision of the court is based on this fact; while, in the case we are considering, the plaintiff in error did have a lien upon the stock upon which the assessments paid by him were levied, and it was necessary for the preservation of this lien that such assessments should be paid.

There is no finding upon the issue presented by that part of the answer of defendants in error in which the statute of limitations is pleaded as a defense to the action. This omission to find, however, is not material, as the action is not barred upon the admitted facts. Under subdivision 1 of section 339 of the Civil Code of Procedure of the State of California, "an action upon a contract, obligation, or liability, not founded upon an instrument of writing," must be brought within two years after the cause of action accrues. This is the provision of law applicable to the case under consideration. In our opinion, there was no implied promise upon the part of Fair to repay the plaintiff in error the amount paid by him on account of the assessments referred to, until May 21, 1884, on which day Fair availed himself of the benefits arising from such payments by taking a transfer of the legal title of the stock under the decree of the circuit court. The complaint in this action was filed April 13, 1886, and therefore within two years after the cause of action for money paid by plaintiff in error to the use and benefit of Fair accrued. All of the material facts having been agreed upon by the parties at the trial, as shown by the bill of exceptions, there is no necessity for a new trial of the action. In accordance with the views expressed in this opinion, the judgment will be reversed, and the cause is remanded to the circuit court, with directions to render judgment upon the admissions of the parties contained in the bill of exceptions, in favor of the plaintiff in error, for the sum of \$15,190.60, with legal interest thereon from May 21, 1884, and costs.

CRAMER v. SINGER MFG. CO.¹**(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)****No. 472.****JUDGMENTS—PARTIES ESTOPPED—ASSUMING DEFENSE.**

If one not a party of record, nor in privity with a party of record, desires to avail himself of the judgment as an estoppel on the ground that he in fact defended the action, he must not only have defended it, but must have done so openly, to the knowledge of the opposite party, and for the defense of his own interests. That he employed the attorneys for the defendant, and paid all the expenses of the defense, will not avail him, where this was not known to the plaintiff.

In Error to the Circuit Court of the United States for the Northern District of California.

The plaintiff in error was the plaintiff in an action brought against the Singer Manufacturing Company for the infringement of letters patent No. 271,426, for an improvement in treadles for sewing machines, issued January 30, 1883, to Herman Cramer. The defendant, among other defenses, pleaded that, in an action brought on May 31, 1893, jointly against the defendant and one Willis B. Fry for infringement of the same patent, from which action the present defendant had been dismissed for want of service upon it, a verdict and judgment had been rendered in favor of the said Willis B. Fry, and against the plaintiff, which was a bar to the present action. Upon the trial in the circuit court, before Judge Beatty, the defendant, in support of its defense of a former adjudication, produced in evidence the judgment roll in the same court in the case of Cramer v. Manufacturing Co., 59 Fed. 74, and the opinion of Judge McKenna, before whom said cause was tried; and supplemented the same with the testimony of Willis B. Fry, who testified that he was, when said action was commenced, and ever since had been, the general agent of the Singer Manufacturing Company for the entire Pacific coast; that the business of the company was selling sewing machines; that the Singer Manufacturing Company paid the expenses of the defense in that suit, and paid the defendant's attorney's fees; that, in taking depositions for the defense in the East, the company, at his request, furnished him the models and the information necessary for his defense; that he did not personally furnish his own counsel; that the counsel were in the case at the start, and continued after the Singer Manufacturing Company was dismissed; that, at the time, he did not know about the expense, but when the bills were finally paid they were paid by the company; that he never paid a single dollar of the expense of defending that suit out of his own funds; that he had no agreement or understanding with the company that they were to reimburse him if he were mulcted in damages; that he made no arrangements with them regarding it; that he was present at all times during the trial, and testified as a witness, and assisted counsel in the preparation of the defense, and assisted them in looking up evidence, by seeing experts, and employing people for the purpose of hunting up machines; that some of the bills may have been paid from the San Francisco office; that, during all the time he acted as agent of the company, he received a salary, and also a commission on the account of sales made by him in his territory. On the evidence so offered, the court instructed the jury to return a verdict for the defendant, upon the ground that the judgment in the case of Cramer v. Manufacturing Co. was a bar to the present action.

J. H. Miller and Crittenden Thornton, for plaintiff in error.

Chas. K. Offield and Wheaton & Kalloch, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

¹ Rehearing denied May 23, 1899.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The principal question presented on the writ of error is whether the circuit court erred in ruling that, upon the evidence adduced by the defendant, the judgment in favor of the defendant in the case of *Cramer v. Manufacturing Co.* is *res judicata* as to the present suit. That judgment was held to be binding upon the plaintiff in this action, not for the reason that the Singer Manufacturing Company was in privity with Fry, or sustained such relation to him that it was bound by a judgment against him, but for the reason that it took an active part in the defense of that action and paid the expenses thereof. In so holding, the circuit court applied the well-settled rule that one who, for his own interests, assumes the defense of an action, is bound by the judgment as if he had been a party thereto or in privity with the defendant. But it must not be overlooked that the rule is subject to the limitation that, in order that one not a party who has assumed the burden of the defense of an action shall be bound by the judgment therein rendered, his connection with the defense must be open and known to the opposite party. In *Herm. Estop.* 157, it is said:

"If one not a party of record, nor in privity with a party of record, to a judgment, desires to avail himself of the judgment as an estoppel, on the ground that he in fact defended the action resulting in the judgment, he must not only have defended that action, but must have done so openly, to the knowledge of the opposite party, and for the defense of his own interests. That he employed an attorney who appeared for the defendant of record, and appeared as a witness for the defendant, is not sufficient."

The same doctrine is found in 2 Black, *Judgm.* § 540; *Freem. Judgm.* § 189; *Andrews v. Pipe Works*, 22 C. C. A. 110, 76 Fed. 166; *Lacroix v. Lyons*, 33 Fed. 437; *Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801; *Association v. Rogers*, 42 Minn. 123, 43 N. W. 792; *Allin's Heirs v. Hall's Heirs*, 1 A. K. Marsh. 425.

On referring to the evidence in the present case, it will be seen that it falls short of showing that the Singer Manufacturing Company had such relation to the defense in the case of *Cramer v. Manufacturing Co.* that it can plead the judgment in that case in bar of this action. So far as the evidence discloses the facts, the company's connection with the former litigation was secret. The company was not present in court, nor was its participation in the defense open and apparent. The defense was conducted by Fry and his attorneys. That the company defrayed the expenses of the defense, and paid the defendant's attorneys, is not shown to have been known to the plaintiff. It is not even shown that the company at any time bound itself to Fry or to his attorneys to pay any portion of the cost of the litigation, or to assist therein. The plaintiff was not chargeable with notice of the company's connection with the case from the mere circumstance that the attorneys who, at the beginning of the suit, appeared for both defendants, subsequently conducted the defense on behalf of Fry. Even if that circumstance, by itself, were sufficient to convey some kind of notice to the plaintiff of the company's interest in the suit, its effect was more than overcome by

the fact that the company, although it was originally made a party defendant, declined to be a defendant, and availed itself of its right to cause the action to be dismissed as to itself, and withdrew from the open connection with the case. There was in this fact a distinct intimation to the plaintiff that the company desired to place itself in an attitude where it should not be bound by any judgment that might be rendered in that case, but would be left free to litigate its rights thereafter. This was further evidenced by the fact that, by the terms of the judgment entry then made, the action was dismissed as to the Singer Manufacturing Company, "without prejudice to the right of plaintiff to commence another suit for the same cause of action." The rule announced by the authorities above cited is supported by sound reason, and its justice is illustrated by its application to the facts of the present case. The plaintiff sued for a large sum of money as damages for infringement of his patent. He attempted to recover the same from the Singer Manufacturing Company and its agent. The company asserted its right to withdraw as a party defendant, for want of legal service upon it. Numerous reasons suggest themselves why its subsequent relation to the defense—a relation which was secret and undisclosed to the plaintiff—should not now operate to prevent his recourse against it. Estoppels must be mutual. If Cramer had obtained a judgment against Fry in the former action, by what means could he have enforced it against the Singer Manufacturing Company? How could he have known, or, if he suspected such to be the case, how could he have proven, that that corporation secretly aided the defense and paid the expenses thereof? Again, circumstances may readily be conceived under which the plaintiff, in an action such as this, might be unwilling or unable to incur the expense of a thorough vindication of his rights, as against an infringer's agent who might be without the means to meet a judgment for the damages, and whose principal was not known to be so identified with the defense as to be bound by the conclusion of the suit. This view of the principal point in the case renders it unnecessary to consider the other assignments of error. We think the circuit court erred in instructing the jury to return a verdict for the defendant. The judgment will be reversed, and the cause remanded for a new trial.

In re HOLLOWAY.

(District Court, D. Kentucky. April 6, 1899.)

No. 11.

BANKRUPTCY—FORECLOSURE OF MORTGAGE—SALE BY STATE COURT.

Where a mortgagee has obtained a judgment for foreclosure and sale in a state court before the institution of proceedings in bankruptcy against the mortgagor, and the court of bankruptcy is satisfied that the mortgaged property will not sell for enough to pay the mortgage debt, whether sold under authority of the state court or by the trustee in bankruptcy, and that the mortgagee has no intention to delay the sale unreasonably or

prevent the property bringing a fair price, proceedings in the state court will not be stayed, nor will the bankruptcy court take control of the property for the purpose of a sale by the trustee.

In Bankruptcy.

R. H. Cunningham, for petitioner.

Clay & Clay, for Farmers' Bank of Kentucky.

EVANS, District Judge. Robert A. Holloway on his own petition was adjudged a bankrupt on the 6th day of September, 1898. In 1897, in a suit brought in the Henderson circuit court, by the Farmers' Bank of Kentucky, a judgment was recovered against Holloway for over \$10,000, and in that suit a judgment was also rendered for the sale of the mortgaged property described in the pleadings therein. The master commissioner of the court was directed to execute the judgment; but, owing to the willingness of the bank to indulge its debtor, a sale of the mortgaged property was not in fact made. That property embraced all of the real estate of Holloway. Since the adjudication in bankruptcy, a controversy has arisen here resulting from the petition of the trustee in bankruptcy asking for a stay of proceedings in the state court, and praying that the bankrupt's estate, so far as it was mortgaged, and so far as it was directed to be sold under the judgment of the state court, shall also be administered in these proceedings. It is urged, however, on behalf of the bank, that the mortgaged property is clearly insufficient to pay the mortgage debt; that there cannot in any event be any surplus for the trustee in bankruptcy; that the state court proceedings had advanced to a judgment long before the bankruptcy of Holloway, and, indeed, long before the passage of the bankrupt law; and that it can only result in additional and unnecessary costs, practically to the extent of the trustee's fees, to require the mortgage property to be sold in these proceedings, instead of permitting it to be done under the judgment of the state court. On the trial of the petition of the trustee in this case, it was frankly admitted by his counsel that there was no likelihood of there being any surplus for the general creditors; the mortgaged property being probably insufficient to pay the judgment of the state court. It appears from other testimony, to the satisfaction of the court, that it is entirely certain that the mortgaged property will not sell for enough to pay the mortgage debt, and that it is not in fact worth the amount of the judgment.

The question presented is, shall the court, under circumstances of this character, stay the proceedings of the state court, and require a sale of the property to be made by the trustee in bankruptcy, and the proceeds to pass through his hands? It seems to the court, from the provisions of the bankrupt law contained in sections 11 and 47, that after the adjudication the matter is entirely within the discretion of the court, to be determined as may appear best for the interest of the general creditors. If it were probable that a larger sum would be realized from the sale by the trustee than from a sale by the master commissioner of the state court, and that the general creditors would be the beneficiaries of this increased price, it would be the duty of the court to see that the best results were obtained for the general credit-

ors. But, where it is apparent or extremely probable, that the mortgaged property will not be sufficient to pay the mortgage debt, it would be neither necessary nor judicious for this court to interfere with the state court proceedings. It seems that this was the well-established practice of the bankrupt courts under the act of 1867. Many adjudications might be referred to in which bankrupt courts were then guided by similar considerations. Should the property bring more than enough to satisfy the mortgage debt in this case, when sold under the judgment of the Henderson circuit court, it would be the duty of the trustee in bankruptcy to apply for the surplus. For the purpose of ascertaining what the surplus is, and for the purpose of being ready to obtain it, should it unexpectedly be realized, it might be well for the trustee to intervene in the state court proceedings, or at least keep in touch with them, so as to be ready promptly to look after the interest of the bankrupt's general creditors. Matters of this sort being in the discretion of the bankrupt court, should there be unreasonable delay in the state court proceedings, or should any unexpected complications arise, it might be the duty of the court on that account to stay other proceedings, and permit the trustee to take charge of the sale in lieu of the state court officers; but, as there does not appear to be any purpose upon the part of the judgment creditor in the state court to delay the sale of the property, nor to do anything to prevent its bringing a fair price, the motion of the trustee in this case will for the present be overruled, reserving power to take another course should the circumstances of the case require it.

The court is also of the opinion that the rights of other persons claiming liens on the same property can be better adjusted in the state court, as the questions arising upon these matters afford no reasonable expectation of any benefit to unsecured creditors. The interest of the latter is rather diminished than increased by the other lien claims.

JOHNSON v. WALD et al.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1899.)

No. 801.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—PREFERENCE.

Under Bankruptcy Act 1898, § 3, providing that it shall be an act of bankruptcy if a person shall have "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors," the payment and discharge of a debt, by an insolvent debtor, by a conveyance to the creditor of personal property of greater value than the debt, the debtor receiving the difference in cash, is a preference of such creditor, and an act of bankruptcy.

2. SAME—INTENT TO PREFER.

Where an insolvent debtor transfers to one of his creditors, in payment of his debt, personal property sufficient in value to satisfy the debt in full, his "intent to prefer such creditor over his other creditors," necessary to make such transfer an act of bankruptcy, will be presumed; the preference being the natural result of the transfer.

Appeal from the District Court of the United States for the Northern District of Georgia.

Lewis Wald and three other creditors of J. C. Johnson filed their petition, showing that they each held provable claims against him amounting in the aggregate to more than \$500. The petition contained the usual formal averments, and charged that J. C. Johnson, within four months next preceding the time of filing the petition, "at Calhoun, Ga., in said district, on the 13th day of October, 1898, being possessed of and owning certain property described in a certain instrument of writing or deed made by the said J. C. Johnson to J. F. Fields, bearing date on said 13th day of October, 1898, and described and set forth in said instrument of writing made by the said Johnson to the said Fields in the following language, to wit: 'My entire stock of merchandise now located in brick storehouse on Railroad street, in the town of Calhoun, said house being the property of J. B. F. Harrell, now occupied by J. C. Johnson, said stock of merchandise consisting of dry goods, boots, shoes, notions, clothing, hardware; also show cases, tinware, and crockery, iron safe of the Hall Lock Company manufacture; also oil tanks and oil pumps,—in fact everything I have in my said storehouse; also one large iron gray horse, about nine years old, one dray and harness for same; also ten acres of corn, planted on the R. Peters farm, of the value of seventy-five dollars;' also eighteen hundred dollars or other large sum, consisting of notes and accounts held and owned by the said J. C. Johnson against various and sundry parties whose names petitioners are unable to give or the respective amounts of said notes and accounts,—did convey and transfer the same, with all other property herein described, on said 13th day of October, 1898, to J. F. Fields, of Gordon county, Georgia, a brother-in-law of said J. C. Johnson, the said J. C. Johnson being insolvent at the date and time of the transfer of said property within the meaning of said act. The said J. F. Fields being one of the creditors of him, the said J. C. Johnson, said transfer of the said property by the said J. C. Johnson to the said J. F. Fields was made with intent to prefer such creditor over other creditors of him, the said J. C. Johnson. Your petitioners further charge that said transfer of said property by the said J. C. Johnson to the said J. F. Fields was made with intent to defraud your petitioners and defeat the payment of their several claims against him, the said J. C. Johnson." The prayer was that the said J. C. Johnson may be declared a bankrupt. Johnson filed an answer in which he admitted the debts due to petitioners (except one of them), admitted that he was insolvent, and as to the charge of his having transferred his property to J. F. Fields he answered as follows: "He admits making a transfer of his property, as shown by said deed as charged in the petition, to said Fields, but he denies that said transfer was made for the purpose of hindering, delaying, and defrauding his creditors, or for the purpose of preferring said Fields. Said transfer was made in good faith and for a good and valuable consideration, and said transfer is valid under the bankrupt act."

On the trial of the issue, the deed of Johnson to Fields was offered in evidence:

"Deed. J. C. Johnson to J. F. Fields.

"Georgia, Gordon County.

"This indenture, made this the 13th day of October, 1898, between J. C. Johnson, of the county and state aforesaid, of the one part, and J. F. Fields, of the same place, of the other, witnesseth that the said J. C. Johnson, for and in consideration of the sum of twenty-five hundred dollars (\$2,500) cash in hand paid, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the said J. F. Fields my entire stock of merchandise now located in brick storehouse on Railroad street, in the town of Calhoun in said county, said house being the property of J. B. F. Harrell and now occupied by said J. C. Johnson, said stock of merchandise consisting of dry goods, boots, shoes, notions, clothing, hardware; also show cases, tinware, and crockery, iron safe of the Hall Lock Co. manufacture; also oil tanks and oil pumps,—in fact everything I have in my said storehouse. The said J. C. Johnson, for and in consideration of the sum aforesaid, also sells, bargains, and conveys unto the said J. F. Fields one large iron gray horse about nine years old, and also one dray and harness for same, and also ten (10) acres of corn planted on the R. Peters farm, and I, the said J. C.

Johnson, unto the said J. F. Fields, for myself, my heirs and executors and administrators, do warrant the title to the property by these presents sold. In witness whereof, the said J. C. Johnson has hereunto set his hand and seal the day and year above written.

"[L. S.]

J. C. Johnson.

"Signed, sealed, and delivered in presence of

"J. J. Bozeman.

"M. T. Adcock."

O. N. Starr testified as follows: "Last Monday or Tuesday, in justice court at Calhoun, Gordon county, Ga., Mr. Fields stated on oath that he had purchased the stock of goods in controversy in this case from J. C. Johnson, the purchase price being \$2,500; that J. C. Johnson owed him a debt of something over \$2,000, which he took in payment of the goods; and that he paid him in cash a balance of \$480. J. C. Johnson also, under oath, testified that he took a debt to Fields, amounting to something over \$2,000, for the purchase of this stock of goods, and J. F. Fields paid him a balance of the purchase price of between \$400 or \$500. J. C. Johnson told me on other occasions since the controversy in this case that this transfer was made to pay Fields' debt. He told me further that he had transferred to Fields notes and accounts amounting to about \$1,800. When he was under oath last Monday or Tuesday, he stated that what he said to me then was not under oath,—he was simply talking about the notes and accounts,—that he had the notes amounting to about \$1,500 in his possession, and that he had turned over to Fields notes and accounts amounting to \$200 or \$300. Johnson also said, under oath, that he was insolvent, and did not know whether he owed more or less than \$5,000, and that he had no property. I heard this myself personally. Both parties, Johnson and Fields, stated that this stock of goods was transferred to Fields in settlement of the debt due by Johnson to Fields, and in consideration of the cash of \$480. I so understood it. Fields testified that in so many words." This was all of the evidence.

On the hearing, J. C. Johnson was adjudged an involuntary bankrupt, and he appealed to this court. The action of the court in declaring and adjudging him a bankrupt is assigned as error.

L. A. Dean and C. P. Goree, for appellant.

E. T. Florence, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the facts, delivered the opinion of the court. The only question raised by the record is whether or not the execution of the deed by Johnson conveying his property to Fields was an act of bankruptcy. He was insolvent, and was indebted to Fields in about the sum of \$2,000. The property conveyed was estimated to be worth \$2,500, and Fields paid Johnson in cash \$480. By section 3 of the bankruptcy act of 1898, "acts of bankruptcy by a person shall consist of his having * * * transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditor over his other creditors. * * *

The appellant contends that the bankruptcy act of 1898 does not make a "payment" in property, with the intent to give a preference to the creditor so paid, an act of bankruptcy. It is claimed that the provision, in that regard, of the bankrupt act of 1867, is omitted from the act of 1898. While it is true that the word "payment" is not used in the latter act in the same connection in which it is used in the former, the language used leaves no doubt of the intention. Paragraph 25 of section 1 of the act of 1898 is in these words: "* * *

"Transfer" shall include the sale and every other and different mode of disposing of or parting with property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." The conveyance made by Johnson to Fields clearly gave him a preference. Section 60, par. a, of the act makes it a preference. "A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." The fact that Johnson received \$480 in money, which in his pocket could not be reached by execution, does not alter the effect of the transfer. That the deed was made with intent to prefer Fields is shown by the deed itself, since one must be presumed to intend the natural result of his own acts.

The judgment of the district court is in conformity with the views here expressed, and it is affirmed.

In re BRODBINE.

(District Court, D. Massachusetts. April 24, 1899.)

No. 840.

1. **BANKRUPTCY—ASSETS—LIQUOR LICENSE.**

Under the laws and regulations in force in the city of Boston, the right to apply for the renewal of a license to sell liquor, held by the bankrupt, passes to his trustee as assets in bankruptcy, and may be disposed of by the latter for the benefit of the estate.

2. **SAME—JURISDICTION IN SUMMARY PROCEEDINGS—RIGHTS OF THIRD PERSONS.**

On a petition by a trustee in bankruptcy, alleging that the bankrupt and another jointly held a license for the sale of liquor, that the bankrupt was the sole beneficial owner of such license, and that the other party had no financial interest in the same, and praying the court to enjoin the latter from applying for a renewal of the license, and to require him to join the trustee in transferring the license to a prospective purchaser, by application to the licensing board, *held*, that the court had no jurisdiction to determine the rights of the respondent in a summary proceeding of this character, but that the trustee might apply for leave to modify his petition so as to make it a bill in equity.

In Bankruptcy.

Dana B. Gove & Sons, for bankrupt.

Wm. Henri Irish, for trustee.

LOWELL, District Judge. The amended petition filed by the trustee seeks to compel Cornelius Brodbine, the father of the bankrupt, to withdraw his application for the renewal of a liquor license now standing in his name and that of the bankrupt, to enjoin him from renewing that application, and to compel him to request the licensing board to issue the license to the person who shall purchase it from the bankrupt's estate. The petition alleges that the respondent has no financial interest in the license, that he has never paid any money on account of the same, and that the bankrupt caused the respondent's name to be placed upon the license in order to prevent a lapse of the privilege granted thereby in case of the bankrupt's death.

It has already been held that the right to apply for a renewal of a liquor license in Boston passes to the trustee in bankruptcy. The question raised in this case concerns the jurisdiction of this court in this proceeding to compel the respondent, a third party, to join in or to make the transfer or surrender of the license which is necessary in order that the trustee may convert into money its surrender value for the benefit of the bankrupt's estate. Under the act of 1867 it was held that the assignee in bankruptcy could not recover, by summary proceedings, property in the hands of a third party which was alleged to belong to the bankrupt's estate, but that the assignee must proceed by regular suit at law or in equity, as the facts might require. *Smith v. Mason*, 14 Wall. 419; *Marshall v. Knox*, 16 Wall. 551; *Knight v. Cheney*, Fed. Cas. No. 7,883; *In re Evans*, 1 Low. 525, Fed. Cas. No. 4,551. It seems that the act of 1841 was construed differently by reason of its different language. *Ex parte Christy*, 3 How. 292; *Knight v. Cheney*, *ubi supra*. There is nothing in the act of 1898 to give broader jurisdiction to the district court in summary proceedings than it possessed under the act of 1867. Section 1 of the earlier act, which was held by the supreme court not to give this court jurisdiction by summary proceedings, reads as follows (omitting immaterial parts):

"The several district courts of the United States are constituted courts of bankruptcy, and shall have original jurisdiction in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act, and the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and distribution of the different funds and assets so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the bankruptcy, until final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

The material parts of section 2 of the act of 1898 are as follows:

"The district courts of the United States are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings; to (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estate, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estate; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they are closed before being fully administered; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this

act. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

If there be any difference in the jurisdiction conferred by these two sets of provisions, that conferred by the act of 1867 seems to me the more extensive. Clauses 6 and 15 of section 2 of the act of 1898, which were relied upon in argument by counsel for the trustee, should not be construed, I think, to extend the jurisdiction of this court to a very large and important class of controversies not otherwise brought within the court's jurisdiction. The case at bar is not one in which the petitioner seeks to recover property from a third person, who is holding it by a title derived from the bankrupt, which title is made void or voidable by the bankrupt act. In cases of that sort it may be that the court of bankruptcy has jurisdiction to recover the property. In *re Gutwillig*, 92 Fed. 337. But see *Knight v. Cheney*, Fed. Cas. No. 7,883. The title of Cornelius Brodbine is not derived from the bankrupt, but immediately from the licensing board.

Coming to the decisions which construe the act of 1898, I find that the circuit court of appeals for the Eighth circuit has held, in *Davis v. Bohle*, 92 Fed. 325, and in *Re Sievers*, 91 Fed. 366, that section 2 of the act of 1898, "which empowers courts of bankruptcy, in substance, to appoint receivers or marshals, upon application of parties in interest, to take charge of the property of bankrupts after the filing of petitions against them, for the preservation of their estates, and to make such orders, issue such process, and enter such judgments as may be necessary for the enforcement of the provisions of this act," gives the district court jurisdiction of a petition filed by certain creditors of the bankrupt against his common-law assignee for the benefit of his creditors to enjoin such assignee from proceeding under the general assignment. The court further held that the district court had jurisdiction to appoint a receiver to take possession of the assigned property and effects, who should hold them subject to the court's order. In *Davis v. Bohle*, as in *Re Gutwillig*, the respondent claimed title under the bankrupt, and the title was created by an assignment made void or voidable by the act. Furthermore, the court of appeals seems to have treated the jurisdiction of the district court as depending upon its right "to recover the assigned property from the assignee, and preserve it for the time being, until the assignor had been adjudicated a bankrupt, and a trustee had been selected by the creditors." It does not follow that the court of appeals would hold that the district court had jurisdiction to make final determination of the controversy between the trustee in bankruptcy and the common-law assignee. In both these respects *Davis v. Bohle* differs from the case at bar, for here the trustee seeks to recover property alleged to belong to the bankrupt from a person who does not claim title under the bankrupt; and, again, it is not the respondent's temporary restraint from dealing with the property which is sought, but his final and complete deprivation of the property. In *Re Gutwillig*, 92 Fed. 337, the circuit court of appeals for the Second circuit said that:

"If the general assignment made by the alleged bankrupt would, in the event of an adjudication of bankruptcy, be treated as void as against the

trustee of his estate, the order enjoining the assignee from disposing of or interfering with the property transferred pending the hearing was a proper and expedient exertion of the authority conferred upon courts of bankruptcy by clause 15, § 2, of the present act."

The remarks made concerning *Davis v. Bohle* are equally applicable to *In re Gutwillig*. So far as has been pointed out, these are the only two decisions made by a circuit court of appeals which can be supposed to have any bearing upon the case at bar. Whatever view I am disposed to take of the correctness of these decisions, I am practically bound by them. *Beach v. Hobbs*, 82 Fed. 916. But, as has just been said, they do not cover the case at bar. A variety of more or less conflicting decisions have been made by the various district courts. In *Mitchell v. McClure*, 91 Fed. 621, Judge Buffington held that the court of bankruptcy had no jurisdiction of a suit of replevin brought by a trustee to recover possession of property held adversely by the defendant under claim of title thereto. The action was a common-law action, not a petition for summary process. If the court has no jurisdiction of a common-law action to recover property, a fortiori it has no jurisdiction to recover it by summary process. See, also, *Burnett v. Mercantile Co.*, Id. 365, decided by Judge Bellinger. In *Re Kelly*, Id. 504, Judge Hammond held that, under an involuntary petition, and pending an adjudication, a receiver could not be appointed to take possession of property in the hands of a third person, who claimed title thereto under a conveyance made voidable by the act. The case goes further than is necessary to sustain the respondent's contention in this case. See, also, *In re Rockwood*, Id. 363, decided by Judge Shiras. In *Re Brooks*, Id. 508, Judge Wheeler held that a court of bankruptcy has jurisdiction of a trustee's petition filed against one who had foreclosed a chattel mortgage of the bankrupt's property after adjudication to compel the return of the property to the trustee. In that case the respondent claimed under the bankrupt, and by a title voidable in bankruptcy. The case is, therefore, no authority for the petitioner in the case at bar. In *Re Smith*, 92 Fed. 135, 139, Judge Baker agreed with *Davis v. Bohle*, but said: "If the property of the bankrupt is in the possession of a person who has a colorable title, as purchaser or otherwise, it may be that the court would not compel him, by a summary proceeding, to surrender the possession." In *Carter v. Hobbs*, 1 Nat. Bankr. News, 191, 92 Fed. 594, the same judge took jurisdiction of a "petition or bill" to set aside a fraudulent transfer of the bankrupt. He seems to have rested his decision upon the ground that, "where the trustee brings suit to enforce a right of action which never existed in the bankrupt, the district court has ample jurisdiction to maintain it." In this case, if Cornelius Brod-bine had no equitable right in the license, as alleged in the petition, there did exist in the bankrupt a right of action to prevent the respondent from interfering in its control. In *Re Buntrock Clothing Co.*, 1 Nat. Bankr. News, 228, 92 Fed. 886, Judge Shiras refused to compel by summary process the mortgagee of a bankrupt's chattels to deliver the mortgaged property to the trustee, saying:

"If the trustee questions the validity of the mortgages, he can attack the same by proper proceedings to that end, or he may redeem the property by

payment of the mortgage liens, or in other ways, perhaps, protect the interests of creditors; but he cannot, by summary proceedings, compel the delivery of possession of property by third parties who hold the same as mortgagees, and whose possession antedates the filing of the proceedings in bankruptcy." "The mortgagees cannot be compelled to yield up possession of the property in their hands which passes into their possession before the proceedings in bankruptcy were begun by an order entered in a summary proceeding of this character."

From this hasty review of the decided cases, it appears that no one of them is authority for the petitioner's contention in the case at bar, while several of them are direct authorities in support of the respondent. As was said in *Marshall v. Knox*, 16 Wall. 551, 556:

"We think that it could not have been the intention of congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of law in defense of their rights."

If the petitioner desires so to modify his petition as to make it a bill in equity, he may apply for leave to do so. See *In re Evans*, 1 Low. 525, 526, Fed. Cas. No. 4,551. Petition dismissed.

HEATH v. SHAFFER et al.

(District Court, N. D. Iowa, E. D. May 5, 1899.)

1. BANKRUPTCY—ENJOINING PROCEEDINGS IN STATE COURTS.

Where the holder of a chattel mortgage had taken possession of the mortgaged property before the institution of proceedings in bankruptcy against the mortgagor, and thereafter brought suit in a state court for foreclosure of the mortgage against the bankrupt and his trustee in bankruptcy, *held*, that the court of bankruptcy would not, on a bill by such trustee alleging the mortgage to be voidable as an unlawful preference, enjoin the further prosecution of such suit, but the trustee must appear and assert his rights and title in the state court.

2. SAME—JURISDICTION OF STATE COURTS.

The proper state courts have jurisdiction of suits by trustees in bankruptcy for the collection of debts due the estate of the bankrupt, and of controversies between such trustees and adverse claimants with respect to property claimed as belonging to the estate.

In Equity. This was a bill in equity by complainant, as trustee in bankruptcy of the Buntrock Clothing Company, asking for an injunction to restrain the defendants from further prosecuting in a state court a suit brought by them for the foreclosure of a chattel mortgage executed by the bankrupt.

F. F. Swale and D. E. Lyon, for complainant.

Springer & Clary and Henderson, Hurd, Lenehan & Kiesel, for defendants.

SHIRAS, District Judge. In the bill filed in this case it is averred that on the 13th day of December, 1898, the Buntrock Clothing Company, a corporation created under the laws of the state of Iowa, was adjudged to be a bankrupt by this court upon a petition filed by creditors, and that thereafter the present complainant was duly appointed and commissioned the trustee of the estate of said bankrupt corporation; that on the 31st day of August, 1898, the

Buntrock Clothing Company, being then the owner of a large stock of clothing and furnishing goods, of the value of \$10,000, executed a chattel mortgage thereon to the defendants herein to secure certain indebtedness described in the mortgage, it being charged that this transfer was made in order to give to the defendants an unlawful preference over the other creditors of said corporation, the defendants knowing such to be the fact. It is further averred in the bill that, after the execution of the chattel mortgage, the defendants took possession of the property therein described, and refuse to yield possession thereof to the complainant as trustee in bankruptcy, and that they have brought a suit in equity in the district court of Chickasaw county, Iowa, against the Buntrock Clothing Company, and the present complainant, as trustee in bankruptcy, for the purpose of foreclosing the mortgage, obtaining a decree for the sale of the mortgaged property, and for the application of the proceeds of the sale to the payment of the debts secured by the mortgage sought to be foreclosed. The prayer of the bill now before this court is that the mortgage be decreed to be fraudulent and voidable, because in contravention of the provisions of the bankrupt act, and that the defendants be enjoined from the prosecution of the foreclosure suit pending in the state court.

Under the provisions of the bankrupt act of 1867, it was uniformly held by the supreme court that the state courts had concurrent jurisdiction with the federal courts over contests between the bankrupt or his assignee and third parties who asserted rights in or to any property claimed by the assignee to be part of the estate of the bankrupt. Thus, in *Eyster v. Gaff*, 91 U. S. 521, it was said by Justice Miller, speaking for the court, that:

"The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt the district court which has so adjudged draws to itself, by that act, not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or contracts, into the bankruptcy court by service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such action. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with, and does not divest, that of the state courts."

In *McKenna v. Simpson*, 129 U. S. 506, 9 Sup. Ct. 365, an assignee in bankruptcy filed a bill in the chancery court of Shelby county, Tenn., to set aside certain conveyances of property executed by the bankrupt as being in fraud of the provisions of the bankrupt act of 1867, and it was objected thereto that the state court was without jurisdiction, but the supreme court expressly held that there was nothing in the bankrupt act which precluded the state court

from entertaining the suit. If, under the provisions of the act of 1867, there existed in the state courts jurisdiction over cases where in the assignee in bankruptcy and third parties contested the rights to certain property, certainly it must be held that the state courts possess a like jurisdiction under the present act. If the trustee, complainant in this action, should not appear in the state court, and that court should decree a foreclosure of the mortgage given by the Buntrock Clothing Company and order a sale of the property, the title of the purchaser at such sale could not be attacked collaterally. The state court is not bound to assume that its jurisdiction is affected by the proceedings in bankruptcy, unless the trustee presents the question in some proper form to that court. Thus, in *Eyster v. Gaff*, supra, the supreme court, referring to the state court, said:

"It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, so to do. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree as between the parties before it, until, by some proper pleadings in the case, it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty, as the case stood, in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if, at any stage of the proceedings, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had or set up any defense to the suit."

Thus is stated the correct rule for the guidance of the trustee in cases of this character. He should appear in the state court, and, by pleading the adjudication in bankruptcy and his appointment as trustee, lay the foundation for the protection of his rights. If he questions the jurisdiction of the state court, he can plead thereto in proper form. If the case be one that is removable under the provisions of the judiciary act, he can make the requisite showing. If he does not dispute the validity of any lien asserted by the plaintiff, he can set up his title and rights as trustee, subject to the admitted lien, and the state court will protect his rights in the premises. If he wishes to contest the validity or extent of the adverse claim asserted by the plaintiff in the state court, he can do so by answer or cross bill. If, upon the hearing, the state court holds and adjudges the plaintiff's claim or lien to be invalid and void either at the common law or under the provisions of the bankrupt act, that court would, undoubtedly, order the property to be delivered to the possession of the trustee. If the state court holds and adjudges the lien of the plaintiff to be valid, it would, upon the proper showing, also recognize the title and rights of the trustee, subject to the lien of the plaintiff, and would enforce the same according to the true intent and meaning of the bankrupt act. In some of the discussions had upon this general subject, it seems to be assumed that the state courts cannot aid in carrying out the general provisions of the bankrupt act, and that the trustee can only appeal to the courts of bankruptcy when seeking to secure a disposition of a bankrupt's estate under that act; but this is a mistaken view of the law. The state courts, in all proceedings pending before them, have the right to apply and enforce the provi-

sions of the bankrupt act in the determination of the questions at issue before them, and can give full protection to the rights of the trustee. The bankrupt act is the law of the land, and the state courts have full right to enforce its mandate in all proceedings properly before them. Of course, it is not meant by this that a state court can adjudge a person to be bankrupt, or grant him a discharge, or control the distribution of the bankrupt's estate; but what is meant is that in all suits pending before them, wherein may be involved a contest between the trustee and a third party, which depends, in whole or in part, upon the provisions of the bankrupt act, the state courts must, of necessity, have full right and jurisdiction to apply and enforce the provisions of the bankrupt act, not only in deciding the question of right at issue, but in securing to the parties the proper protection accorded to them under the act. Thus, in the proceeding pending in the state court, even though the court should adjudge the lien of the mortgage to be valid, it would undoubtedly recognize and properly protect the right of the trustee in the mortgaged property, and in ordering a sale of the property would have due regard to the rights and equities of the mortgagees and the trustee alike. Taking into consideration the entire provisions of the act, it clearly appears that it was the intent of congress to utilize the state as well as the federal courts in administering the law, at least in cases wherein an adversary claim may exist between the trustee and third parties. In this respect the state and federal courts hold a position somewhat analogous to that existing with relation to the estate of deceased persons. The federal courts have not probate jurisdiction, and therefore cannot undertake the administration of the estates of decedents, but they may, under proper circumstances, hear and adjudge controversies between third parties and the executors or administrators of the estate. *Yonley v. Lavender*, 21 Wall. 276; *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906.

So, the courts of the several states are not created courts of bankruptcy, and therefore they cannot adjudge parties to be bankrupts under the act of congress, nor can they grant a discharge to a bankrupt, nor can they control, through the trustee, the distribution of the assets coming into the hands of the trustee, but they have jurisdiction to collect, at the suit of the trustee, the debts due the estate, and have also jurisdiction over controversies between the trustee and third parties with respect to the property claimed by the trustee to belong to the estate.

Upon the face of the present bill, it appears that the mortgage complained of was executed, and possession of the mortgaged property was taken, by the defendants herein, long previous to the filing of the petition in bankruptcy. The mortgagees, desiring to foreclose the mortgage, brought suit to that end in the state court; that being the only court in which they could institute foreclosure proceedings. The mortgaged property was not in possession of the trustee or of the court in bankruptcy, and the foreclosure proceedings were not brought for the purpose of taking the property away from the trustee, or from in any mode interfering with the control of any property in the actual

custody of the court in bankruptcy; and I can see no ground for holding that the state court was without jurisdiction to entertain the suit originally, or that the suit should be stayed by an injunction from this court. Furthermore, there is very grave doubt whether this court has jurisdiction over this proceeding, viewed as a bill brought to test the validity of the mortgage sought to be foreclosed in the state court. The bankrupt, the trustee, and the mortgagee are all citizens of the state of Iowa, and the question is whether, under the provisions of the second clause of section 23 of the Bankrupt Act of 1898, jurisdiction can be maintained, except with the consent of the defendants. In terms, this clause enacts that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought the same, if proceedings in bankruptcy had not been instituted. If this limitation applies to the district courts of the United States, it is clear that this court is without jurisdiction over the present bill, and I am greatly inclined to the view that this clause is a limitation upon the jurisdiction of the district court. In the case of *In re Sievers*, 91 Fed. 366, is to be found a very strong argument by Judge Adams in support of the view that this clause of section 23 is intended to apply only to the circuit courts. The contrary view is held by Judge Bellinger in *Burnett v. Mercantile Co.*, Id. 365, and by Judge Buffington in *Mitchell v. McClure*, Id. 621. As this case is now before me solely upon the application for a preliminary injunction, and as I hold that, assuming that this court might have jurisdiction, the showing for the issuance of an injunction is not sufficient, it is not necessary to finally decide this question of the extent of the jurisdiction of this court, although, as already stated, I incline to the view that the jurisdiction does not exist in a case of this character. The application for an injunction is refused.

DIECKERHOFF et al. v. MILLER et al.

(Circuit Court of Appeals, Second Circuit, April 4, 1890.)

No. 154.

1. CUSTOMS DUTIES—PROTESTS.

Act Cong. Feb. 26, 1845, relating to protests on imports of goods, was repealed by Act Cong. June 30, 1864, which substituted for the common-law action of the importer against the collector a statutory remedy, and regulated its incidents. The provisions of both acts were incorporated into the Revised Statutes approved June 22, 1874; those of the act of 1864 being reproduced in section 2931, and those of the act of 1845 in section 3011. *Held*, that the provisions of the act of 1845 did not affect the rights of an importer which accrued between December 1, 1873, and June 22, 1874; and, if the importer's protests were made in the manner provided by the act of 1864, they were valid.

2. SAME—HAIRCLOTH GOODS.

Importations of bindings, braids, and buttons made between the 6th day of February and the 15th day of June, 1874, all made of mohair, should have been classified for duty under Act July 14, 1870, § 21, as corrected by joint resolution of January 30, 1871, providing that the duty "on hair-cloth known as crinoline cloth, and on all other manufactures of hair not otherwise herein provided for, 30 per cent. ad valorem," and not under the act of March 2, 1867.

In Error to the Circuit Court of the United States for the Southern District of New York.

Edwin B. Smith, for plaintiffs in error.

Henry C. Platt, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiffs in the court below to review a judgment entered upon the direction of the court. Between the 6th day of February and 15th day of June, 1874, the plaintiffs imported into New York certain bindings, braids, and buttons, all made of mohair, which is the hair of the Angora goat. Defendants' testator, collector of the port, classified these goods under the provisions of the act of March 2, 1867, entitled "An act to provide increased revenue from imported wool, and for other purposes," reading as follows:

"On webbings, beltings, bindings, braids, galloons, fringes, gimps, cords, cords-and-tassels, dress-trimmings, head-nets, buttons or barrel buttons, or buttons of other forms for tassels or ornaments; wrought by hand or braided by machinery; made of wool, worsted or mohair, or of which wool, worsted or mohair is a component material, fifty cents a pound and, in addition thereto, fifty per centum ad valorem." 14 Stat. 561.

Within 10 days after the collector had liquidated the duties upon this basis, but not at or before payment of these duties, the plaintiffs protested against this assessment, claiming their goods to be dutiable under that clause of the twenty-first section of the act of July 14, 1870 (as corrected by joint resolution of January 30, 1871), which reads thus:

"On hair-cloth known as crinoline cloth, and on all other manufactures of hair not otherwise herein provided for, 30 per cent. ad valorem." 16 Stat. 264, 593.

Answering an appeal taken by plaintiffs, the secretary of the treasury affirmed the collector's action in the premises. Thereupon this suit was seasonably brought. These facts having been proved upon the trial, the defendants, without offering evidence, asked to have a verdict directed in their favor upon these grounds: (1) That plaintiffs had not shown facts sufficient to entitle them to recover; (2) that all the importations in suit being after December 1, 1873, and prior to February 8, 1877, no protests were shown to have been made, filed, or served by the plaintiffs in this action within the time prescribed by the law in force at the time of such importations, nor has it been shown that the payments of duty thereon were made under protest, as then required by law, in order to enable the plaintiffs to maintain this action; (3) that the goods in this suit were concededly braids, buttons, and bindings of mohair, and were specifically provided for *eo nomine* in the act of March 2, 1867, and that the collector's action was right in assessing them for duty under said specific provision.

The only question argued at bar is whether either the second or third objection to the right of the plaintiffs to recover is well founded. The validity of the first objection depends upon the question whether the provision in respect to protest contained in the act of congress

of February 26, 1845, was repealed by that contained in the act of congress of June 30, 1864. That the latter was, by implication, a repeal of the former was declared by Mr. Justice Bradley in *Barney v. Watson*, 92 U. S. 453, and in *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. 184, where the question was again considered, the court adhered to that opinion, and held that the act of 1864 substituted for the common-law action of the importer against the collector a statutory remedy, and regulated as to all its incidents his right of action to recover duties illegally exacted. The provisions of both acts were, however, incorporated into the Revised Statutes of the United States, —those of the act of 1864 being reproduced in section 2931, and those of the act of 1845 in section 3011; and it is insisted for the defendants in error that by the terms of section 5595 both provisions were embraced as laws of the United States in force on the 1st day of December, 1873. We cannot adopt this view. The Revised Statutes were approved June 22, 1874, and it was from that date that they became new enactments of the United States. It is from that date that they are to be treated as a legislative declaration of the statute law existing on the 1st day of December, 1873, respecting the subjects which they embrace. The plaintiffs' rights accrued in the interval between December 1, 1873, and June 22, 1874; and, if their protests were made in form and manner according to the statutes then in force, their remedy is not taken away by a subsequent legislative declaration that they were not thus made. Section 5595 is one of several sections, entitled "Repeal Provisions," intended to effectuate the substitution of the Revised Statutes for all pre-existing statutes, and that it was not meant to affect any act done or right accruing or accrued between December 1, 1873, and the time of the enactment of the Revised Statutes is apparent from the other sections. We have examined the many adjudications of the supreme court in which the effect of section 5595 has been considered and treated as a legislative declaration of the statute law existing on the 1st day of December, 1873, but none of them touch the present question. They are all cases in which its declaratory force was involved in respect to occurrences which took place subsequent to June 22, 1874.

We are of the opinion that the importations should have been classified for duty, under the provision of the act of 1870, as manufactures of mohair not specially enumerated or provided for in that act. It is a familiar rule in the construction of tariff acts that terms of general description must give way to those of particular description, and that a specific provision for duty on a particular article is not superseded by a provision of a subsequent statute imposing a different duty upon the class of articles of which it is one of the members. The statutes enacted at different times are parts of one composite general system, and terms of general description in a later statute have no different effect in displacing terms of particular description in an earlier statute than they have when both are used in the same act. Any alteration is to be regarded in connection with the system, and no disturbance of existing legislation is to be allowed beyond the clear intention of congress. *Saxonville Mills v. Russell*, 116 U. S. 13, 6 Sup. Ct. 237. Applying these rules to the present case, if in the earlier act,

or in the later and earlier acts, there were found two provisions,—one subjecting to duty “bindings, braids and buttons, made of mohair,” and another subjecting to duty “all manufactures of hair,” or “all manufactures of hair not otherwise provided for,”—the articles in controversy would be properly classified for duty under the former or more specific provision. If in the later act congress had imposed a duty upon “all manufactures of hair not otherwise provided for,” inasmuch as the importations were subjected to duty by the previous act as “bindings, braids and buttons,” they would have been otherwise provided for. But in the act of 1870 the intention of congress is distinctly expressed to reduce the duties imposed by pre-existing acts upon all manufactures of hair, except those provided for in that act itself,—“not otherwise herein provided for.” The word “herein” is most significant. It excludes any reference to earlier acts to ascertain the duty upon that class of articles. The provision includes every article within the general description not in that act itself otherwise provided for. This act was considered in *Arthur's Ex'rs v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. 714, and the court, after observing that the words, “all other manufactures of hair, not otherwise herein provided for,” meant not otherwise provided for in the act of which they were a part, said:

“There is no provision in that act for other manufactures of hair than crinoline and hair seating. It therefore necessarily follows that, if the goat-hair goods in question are to be deemed manufactures of hair, the duties are to be assessed in conformity with the act, and not according to the provisions of any other act.”

A similar question arose in *Arthur's Ex'rs v. Vieter*, 127 U. S. 572, 8 Sup. Ct. 1225. In that case, stockings imported by the plaintiffs, composed in part of wool, were classified by the collector under a provision of the tariff act of March 2, 1867, subjecting to duty “woolen cloths,” woolen shawls, and all manufactures of wool of any description, made wholly or in part of wool, not herein otherwise provided for.” The plaintiff insisted that the goods were dutiable under a provision of an earlier act imposing duty upon “caps, gloves, leggings, mitts, socks, stockings, woven shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women and children, and not otherwise provided for.” The court reiterated the proposition decided in *Arthur's Ex'rs v. Butterfield*, that the words, “not otherwise herein provided for,” in an act prescribing customs duties, mean not otherwise provided for in the act of which they are a part, and decided that the duties were properly imposed under the later act. These conclusions lead to a reversal of the judgment.

FALCONER et al. v. MILLER et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 149.

CUSTOMS DUTIES—HAIRCLOTH GOODS.

Women's and children's dress goods manufactured of hair imported between April 30, 1874, and June 24, 1874, were dutiable under Tariff Act, July 14, 1870, § 21, as amended January 30, 1871, prescribing the duty on "hair-cloth known as crinoline cloth, and all other manufactures of hair not otherwise herein provided for."

In Error to the Circuit Court of the United States for the Southern District of New York.

W. B. Coughtry, for plaintiffs in error.

Henry C. Platt, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This case presents but a single question. The plaintiffs imported into the port of New York, at various times between April 30, 1874, and June 24, 1874, women's and children's dress goods manufactured of hair, and the importations were subjected to duty under the provisions of the tariff act of March 2, 1867, imposing duty upon "women's and children's dress-goods * * * composed wholly or in part of wool, worsted, the hair of the alpaca goat and other like animals." The question is whether they were dutiable under this provision, or under a provision of the tariff act of July 14, 1870 (as amended January 30, 1871), prescribing the duty on "hair-cloth known as crinoline cloth, and all other manufactures of hair not otherwise herein provided for."

Our decision in *Dieckerhoff v. Miller*, 93 Fed. 651, determines this case in principle. In that case, as in this, there was a provision in the earlier tariff act more specifically descriptive of the importations than the provision in the later act, but we held that they should have been classified under the provision of the later act, because congress intended by that act to prescribe the duty upon the entire class of articles of which they were a variety, exclusive of any exceptions not mentioned in the act itself. In this case they are "dress goods" specially enumerated in the earlier act; in the other case they were "bindings, braids and buttons," specially enumerated in the earlier act. As they were also manufactures of hair, and the later act was intended to establish the duty on all articles of that description, except such as were otherwise provided for by its own terms, they were dutiable under the provisions of the later act. Some observations in the opinion in *Arthur's Ex'rs v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. 714, are relied upon by the defendants in error as inferentially suggesting that the court would not have decided that case as it did if the facts had been like those in this case; but these observations were not addressed to the point, and a careful reading of the opinion satisfies us that the rule of that case extends to the facts of the present case. As the court below directed a verdict for the defendants upon the theory that the goods were properly classified, the judgment must be reversed.

UNITED STATES ex rel. SCOTT v. McALEESE.

(Circuit Court of Appeals, Third Circuit. April 20, 1899.)

No. 34, March Term.

HABEAS CORPUS — FEDERAL QUESTION — JURISDICTION OF STATE COURTS—COMITY.

Where a debtor was arrested on process issuing from a state court on a charge of having violated a penal statute of the state against fraudulent insolvency, and afterwards, on petition of his creditors in the proper federal court, was adjudged bankrupt, and the state court, on hearing, then committed him for trial, and he thereupon applied to the United States circuit court for his release on habeas corpus, on the ground that the state statute was superseded by the bankruptcy law, *held*, that the state courts were competent to decide the federal question thus raised, and that, no circumstances of special urgency being shown, the federal courts should not assume its determination until the prisoner had exhausted his remedy in the state courts.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

The relator, J. McD. Scott, sued out a writ of habeas corpus in the circuit court, directed to John McAleese, as warden of the prison of Allegheny county, Pa., alleging that he was unlawfully restrained of his liberty by the respondent under certain commitments from the court of common pleas of said county. From an order of the circuit court discharging the writ and remanding the prisoner, the latter appeals.

J. S. Ferguson, for appellant.

W. A. Blakeley and W. A. Way, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and McPHERSON, District Judge.

McPHERSON, District Judge. The defendant is the warden of the Allegheny county prison, and holds the appellant in custody by virtue of three commitments. One is for contempt of court in refusing to answer certain questions put to the appellant before a referee in bankruptcy; and as this commitment is formally unobjectionable, and has not been successfully attacked upon any ground appearing on the record, it would of itself support a judgment of affirmance. But for reasons that are satisfactory to us, although they need not be set out in this opinion, we have no doubt that the commitment for contempt should not be regarded as an existing process, and accordingly we shall treat it as furnishing no ground for the relator's detention.

It remains to consider the other two commitments. Concerning these the following facts are undisputed: The appellant was a merchant doing business in the city of Pittsburg. On October 12, 1898, he made an assignment for the benefit of creditors; and shortly afterwards, in the same month, several creditors proceeded against him by petitions for warrants of arrest under the Pennsylvania statute of July 12, 1842 (P. L. 339). The petitions averred that the relator had violated section 3 of the statute in certain particulars, and accordingly warrants of arrest were duly issued by a judge of the court of com-

mon pleas of Allegheny county. During the month of November, and before hearings were had under the warrants, proceedings were begun in the district court of the United States for the Western district of Pennsylvania, charging the relator with involuntary bankruptcy, and upon these petitions he was adjudged a bankrupt on December 3d. Afterwards, in January, 1899, hearings were had by the state judge under the warrants of arrest; and, as a result of the action taken thereon (without stopping to detail the proceedings, step by step), the court of common pleas of Allegheny county found, as facts, that "there is just ground to believe that the said J. McD. Scott has concealed money, goods, building materials, plumbing materials, books, and other valuable articles, being part of his estate and effects; and that he has colluded and contrived with other persons for such concealment; and that he has conveyed property to other persons for the use of himself, his family and friends, with the expectation of receiving future benefit to himself of them, and with intent to defraud his creditors." The consequence of this finding was that the court committed the relator for trial upon the charge of fraudulent insolvency. After the hearing, the judge issuing the warrants was also satisfied that the relator had fraudulently contracted certain debts, and had concealed his property with intent to defraud his creditors; and upon this ground he sent the defendant to prison under a separate commitment, there to remain "until he shall be discharged by due process of law." These are the two commitments to be considered. They both conform to the Pennsylvania statute, and are formally regular in every respect. The relator asserts, however, that the statutory provisions upon which they rest have been superseded by the bankrupt law of 1898, and that henceforth proceedings to punish fraudulent insolvency cannot be pursued in the Pennsylvania courts. Insisting upon these objections, he sued out the writ of habeas corpus now before us, but failed to convince the court that he should obtain his liberty. The pending appeal is from the order of the circuit court discharging the writ and remanding the prisoner.

The relator's objections raise a federal question of which the circuit court had jurisdiction, and which might have been considered by that tribunal if the learned judge had seen proper to entertain it. He may, indeed, have considered and decided it, but, as he filed no opinion, we are unable to determine by what reason he was moved to enter the decision now under review. We have before us merely his judgment, and, if for any reason we find the judgment to be correct, our duty is to affirm it. We believe it to be correct, upon the sufficient ground that the state courts are competent to deal with the federal question already stated, and that no circumstances are shown requiring the courts of the United States to take the controversy into their own hands.

No doubt, the question is important; for since the bankrupt act is not as wide in its scope as the Pennsylvania statute of 1842, and the related statute of 1836, it is obvious that, if the relator's contention be sound, offenses now condemned, and properly condemned, by the state law, will escape punishment. But, while the importance of the question must be conceded, we are nevertheless constrained to hold

that the point should not be determined upon this appeal. The relator's remedy in the state courts should first be pursued, and, if he fails to enforce there whatever right he may possess under the federal law, he may safely rely upon liberation at the hands of the courts of the United States. The tribunals of Pennsylvania are as much bound, and we believe them to be as willing, as are the federal courts, to respect and enforce a right resting upon a law of the United States; and, for the present, we are bound to act upon the presumption that the relator will receive as complete protection at their hands as he would receive at ours. As the facts appear, we must follow the rule of policy that requires the courts of the United States ordinarily to defer action in a case such as this until the state courts have had an opportunity to hear and decide the federal question. The rule is thus expressed in *Ex parte Royall*, 117 U. S. 254, 6 Sup. Ct. 742:

"Where a person is in custody under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion whether it will discharge him upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of habeas corpus summarily to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States."

And in *Whitten v. Tomlinson*, 160 U. S. 241, 16 Sup. Ct. 297, the court say:

"In cases of urgency, such as those of prisoners in custody, by authority of a state, for an act done, or omitted to be done, in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign nations, the courts of the United States should interpose by writ of habeas corpus. * * * But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the state, and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court."

Other cases are *Ex parte Fonda*, 117 U. S. 516, 6 Sup. Ct. 848; *In re Duncan*, 139 U. S. 449, 11 Sup. Ct. 449; *New York v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30; and *Fitts v. McGhee* (decided January 3, 1899) 19 Sup. Ct. 269. The recent decision in *Ohio v. Thomas* (delivered February 27, 1899) *Id.* 453, upholds a recognized exception to the rule.

In obedience to these authorities, we are of opinion that the discretion of the circuit court was properly exercised in refusing to discharge the relator from custody, and accordingly the order of that court is now affirmed.

In re GIOVANNA, et al.

(District Court, S. D. New York. March 31, 1899.)

1. **ALIENS—EXCLUSION—UNITED STATES DISTRICT COURT—JURISDICTION TO REVIEW.**

Under Appropriation Act Aug. 18, 1894 (28 Stat. 390, c. 301), providing for the exclusion of aliens, the United States district court has no jurisdiction to review the action of the secretary of the treasury, confirming the decision of the executive officers excluding aliens domiciled here, on their return from a temporary visit abroad.

2. **SAME—CHILDREN OF ALIENS.**

Children of aliens born in the United States are citizens, and not aliens, and hence are not subject to exclusion, under the immigration laws, on their return with their alien parents from a temporary visit abroad.

Habeas Corpus. Immigrants.

John Palmieri, for petitioners.

Ullo, Ruebsamen & Higginbotham, for commissioner of immigration.

BROWN, District Judge. Upon the return and traverse of the writ of habeas corpus in this case, it appears on the agreed statement of facts that Anzelmo Giovanna and her husband and their two children Emma and Salvatore, aged respectively 6 and 8 years, and Providenza Conti, arrived at this port from Italy on February 2, 1899, and after special examination, were determined to be alien immigrants likely to become a public charge, and on that ground were refused permission to land and were detained for the purpose of being sent back to Italy, and on appeal this ruling was affirmed by the secretary of the treasury. It further appears that the parents came to this port about 10 years ago where they then established their home and have been domiciled ever since, but they have never become citizens. The two children above named were born in this country and have always resided here until about two months ago, when in December, 1898, the parents leaving their older children at their home in this port, went to Italy for a temporary purpose, taking with them the two children above named and returning in February last, as above stated.

Upon the above statement of facts some doubt may exist whether the decision of the supreme court in the case of *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 15 Sup. Ct. 967, intended to hold that the exclusion by executive officers alone of aliens domiciled here on their return from a temporary visit abroad should be extended beyond Chinese aliens under the provision of the appropriation act of August 18, 1894 (28 Stat. 390, c. 301). The paragraph containing that provision in the appropriation act comes under the heading: "Enforcement of the Chinese Exclusion Act." Neither this heading nor the context is given in the clause relating to the exclusion of aliens in 2 Supp. Rev. St. p. 253; but the heading in the appropriation act may qualify the whole provision. For the purpose of a review, which it is understood will be taken, I shall, however, treat that provision as general and including all aliens without limitation; and the effect of this ruling must be that I have no jurisdiction to review the

action of the secretary of the treasury as respects the mother or Providenza Conti.

As respects the two children who were born in this country while their parents were resident and permanently domiciled here, the decision of the supreme court in the case of *United States v. Wong Kim Ark*, 169 U. S. 649, 693, 704, 18 Sup. Ct. 456, seems to me not distinguishable from the present; and I must therefore hold that these children, being citizens of the United States and not aliens, were not subject to the jurisdiction of the immigration officers under the statute upon which they have been excluded. This decision, though necessary from the rulings in the cases above cited, involves the unfortunate result of separating the mother from her children of tender years. It is understood that both sides desire to take an appeal upon the decision here made. It is to be hoped that during the pendency of proceedings, at least, the commissioner of immigration will find some means to avoid such a separation.

The infants are discharged from custody, and the mother and Providenza Conti are remitted to the custody of the commissioner of immigration.

BATCHELLER v. THOMSON (two cases).

THOMSON v. BATCHELLER.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

Nos. 92-94.

1. TRADE-MARK—USE BY FIRM—ASSETS.

A manufacturer of corsets in England adopted a trade-mark before its use in this country; and its application to the goods before their importation, and its distinct ownership, were known and acted upon by a firm in New York, of which the manufacturer was a member. The goods so manufactured and stamped in England were sold to the New York firm, and the trade-mark was subsequently permitted by the owner to be used by the firm on corsets manufactured by it in the United States. *Held*, that this licensed use in the business of the firm of the trade-mark owned by one partner did not place the trade-mark in the firm, as a part of its assets, nor make it partnership property.

2. SAME—LICENSE TO USE.

On the dissolution of the partnership, and the transfer by the owner of the trade-mark of his interest in the factory property, such owner could continue in the purchaser the right to use the trade-mark which he had previously permitted the firm to use in their factory.

3. SAME—RELINQUISHMENT OF LICENSE.

Where the owner of a trade-mark had been continuously, and still was, both the owner of the trade-mark, and a manufacturer of the goods on which it was affixed, the relinquishment of a license which he had granted to another to use the trade-mark was not void on the ground that a trade-mark, distinct from the articles manufactured, was not the subject of sale, as such transaction was simply a relinquishment to the owner of the license to use his property.

4. SAME—CONTRACT AS TO LICENSE.

An agreement between the owner of a trade-mark and another, a member of a firm to whom he had granted a license to use it, that, when such member retired from the firm, all the rights and privileges granted to him should revert to the owner of the trade-mark, was an agreement that on such retirement the use of the trade-mark should cease.

5. SAME—EXCLUSIVE USE.

Where a trade-mark antedated a patent relating to the article to which the trade-mark applied by more than two years, and the name, and not the patent, gave value to the article, the expiration of the patent did not terminate the exclusive right to use the trade-mark.

Appeals from the Circuit Court of the United States for the Southern District of New York.

These three appeals relate to two bills in equity, known in the case as suits 1 and 2, brought before the circuit court for the Southern district of New York by George C. Batcheller, of the city of New York, against William S. Thomson, of London, England, with respect to the title and use of a trade-mark. In suit No. 2, Thomson filed a cross bill, in which he prayed for an injunction against the use by Batcheller of the same trade-mark. The circuit court decreed for complainant in the two bills, and dismissed the cross bill. 86 Fed. 630.

Hamilton Wallis, for appellant.

S. D. Cozzens, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On January 1, 1865, the firm of W. S. Thomson, Langdon & Co. was established in the city of New York; the partners being William S. Thomson, Charles H. Langdon, and George C. Batcheller. Thomson and Langdon had been partners for a number of years. Thomson's brother-in-law, William A. Nettleton, was taken into the firm in 1866, and retired May 31, 1869. In June, 1869, the firm became Thomson, Langdon & Co., and continued under the same name until December 31, 1878, Thomson, Langdon, and Batcheller being partners, when Thomson sold his interest to Langdon, and the partnership was dissolved. Before 1865, W. S. Thomson went abroad, and thereafter continued to live in Paris or London, and with his brother, under the name of Thomson Frères, commenced to manufacture corsets in Paris in 1865, which were called "Corsets Gants." The firm of W. S. & C. H. Thomson, consisting of four persons, commenced in England, in the latter part of 1866, the manufacture of corsets called "Thomson's Glove-Fitting Corsets." The French and the English firms were entirely distinct from the New York firm. The interests of the three other members of the English firm were subsequently purchased by W. S. Thomson. To these English corsets, offered for sale and sold in England during the early part of 1867, the trade-mark above mentioned was affixed by Thomson, and the articles so marked were vendible articles in the market. In May, 1867, Langdon went to Paris, and also to England, and during his absence saw these corsets, and wrote to his New York partners in reference to manufacturing them in this country, and thought that the business would be profitable, as "we should make the name of the glove-fitting corset a specialty." Samples for examination were sent from the English factory to the New York firm, and in reply an order for 200 dozen was sent on June 18th; and thereafter a most extensive business sprang up, in the purchase from Thomson, and in the sale in the United States, of these imported corsets, which were manufactured in England, and there stamped by Thomson with his trade-mark. The purchases from Thomson continued until the erection by the New York

firm, with his consent, of a factory in Bridgeport, Conn., in 1877, where the corsets which they sold in the United States were subsequently manufactured by the firm, and were stamped with the trade-mark.

The contested question of fact in the case was in regard to the priority of the use of the trade-mark; the complainant endeavoring to show that the name was invented by the New York firm, and was applied by it to the samples which came from London and were sold in New York before the actual use of the name upon goods sold in London. In view of the testimony derived from the written documents signed or known at the time of their date by all the parties, their conduct, and the previous declarations of Batcheller under oath, it is manifest that the origin of the trade-mark in London, before its use in this country, its continued application to the goods before their importation, and its individual ownership by Thomson, distinct from his interest in the New York firm, were known and acted upon by that firm constantly during the continuance of the partnership of Thomson, Langdon & Co. The oral testimony of the parties in regard to the order of events in 1866 and 1867 might leave the mind in uncertainty as to that order, but the written business papers in the execution or formation of which the three partners were brought together, and their conduct at the time of the dissolution, leave no doubt that Thomson's ownership of the trade-mark was, during the partnership, conceded.

Before Thomson's retirement from the firm, in December, 1878, three written agreements were executed, which, though not bearing the same date, were parts of the same transaction of sale to Langdon, and dissolution of partnership. By an agreement of October 31, 1878, between Thomson and Langdon, the former sold to the latter all his interest in the Lyman patent, which will be hereafter mentioned, and also assigned to Langdon "all the interest and claims of said Thomson in and to any and all trade-marks, of any description whatever, heretofore used by said Thomson, Langdon & Co. in the United States, with the full privilege and liberty to use the same during his lifetime in such manner as said Langdon may deem best." He also had the right to use the business signature of Thomson, Langdon & Co. as long as he was personally engaged in the business then carried on by that firm. The second agreement between the same parties refers to a sale to Langdon by Thomson of all his interest in the assets and property of the firm. In a third agreement between the three partners, Langdon & Batcheller agree that so long as the new firm of which they two shall be partners shall continue to use the designation of Thomson, Langdon & Co., or stamp the name of Thomson upon their goods, the new firm "will entirely abstain from selling any goods manufactured by them, which the London house of W. S. Thomson & Co. now make," to or for the markets of Canada or Great Britain. On October 29, 1883, Thomson and Langdon had an interview in New York, in which Thomson sharply charged the existing firm with having sold corsets in Canada. As a result of that interview, Langdon wrote him a letter of that date, which contained sundry agreements, of which the fourth was as follows:

"4th. That in case I shall have any interest in any new co-partnership which may be formed after the expiration of the present co-partnership, on the first January, 1885, or at any earlier date, for the transaction of business in corsets, busks, crinolines, or goods of that character, then Mr. William A. Nettleton shall be a partner in said business, and shall have for his services an interest therein of 25%, without the necessity of furnishing any capital to the same; and, in case I retire from the business, I hereby agree that the contract and agreement made between us on the 31st October, 1878, shall in that case become null and void, and that all the rights and privileges ceded by you to me shall then revert to you."

At this time Nettleton was a partner, and so continued after January, 1885, on the terms named in this letter. Langdon and Batcheller continued as partners from January 1, 1879, until December 31, 1881, when a partnership consisting of Langdon, Batcheller, Nettleton, and one Colton was formed, which continued to December 31, 1884. The third change took place on January 1, 1885, when Colton retired. Nettleton retired December 31, 1887. The firm continued until December 31, 1888. All these firms bore the name of Thomson, Langdon & Co. Thereafter the firms were called Langdon, Batcheller & Co., but Langdon retired January 1, 1893, and assigned his interest in the trade-mark to Batcheller, who continued the manufacture of corsets and the use of the trade-mark. Langdon is 79 years old. Thomson has continued the manufacture of corsets in England under his trade-mark to the present time, and they have been extensively sold in England, upon the continent of Europe, and in Canada. On October 22, 1889, he registered his trade-mark in the United States patent office; and in 1871 Thomson, Langdon & Co. (Langdon purporting to act as attorney for Thomson) registered in the patent office the trade-mark, "Thomson's Patent Glove-Fitting Corset." When Thomson commenced in Paris and in England the manufacture of corsets, they were made in accordance with an alleged invention of Edward Drucker. Letters patent of the United States for this corset were issued in the name of Drucker on May 7, 1867; but the corsets made accordingly were unsatisfactory, the alleged invention was concededly of no value, ceased to be used, and an improvement was made in England by an employé of Thomson, which was patented in the United States on November 30, 1869, to Henry A. Lyman, assignor to Thomson, Langdon & Co. This patent expired November 30, 1886. How closely the corsets of complainant or defendant followed this improvement did not appear, and, indeed, the distinctive value which the improvement imparted to the product did not appear.

The relief prayed for in suit No. 1 was that the registration of the trade-mark which was obtained by Thomson on October 22, 1889, should be declared void, and should be annulled. In suit No. 2, the complainant averred that he was entitled to the entire interest in the trade-mark in the United States, and prayed that Langdon's agreement of October 29, 1883, should be declared not to have created any title thereto in Thomson. The cross bill prayed for an injunction against the use of the trade-mark by Batcheller.

The circuit court found that the use of the trade-mark began in New York and in London at about the same time; that it identified the corsets of the New York firm, and belonged to the New York business;

that Thomson sold to Langdon his interest in the trade-mark, as used in the New York business; and that, as he never resumed his interest in the business, he could resume no right in the trade-mark. From the finding of facts which has been given in regard to the origin and use of the trade-mark from 1866 to 1877, it appears it was originated by Thomson, was used by him upon his entire product, was stamped in England upon all the goods which he sold to Thomson, Langdon & Co., and was subsequently permitted by him to be used upon the product of their Bridgeport factory. This licensed use in the business of a firm of the trade-mark owned by one partner does not place the trade-mark in the firm, as a part of its assets. Thomson's permission or allowance to the firm to use his trade-mark did not make it partnership property. *Kidd v. Johnson*, 100 U. S. 617. Upon the dissolution of the partnership, and the transfer by Thomson of his interest in the factory property, he could rightfully continue in the purchaser the right to use the trade-mark which he had previously permitted the firm to use in their factory. The ownership and right to a general use remained in Thomson, the limited right to use for a limited period being continued in Langdon individually.

It is said that the relinquishment of this license to Thomson by Langdon was void, because a trade-mark, as distinct property, separate from the article created by the original manufacturer, is not the subject of sale. *Kidd v. Johnson*, *supra*. But Thomson had been continuously, and still was, both the owner of the trade-mark and the extensive manufacturer of the goods to which it was affixed, and Langdon simply relinquished to the owner a license to use his property.

The construction of Langdon's agreement of October 29, 1883, is also in controversy; the question being whether his right to use the trade-mark ceased whenever he retired from business, or whether it continued during his lifetime, if he did not retire in 1885. The record furnishes very little light in regard to the circumstances which induced the execution of this agreement. It simply appears that, whereas Thomson and Langdon had been very intimate friends, Thomson now distrusted the new firm, and feared that his brother-in-law would be displaced. It is suggested that the promise of Langdon related exclusively to the next partnership, and was connected with Nettleton's continuance, and meant, "If I then retire, the use of the trade-mark will cease; but, if I do not then retire, it continues as before." The agreement, however, related to the retention of Nettleton in any subsequent partnership, and looked to a longer future than the partnership of 1885, and said, also, "When I retire, the use of the trade-mark shall cease." The natural rendering of the agreement is that, whereas Thomson distrusted the fidelity of the new firm to their agreement in regard to sales in Canada (in other words, distrusted Batcheller), Langdon said, "Your brother-in-law shall continue in any of the partnerships, and, when I retire, you shall have your trade-mark." It is noticeable that the limited interpretation was nowhere sought or claimed by the complainant.

The complainant seeks to make use of the principle stated in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, that, if the owner of a patent had given to its product a name which constituted its

generic description, the right to make the patented article and to use the generic name passed to the public upon the expiration of the patent, and that, therefore, the exclusive right to use the trade-mark of the corset ceased with the life of the Lyman patent. In this case the name antedated this patent by more than 2½ years, and the name, and not the patent, so far as can be seen, gave value to the article. The Drucker patent was for an alleged improvement in the old class of corsets, in which seams run transversely, and was of no value. The Lyman patent was for an alleged improvement upon Drucker in the same class of corsets. The Thomson corset was extensively advertised, and was a favorite, but whether its value was connected with the Lyman patent is unknown.

The decrees of the circuit court are reversed, with costs, upon the appeal from the decree upon the cross bill; and the cases are remanded to that court, with instructions to dismiss the two bills of the complainant, without costs, and to enter a decree, with costs, upon the cross bill, that Batcheller has no adequate title to the trade-mark, and for an injunction against its use, upon such terms, as to time of issuing the order, as the circuit court shall deem reasonable.

MAXWELL v. GOODWIN.

(Circuit Court, N. D. Illinois. April 26, 1899.)

1. LITERARY PROPERTY—DRAMATIC COMPOSITIONS—TEST OF INFRINGEMENT.

The weight of American authority sustains an author's right of property in his dramatic compositions aside from that given by copyright statutes, and establishes the test of piracy of such a composition as being, not whether it is copied in the language of the original, but whether it is, in substance, reproduced without authority, either in whole or in a material part.

2. SAME—ACTION FOR PIRACY—POWER OF COURT TO SET ASIDE VERDICT.

The rule held in patent causes at law that issues as to infringement and identity should be submitted to a jury applies in actions for infringement or piracy of dramatic compositions, but under the same rule the court is authorized to set aside a verdict unsatisfactory to itself as against the weight of evidence.

On motion to set aside the verdict, which found the defendant guilty, and assessed the damages of the plaintiff at \$10,000, in an action charging piracy of an unpublished play called "Congress," of which plaintiff is the author.

W. J. Strong, for plaintiff.

W. K. Lowry and F. F. Reed, for defendant.

SEAMAN, District Judge. Interesting questions of law were presented at the trial, which affect the right of action independent of any contention on the facts, and are reargued on this motion with thoroughness and ability. The propositions submitted on behalf of the defendant are not without force. The existence of a dramatic or stage right at common law, upon which the plaintiff's cause of action must rest, is controverted by the English precedents cited, and support is found in American authorities as well for the further

contention that there is no inherent property right in ideas, sentiments, or creations of the imagination expressed by an author, apart either from the manuscript in which they are contained, or "the concrete form which he has given them, and the language in which he has clothed them." *Stowe v. Thomas*, Fed. Cas. No. 13,514. On the other hand, American decisions have in notable instances upheld dramatic rights, not resting on the copyright statutes, but as literary property at common law; and there is a line of the same authority for the test of piracy which was given in the general instructions to the jury in the case at bar, namely:

"As the owner of material possessions may assert his rights wherever or in whatever disguise his property is found, so the author of a literary composition may claim it as his own in whatever language or form of words it can be identified as his production. The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether, in substance, it is reproduced; not whether the whole, but a material part, is taken. * * * The controlling question is whether the substance of the work is taken without authority."

If either of the fundamental propositions for which the defendant contends is sustained, it is clear that this instruction was erroneous, and that there was no question of fact for the jury. On reviewing the authorities cited, I conclude that the instruction is in accord with the weight and trend of decisions in this country, and that doubt whether the rule so held is well founded at common law should not be resolved against the verdict, if it were otherwise satisfactory, as exceptions are well preserved for final settlement on writ of error. This contingency, however, is not presented here, as I am of opinion, aside from these questions, that the verdict is not supported by the evidence, and that the tests of piracy, as further defined in the instructions, were clearly disregarded or misapprehended by the jury.

Applying the rule held in patent causes at law, that issues of infringement and identity must be passed upon by the jury, it was deemed proper, if not necessary, to so submit the issue of infringement or piracy in this case. Under the same rule the court is authorized "to set aside a verdict unsatisfactory to itself as against the weight of evidence." *Bischoff v. Wethered*, 9 Wall. 812, 814; *Coupe v. Royer*, 155 U. S. 578, 15 Sup. Ct. 199. But I do not feel justified, under the undisputed testimony here, to rest decision upon that view alone. The instructions were specific that, unless material portions of the play of "Congress," which were found to be the intellectual production of the plaintiff, were in fact and manifestly reproduced and copied in the defendant's play "Ambition," the charge of piracy was not sustained. The jury were further instructed, in reference to alleged resemblances between the two plays in general feature,—such as scenes laid in Washington, and relating to congressional legislation, honest and dishonest senators or congressmen beset by temptation at the hands of a sugar trust, love scenes complicating the plot, secretaries, negro servants, dudes, and other accessories of the modern drama,—that they were, with the general theme or story showing the triumph of an honest legislator over corrupt influences, common subjects, for imagination, at least, in which the plaintiff possessed no right of literary property; that, unless identity was found

in the matter and expression showing that one was copied from the other substantially and in material parts, although not in the exact language or form, there was no piracy, and the defendant was not liable in this action. It is probable that the distinctions called for were imperfectly stated, and not well understood by the jury, as the boundaries are not so well marked; at best, as to be within ready observance. There can, however, be no identity of the production, on which to establish a right of action at common law, short of the test indicated in this instruction; and, so considered, I find no escape from the conclusion that the evidence is insufficient to sustain the verdict, whether measured as a whole or taken alone on the testimony presented by the plaintiff.

1. When the two plays are compared, read either as an entire production or in detail in any parts or form, I can find no copying or imitation in plot, scene, dialogue, sentiment, characters, or dramatic situations, and no similarity, aside from the general features and subjects which are pointed out in the instructions as clearly open to common use,—resemblances which may naturally occur when congressional life in Washington is the theme, and certainly there is nothing uncommon in that subject for story or drama. Indeed, there is marked dissimilarity in the portrayal of all the characters and in thought, treatment, and expression, both in detail and throughout the plays. In the one the dominant idea is apparent in the presentation of a political issue, while the other carefully avoids any such subject; and, briefly stated, no intellectual creation of the one reappears in the other in any form. The plaintiff, testifying as an expert, specified numerous points in which resemblance was asserted, but neither in his specifications nor in any point suggested by counsel can I recall one which comes within the definition of an intellectual creation, or one which is not either inconsequential, or of the class of common subjects adverted to in the instructions. Aside from the fact that Mr. Maxwell submitted his play to the defendant in the spring of 1895, with at least an opportunity to read and glean from it, and that the latter presented the new play of "Ambition" in the following fall season, with scenes laid in Washington, and relating to congress, no discriminating reader would infer a common authorship, or even that the one received inspiration from the other in material matter. In the light of this fact, and without other explanation, the utmost of his inference or suspicion would be that the defendant had taken from the former the suggestion of founding a plot on congressional life in Washington, including the machinations of a "sugar trust," and had thereupon committed it to Mr. Carleton to hasten its production in a new play to anticipate the plaintiff's creation,—an assumed course, which totally disregards the cumulative testimony on the part of the defense as to the time and circumstances of the preparation of "Ambition," and which would, in the extreme view, violate ethics, but no common-law rights of property.

2. This possible inference from the circumstance last referred to brings the inquiry to the testimony relating to the actual origin of the defendant's play, which would remain as a pure question of fact if the plays were identical in substance. The plaintiff commenced

writing the play of "Congress," as his first effort in that line, in the fall of 1894, completing it three or four months later. In the spring of 1895 he left the manuscript with the defendant, who was then in Chicago, having no previous acquaintance, but hoping it might prove acceptable. The manuscript was returned within a week, and the defendant testifies that he neither read nor opened it, and had no information of the contents, aside from a brief statement which the plaintiff gave in their conversations. On the other hand, the play of "Ambition" was written for the defendant by Mr. Carleton, under a contract in writing made September 29, 1893, which is clearly authenticated, and refers to the "scenario" of the proposed play as submitted therewith. Mr. Carleton testifies that he conceived and outlined the play during several months preceding this contract, and had prepared what is called the "scenario" of 20 or more pages, showing plot, naming all the characters, and giving parts of the dialogue, substantially as the play was afterwards written; and this was delivered when the contract was entered into. He is confirmed in these particulars by the testimony of Mrs. Sargensdorf, his secretary, and that of the defendant and his manager, Mr. Appleton. The completion was delayed by circumstances which are explained; but Mr. Carleton testifies that it was originally finished in the fall of 1894, when he read it to Mr. Frohman, a theatrical manager, for criticism, after witnessing a new play just introduced called "The Bauble Shop," in which the principal character was a prime minister; that he had adopted for his hero the position of secretary of state, and it was deemed best, to avoid any apparent coincidence, to transform him into a senator and chairman of the committee on foreign relations. With this, and changes in form, which are named, he states that the play was rewritten, and was delivered to the defendant in September, 1895, on his return from Europe; and that the plot and all substantial features remained unchanged. This testimony is corroborated by Mr. Frohman, who refers to circumstances by which the time is fixed in his recollection. Both Mr. Carleton and Mr. Goodwin testify that no thought or suggestion was taken from the plaintiff's play, nor was any knowledge of its existence communicated to the former, nor suggestions made by the latter in any respect, at any time, as to the plot, characters, incidents, changes, or composition. The cumulative testimony referred to is unimpeached and uncontradicted. Unless it is entirely rejected, there is no room for inference that the play of "Ambition," as produced, was founded in the general plot or characters upon the plaintiff's production. And, if the testimony is credited, it establishes the complete priority of the defendant's play in conception and development; and with credit only in particulars where Mr. Carleton and the defendant are corroborated by circumstances and by other witnesses, priority is established in all matters material to this controversy. Therefore, in either aspect of the testimony as indicated, the verdict must be set aside. An order will be entered accordingly, and a new trial awarded.

**PENTUCKET VARIABLE STITCHING SEWING-MACH. CO. v. JONES
SPECIAL MACH. CO.**

(Circuit Court, D. Maine. January 24, 1890.)

No. 434.

1. PATENTS—VALIDITY AND INFRINGEMENT—SEWING MACHINES.

Claims 4 and 6 of the Woodward patent, No. 354,499, for improvement in sewing machines, construed, and held valid and infringing.

2. SAME—DOUBLE USE.

Heap v. Tremont & S. Mills, 27 C. C. A. 316, 82 Fed. 449, 453, 456, applied with reference to a new or double use.

3. SAME—EVIDENCE—PRESUMPTIONS.

Brooks v. Sacks, 26 C. C. A. 456, 81 Fed. 403, 405, applied as to the nature of evidence required to overcome the presumption that the patentee is the original inventor.

This was a suit in equity by the Pentucket Variable Stitching Sewing-Machine Company against the Jones Special Machine Company for alleged infringement of patent No. 354,499, issued December 14, 1886, to Erastus Woodward, for a sewing machine. The patent contains eight claims, of which, however, only 4 and 6 are here involved. These claims read as follows:

"(4) In a sewing machine of the class described, having a universally movable work feeder, the combination, with the needle, shuttle, automatic work feeder, and a tension device adapted to produce a constant tension on the thread, of automatic thread holding and releasing devices, substantially as described, whereby the needle thread is held while the shuttle is entering the needle loop, and released while the work is being moved by the work feeder, as set forth." "(6) The combination of the needle, the shuttle, the work feeder, an automatic thread grasping and releasing device, and a tension device, all arranged and operating substantially as and for the purpose specified."

William Quinby, for complainant.

Clarke, Raymond & Coale, for defendant.

PUTNAM, Circuit Judge. The letters patent at issue in this case contain eight claims, relating to various improvements in sewing machines, of which only one improvement is involved here. Whether this particular improvement occupies relatively a leading position among those covered by all the claims of the patent, or only an incidental one, the record does not explain to us. The difficulty of analyzing the case, arising from this omission, is a common one, wherever one claim out of a number is brought forward for the consideration of the court. Under such circumstances, it becomes necessary to weigh with extreme care the propositions of counsel and the evidence of the experts, in order to make sure that they do not concern more properly the entire subject-matter of the patent than the particular portion in question. In the present instance this difficulty is increased by the fact that the letters patent at issue, so far as the case before us is concerned, cover merely an improvement on a prior patent to the same patentee.

The subject-matter of the two patents is stated in each of them as follows:

"This invention has for its object to provide a sewing machine capable of forming elongated stitches on the surface of material to be ornamented, and of arranging said stitches in a variety of ornamental forms."

Only two claims are brought to our attention,—4 and 6. They are built up on what was substantially the pith of the invention of the earlier patent to which we have referred, namely, a universally movable work feeder, by virtue of which the machine was made capable of elongated stitches in a variety of ornamental forms. The combination in issue includes with this work-feeder the needle, the shuttle, and a device adapted to produce a constant tension on the thread. These are all old elements. The alleged new element consists of "automatic thread holding and releasing devices," "whereby," as claim 4 says, "the needle thread is held while the shuttle is entering the needle loop, and released while the work is being moved by the work feeder." With these appear the words "substantially described," and "as set forth." Claim 6, while changing the nomenclature in some respects, is, for all the purposes of this case, the same as claim 4, omitting the words, "whereby the needle thread is held while the shuttle is entering the needle loop, and released while the work is being moved by the work feeder." In our view, for the purposes of this case, the use or omission of these words is not of importance, and therefore we treat the two claims hand in hand. We will refer to this again when we come to the question of infringement.

There is no question, on the record, that the element of the automatic thread holding and releasing device is all there is in the claims in issue to distinguish them from the prior patent. But with reference to the doctrine of equivalents, as applied to the claims, the parties are at issue. It is maintained on the part of the defendant that automatic thread holding and releasing devices, with functions as shown by this patent, were known to the prior art, and that, therefore, the claims must, at the best, be limited to details of construction. On the other hand, the complainant cannot well maintain that kindred devices were not known in the prior art, but it denies that they were ever known in combination with a "universally movable work feeder," or ever performed the functions which they perform in the complainant's machine, or were adapted to perform them. That they were never used in combination with a "universally movable work feeder" is admitted by the defendant. This, however, may be a mere matter of word-splitting, provided they were used in a kindred art, as it is plain they were, and also that they were used under such circumstances and with such functions that they might have been adapted to the purposes to which the complainant put them, and as a part of the complainant's combination, without the exercise of the inventive faculty. The device of the earlier patent with which the new element was combined was, so far as we can discover, the first sewing machine which successfully accomplished the object to which we have referred, namely, forming mechanically an indefinite variety of elongated stitches on the surface of the material to be ornamented. The invention was originally intended for

use in connection with heavy materials, but later an effort was made to apply it to worsteds, knit goods, and other elastic goods. This required light tension, so that the thread would feed fast enough for forming elongated stitches, as required, without puckering. But immediately certain difficulties appeared. One witness testifies as follows:

"We then found out, in sewing on moderately light goods, that we had to carry such a light tension on the upper thread, to keep the goods from puckering, that the shuttle, passing through the loop, would drag a certain amount of thread from the constant tension, so that it would leave a loose loop underneath the goods, which was a waste of silk."

Another witness testifies to another difficulty, as follows:

"After the needle has carried a loop of thread through the cloth, and the shuttle has passed through the loop of needle thread, it is necessary to the proper completion of the stitch, by the drawing up of the needle thread around the shuttle thread, that the needle thread shall be held firmly by the tension until the loop has been nearly or quite drawn up."

These difficulties were speedily overcome by combining with the light tension a provision for holding the thread firmly at the critical period referred to in this testimony, which we have stated. The mechanism for accomplishing this involved some degree of ingenuity, and it entirely removed the difficulties, and made the machine successful for use in connection with elastic goods.

The respondent has introduced a great many earlier patents, not so much for the purpose of proving anticipation, in the strict sense of the word, as narrowing the construction of the claims in controversy. The defense rests mainly at this point. It would protract this opinion beyond any reasonable necessity to attempt to explain the numerous patents to which the respondent refers. It is sufficient that they show what are called "intermittent checks," which term expresses the pith of the invention in question. They were, however, not applied to the present use; and we think that there is sufficient to establish patentability in the presumption which arises from the issue of the patent, in connection with the principles applied by the court of appeals for this circuit in *Heap v. Tremont & S. Mills*, 27 C. C. A. 316, 82 Fed. 449, 453, 456. This being established, we have no question that the claims are to be construed as they are expressed, without any limitation by what appears in the specification, and that, so far as the specification shows details, the details are illustrative, and not essential.

On the question of infringement, the respondent relies on the phraseology with reference to which we have pointed out that claim 4 contains matter not found in claim 6. It is, however, our view that this additional matter does not involve a specific element in the combination. Moreover, even on the respondent's proposition, it is entirely clear that it infringes claim 6; and we are likewise of the opinion, for the reasons given, that the two claims are so substantially alike that it infringes each of them. Its machine copies the complainant's device in every particular, except that it does not strictly release the thread through the light tension "while the work is being moved by the work feeder." It attempts to avoid the pat-

ent by providing a supply of thread through the light tension in advance, but, as we construe the claims, this is plainly only a colorable difference.

It is maintained that the patentee was not in fact the first inventor, or, or, indeed, an original inventor; but the evidence on this point is not sufficient to overcome the patent, in view of the principles stated by the circuit court of appeals for this circuit in *Brooks v. Sacks*, 26 C. C. A. 456, 81 Fed. 403, 405. Let there be a decree, as to claims 4 and 6, for a master and an injunction.

ALASKA PACKERS' ASS'N v. PACIFIC STEAM WHALING CO. et al.

(Circuit Court, N. D. California. March 16, 1899.)

No. 12,721.

1. PATENTS—INFRINGEMENT—REPAIR AND RECONSTRUCTION.

The purchaser of a patented machine may repair the same by replacing worn-out parts which, in their relation to the whole structure, are temporary in their nature, so long as the identity of the machine is not destroyed, though such parts may be among the novel or valuable features covered by the claims. But this right to repair does not include the right to reconstruct or rebuild the machine.

2. SAME—PRELIMINARY INJUNCTION.

A preliminary injunction will not be granted to prevent the replacing of a part of the patented machine which wears out very quickly, though such part is one of the elements specially protected by the patent.

3. SAME—CAN-FILLING MACHINES.

The Jensen patent, No. 281,767, for an improved can-filling machine, held infringed, on motion for preliminary injunction.

J. H. Miller, for complainant.

M. A. Wheaton and I. M. Kalloch, for defendants.

MORROW, Circuit Judge (orally). This is an application for a provisional injunction to restrain the defendants from infringing letters patent of the United States numbered 281,767, for an improved can-filling machine. The complainant is a California corporation, having its principal place of business in the city and county of San Francisco, and engaged, in the territory of Alaska and at other places, in the business of packing salmon, in hermetically sealed cans. The defendant Pacific Steam Whaling Company is also a corporation organized under the laws of the state of California, and engaged in the same business as complainant, while the business of the defendant F. A. Robbins Press Works, a corporation of the same state, is that of repairing machinery. The patent in controversy is now owned by complainant, by virtue of various assignments forming a chain of title from the patentee, Mathias Jensen, to whom letters patent of the United States, No. 281,767, were issued on July 24, 1883, for a can-filling machine. It is a complicated mechanism of steel, iron, and brass, composed of a receiving hopper, semicylindrical rotary back, with forks, knives, measuring chamber, spout, plunger, reciprocating plate, etc., and operated by a shaft and various arms, levers, rollers, and cams, and intervening con-

necting devices. It appears from the affidavits on behalf of the defendants in this case that the Pacific Steam Whaling Company for the past nine years has been engaged in the business of packing salmon in the territory of Alaska, and is the owner and operator of five different canneries for canning and packing salmon in said territory; that these canneries are situated in different places in Alaska, many hundreds of miles apart, and without any direct or regular means of communication between them; that at different times since the defendant Pacific Steam Whaling Company has been engaged in the salmon-packing business, commencing with the year 1889, it has purchased six of the Jensen can-filling machines, and is now the owner of all of the six machines so purchased; that each and every one of these machines was sold to defendant by the owners of the Jensen patent, or by their licensees; that, before the commencement of the season of each year, the defendant Pacific Steam Whaling Company has brought its can-filling machines to San Francisco, and delivered them to the F. A. Robbins Press Works for repair. It is claimed by the defendant Pacific Steam Whaling Company that such repairs have been only those ordinarily required to keep the machines in good working order, and, with a single exception, the repairs did not include the rebuilding of any of the patented parts of the machines; that, with respect to one of the machines, the defendant desired to have certain parts built heavier and stronger than they had previously been, and accordingly the F. A. Robbins Press Works so rebuilt and reconstructed the machine that it is admittedly now a practically new machine; and that this rebuilt machine, together with the others that have been repaired, the defendant is about to ship to its canneries in Alaska. Complainant asks that defendants be restrained from making, using, selling, transferring, or delivering to any person whatever any such can-filling machines, or any parts thereof, and from counterfeiting or imitating said machines; also, from sending or shipping or transporting to the territory of Alaska, or to any other place whatever, from the city and county of San Francisco, those certain Jensen can-filling machines referred to in the affidavits, or any of the parts thereof, now in the possession of the F. A. Robbins Press Works, or the defendant Pacific Steam Whaling Company. The repaired machines are designated as Nos. 69, 70, and 108. The rebuilt machine is without a number. It is claimed on behalf of the complainant that the repairs of the three numbered machines have extended to such parts as are specifically covered by the claims of the patent.

My view of the questions now before the court is that the well-known principles governing the issuance of injunctions pendente lite are applicable to a case of this character. The granting of the injunction rests in the sound discretion of the court. But the court is not called upon to determine the merits of the case upon this application. As stated in paragraph 5 of High on Injunction:

"It is to be constantly borne in mind that, in granting temporary relief by interlocutory injunction, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue in statu quo, until a hearing upon the merits, without

expressing, and, indeed, without having the means of forming, a final opinion as to such rights. And, in order to sustain an injunction for the protection of property pendente lite, it is not necessary to decide in favor of plaintiff upon the merits; nor is it necessary that he should present such a case as will certainly entitle him to a decree upon the final hearing, since he may be entitled to an interlocutory injunction, although his right to the relief prayed may ultimately fail."

It will not be necessary, therefore, to determine upon this hearing the final question of an infringement. But the general principles of the law governing the subject of repairing and reconstructing patented machines will materially aid the court in determining the present application. The purchaser of a patented machine may repair the machine which he has purchased, by replacing worn-out parts, so long as the identity of the machine is not destroyed. *Wilson v. Simpson*, 9 How. 109; *Gottfried v. Brewing Co.*, 8 Fed. 322; *Young v. Foerster*, 37 Fed. 203; *Shickle, Harrison & Howard Iron Co. v. St. Louis Car-Coupler Co.*, 23 C. C. A. 433, 77 Fed. 739. The sale of an entire machine carries with it the right to replace a part which, in its relation to the whole structure, is temporary in its nature, although such part may be one of the novel or valuable devices covered by the claims of the patent. *Farrington v. Board*, 4 Fish. Pat. Cas. 216, Fed. Cas. No. 4,687. But the right to repair does not include the right to build a new machine, or to reconstruct or rebuild an old one. *Mitchell v. Hawley*, 16 Wall. 544.

In the case of *Singer Mfg. Co. v. Springfield Foundry Co.*, 34 Fed. 393, the action was for an infringement of several claims of three different patents for improvements in sewing machines. The sewing machine of the complainant was not patented as an entirety, but different parts of the machine were covered by different patents. The claims of one of these patents covered an improved shuttle driver, and the defendant made and sold this device to be used in the complainant's machine. The claim of another patent was for a shuttle race for an oscillating shuttle. The defendant made this shuttle race for use in the complainant's machine. There were also combination claims, the main elements of which were made and sold by the defendant for use in the complainant's machine. The court held that the manufacture and sale of these devices constituted an infringement of the complainant's patents. It is contended by counsel for the complainant here that the doctrine of this case is applicable to the case now before the court; but it will be found upon examination that the decision in the case just cited is based upon the law as declared by the supreme court in *Wilson v. Simpson*, *supra*, where the distinction is drawn between parts of a machine which are of such a temporary character as to require replacement at short intervals, and the more permanent parts which give to the machine its duration and life. It is also pointed out in the *Singer Sewing-Machine Case* that there is a distinction between a patent covering an entire machine composed of several separate and distinct parts, and a machine not patented as an entirety, but in parts, and such parts covered by different patents. In the former cases the purchaser will not infringe by re-

placing temporary parts as they wear out, so long as the identity of the machine is retained, while in the latter case the manufacture and sale of the parts constitute an infringement. It may be that the distinction here indicated will not satisfactorily determine all cases, particularly where separate parts are protected by separate claims in the patent; but the other distinction, which gives the purchaser of a patented machine under an ordinary sale the right to preserve its normal life by replacing temporary parts when worn out, is a distinction that can be applied in all cases of repair, and is in accordance with the just rights of ownership of the property. *Chaffee v. Belting Co.*, 22 How. 217. Applying the principles of law as thus stated to the present case, I arrive at this conclusion: that, with respect to the can-filling machine which has not been designated by any number, it sufficiently appears that its reconstruction is an infringement of complainant's machine. It has not been merely repaired, but it has been rebuilt. The defendant Pacific Steam Whaling Company has simply taken a set of legs, and placed upon them the entire new mechanism of the patented machine. I do not understand that the defendant has or ever had the right to build a new machine under the patent. The complainant has a title to the patent under which these new machines have been built; and, so far as now appears, the patent is valid. Here is infringement of that patent by the defendants Pacific Steam Whaling Company and the F. A. Robbins Press Works in the reconstruction and rebuilding of this particular machine.

The next question is as to whether it sufficiently appears that complainant will suffer an irreparable damage if the defendant Pacific Steam Whaling Company is permitted to use this machine. It is very earnestly contended on behalf of that defendant that the corporation is entirely responsible, that the machine is necessary to enable it to carry on the work of can-filling in its canning and packing business, and that the complainant will not suffer any damage if defendant is permitted to use the said machine. On the other hand, the complainant has stated in its bill that it will suffer such damage, and the affidavits on its behalf state facts which support the allegation. The complainant states that it does not manufacture these machines, and does not propose to manufacture them, nor does it sell them or the right to manufacture or sell the machines; preferring to appropriate its ownership of the patent in the exclusive use of the machine. I think the complainant is entitled to be protected in that ownership and in that right, and that no one should be permitted to build machines, under the patent, in accordance with the specifications and claims of the patent, unless he does so by permission of the complainant. I am therefore of the opinion that this machine which is not designated by a number is an infringement, and that the complainant is entitled to an injunction against the defendants with respect to this particular machine. I think, however, that the defendants should be allowed to take the machine apart and restore the old mechanism; but, in view of the statement of complainant, that the new parts of the

machine, aside from the legs, might be shipped to Alaska and used to the injury of the complainant, some disposition should be made of those new parts that would secure complainant against their use hereafter to its injury or damage.

With respect to machines numbered 69 and 70, the facts presented to the court are, I think, sufficient to show that the machines are being repaired in accordance with the rules of law established with respect to that privilege. It is contended on the part of the complainant that in repairing these machines, as well as in repairing machine numbered 108, the mechanism of claims Nos. 16 and 17 of the patent has been infringed; and that, as these claims amount to a separate patent for the mechanism therein described, the complainant is entitled to be protected against the repair of any of the machines by the replacing of the mechanism described in said claims. In other words, the contention of the complainant is that, while the defendants may repair the machines by introducing new cams, pistons, rods, knives, and forks, and other ordinary mechanism of that character, they have not the right to introduce a new spout, which is the subject of claim No. 16 of the patent; that by repairing the machine by the introduction of a new spout, together with the bolt or slide G and mechanism to move the bolt beneath the spout, those elements are protected by the claims of the patent, and constitute an infringement. There may be something in such a claim, but I am not prepared to go into the merits of that question at this time. It appears, however, that this spout is a temporary or perishable piece of mechanism, that it has not the lasting qualities found in the other parts of the machine, and that when the machine is in operation the spout wears out very quickly. From the examination I made of the machine this morning, I arrived at the conclusion that the spout was more liable to injury and destruction in its working than perhaps any other part of the machine. It does not seem to me to be equitable for the complainant to insist upon an injunction against the repair of the spout, under the circumstances. But I am not called upon now to render a final decision upon this question. I simply determine, upon the present showing, that I will not grant an injunction against repairs of this character. I am of opinion that the defendant Pacific Steam Whaling Company should give the complainant whatever security it desires for the payment of whatever damages may ultimately be determined to have been suffered by the complainant, if it should be determined upon the final hearing that the defendant was not entitled to make the repairs under the law. It may be that, upon a final determination of the case, the court will conclude that the repairing of this spout mechanism, or the introduction of the new spout in connection therewith, constituted an infringement of complainant's patent; and that complainant would be entitled to damages for the use of such machine.

My conclusion is that a preliminary injunction should issue, restraining defendants from the use of the machine without a number, which has been rebuilt; and that the restraining order will

be dissolved, and a preliminary injunction refused, so far as it is proposed to place upon the machines numbered 69, 70, and 108 the ordinary repairs. I will fix the amount of the bond to be given by the defendants at \$25,000, and the bond to be given by the complainant at \$10,000.

Mr. Wheaton: There is one other thing in regard to this motion, if your honor please. If the defendant Whaling Company wants to have the old parts of the unnumbered machine put back upon the legs, I understand from the court that they have a right to do so, and use the machine in that way.

The Court: Yes.

Mr. Wheaton: But that they have no right to put the new parts back.

The Court: No. They will be permitted to do with that machine just what has been done with the others,—make only ordinary repairs.

Mr. Miller: I understand that the old parts have been thrown away, that the cams were broken and out of order, and the spout was of no account and thrown away, the forks were broken, and the knives, and all that sort of thing; and that therefore they threw the old parts away.

The Court: What do you propose to do with that machine, Mr. Wheaton?

Mr. Wheaton: To repair it; put the old parts back, and repair it just as we have the others.

The Court: That is, put in a new spout and a new fork?

Mr. Wheaton: Just put it in order, the same as we have the others. I will ask Capt. Humphrey whether it is a fact that those old parts have been thrown away, as Mr. Miller suggests.

Mr. Humphrey: They have not. Mr. Robbins has them all.

The Court: Let an order be entered in accordance with this opinion

RUBENS et al. v. WHEATFIELD.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1899.)

No. 524.

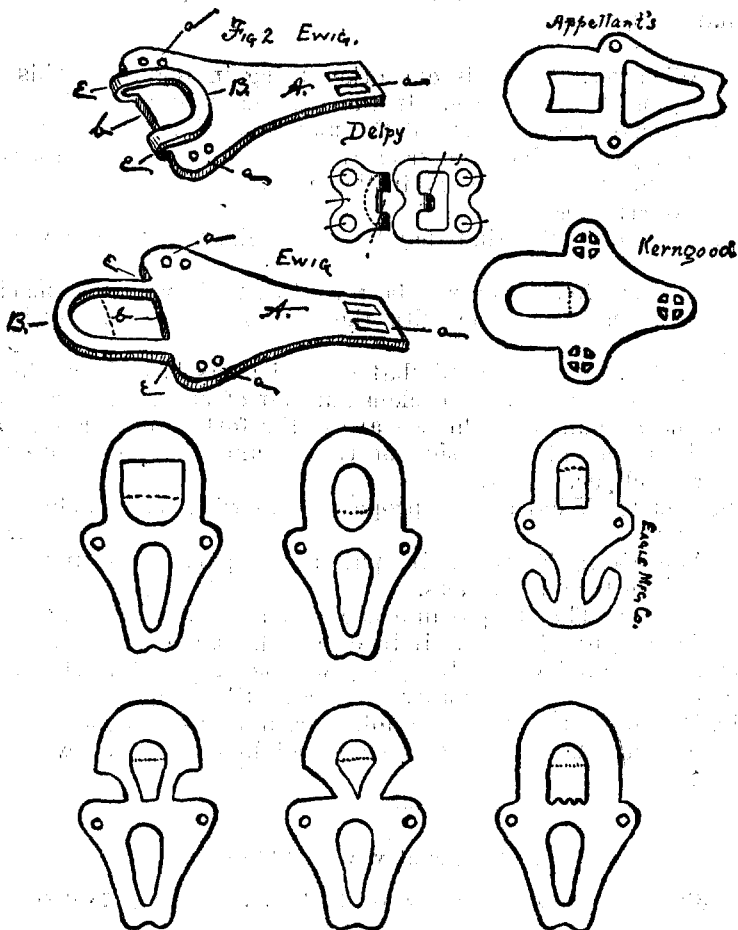
PATENTS—VALIDITY—WAISTBAND FASTENERS.

The Ewig patent, No. 408,300, for an improved waistband fastener, designed particularly for the "fly" of pantaloons, consisting of the combination, with a catch, of a perforated plate having a rounded hood provided with a semicircular slot and shoulders, is void because of anticipation and want of invention.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This appeal is from a preliminary injunction against infringement of letters patent of the United States No. 408,300, granted on March 6, 1890, to John Ewig, assignor of the complainant, for improvement in waistband fasteners, of which the one part now in controversy is illustrated by Fig. 2 of the draw-

ings here reproduced, together with another diagram showing the plate with the loop unturned, and drawings showing the corresponding parts of the fastener used by the appellants, the Kerngood and Delpy fasteners, that made by the Eagle Manufacturing Company, and other forms here produced for the purpose of illustration:



The specification contains the following statements: "This invention relates to a new and improved fastening for the meeting parts of garments, and is more especially intended for the 'fly' of paitaloons, and is in the nature of an improvement on the device for which I applied for letters patent on the 18th day of June, 1887, which application was allowed the 27th day of June, 1887, and has for its object to provide a fastening that may be quickly and easily applied to the garment, and when so applied the meeting parts of the garments may be readily and securely fastened one to the other. * * * Referring to the drawings, the letter A indicates one member of my fastening, consisting of a piece of sheet metal rounded at one end, and having a semicircular slot in said end. Said slotted and rounded end is bent over and back upon the body of the member, A, to form a hook, B, and is bent so as to leave shoulder, e, projecting beyond the edge of the body, A, for the purpose hereinafter described. * * * The fastening is applied to a garment as follows:

The body portion of the member, A, is placed between the two layers of cloth forming the edge of the garment in such a manner that the hook, B, will be upon the inside of the garment. Stitches are then passed through the perforations, a, and through the cloth. I have found in practice that where the hook, B, is at all wide, the edges of the cloth are not sufficiently supported by the threads, and to remedy this defect I cut away the center of the hook to form a slot, b, as shown in Figs. 1, 2, and 3 of the drawings, and the hook portion, B, is so bent over upon the body portion, A, as to leave shoulders, e, e, projecting beyond the said body portion, A, which allows the two layers of cloth on each side of the member, A, to meet slightly beyond the edge of the member, A, and permits the cloth at its edges to be stitched through said slot, thus not only permitting the cloth to be stitched substantially along its entire edge, but also assisting in firmly securing the member, A, in place. To the edge of the garment opposite the hook, B, is secured the catch, C. As shown in Fig. 1, the catch consists simply of a plate perforated at each end, and secured to the cloth by threads passing through the perforations."

The first claim, of which alone infringement is now asserted, reads as follows: "(1) In a garment fastening, the combination with a catch, C, of the plate, A, having the rounded hood, B, provided with a semicircular slot and the shoulders, e, e, said plate, A, being perforated at a, a, substantially as shown and described, and for the purpose specified."

The prior art in evidence consists of the following patents: Nickolds, 44,815, October 22, 1861; Sherman, 60,579, December 18, 1866; Weinberg, 60,600, December 18, 1866; Hall et al., 141,555, August 5, 1873; Haarvig, 144,334, November 4, 1873; McGill, 162,184, April 20, 1875; Masac, 187,879, February 27, 1877; McCabe, 225,849, March 23, 1880; Traphagan, 290,290, December 18, 1883; Whelan, 294,554, March 4, 1884; Delpy, 347,094, August 10, 1886; Ewig, 375,699, December 2, 1887. Concerning these patents, the brief for the appellants says: "We have exhibited in the record a number of prior patents showing hooks and eyes of almost every variety and shape. So many forms have been employed that the principle has long since been exhausted, and only details of form left—only formal changes—at the time Ewig entered the field. If it be said that the Ewig hook is mounted on a broad, flat, thin plate, it may be replied that so are the hooks of the Sherman 1866 patent, the Haarvig 1873 patent, the McCabe 1880 patent, the Delpy 1886 patent, and the Ewig 1887 patent. If it be said that the Ewig broad, flat, thin plate is provided with thread holes to enable it to be sewed to the garment, it may be replied that this is also true of the Haarvig 1877 patent, the Delpy 1886 patent, and the Ewig 1887 patent. If it be said that the hook proper of the Ewig patent sued on is an open one,—that is, cut out or provided with an opening which permits the cloth to be sewed between the members of the hook,—then it may be replied that this is also true of the Sherman 1866 patent, the Whelan 1884 patent, the Delpy 1886 patent, and the Masac 1877 patent, as well as those hooks made of wire, as the Weinberg 1866 patent. If it be said that the hook proper of the Ewig patent sued on is extended forward a short distance beyond the edge of the plate on which it is mounted before it turns back, which permits the cloth to be projected beyond such edge, and sewed between the members of the hook, then it may be said that this is also true of the Sherman 1866 patent, the Masac 1877 patent, and the Delpy 1886 patent. If it be said that the hook proper of the Ewig patent sued on is mounted on a broad, flat plate near its upper and lower edges, so as to communicate the strain to which it is subjected in use to such plate near its upper and lower edges, it may be replied that this is also true of the Sherman 1866 patent, the Masac 1877 patent, the Whelan 1886 patent, and the Delpy 1886 patent. If it be said that the hook proper of the Ewig patent sued on has its members some distance apart where attached to the plate, but united at the point of the hook, then it may be replied that the same is also true of the Delpy 1886 patent; not to mention the hooks made of wire. If it be said that the eye of the Ewig patent sued on is a bar of considerable length attached at or near each end to the cloth, then it may be said that this is also true of the Masac 1877 patent, the Whelan 1884 patent, the Delpy 1886 patent, and the Ewig 1887 patent. If it be said that the hook and eye of the Ewig patent sued on, considered as a physical thing, and in its entirety, has a broad, flat,

thin plate, that it is provided with holes or openings to enable it to be sewed or attached to a garment, that it is provided with a large opening at its hooked end, that it has the hook part projecting from the plate at two points near its upper and lower edges, that the members of the hook begin to bend backward at a point in advance of the edge of the plate, that the construction permits the cloth to be sewed together in advance of the front edge of the plate between the members of the hook, and that it has an eye consisting of a strip of metal attached to the garment at or near its ends to admit a wide hook, then it may be replied that all of these features are to be found in the Sherman 1866 patent, the Masac 1877 patent, the Whelan 1884 patent, and the Delpy 1886 patent. It is true that some of these patents show hooks and eyes that are employed in connection with other portions of garments or wearing apparel than the waistband of trousers; but this is immaterial, inasmuch as they are applicable for use, if desired, in connection with waistbands. The Sherman 1866 patent shows a buckle applied to belts, but nevertheless it is equally applicable to waistbands. The buckle shown in Fig. 2 of the Sherman patent could be sewed in between the layers composing the waistband of trousers, and the eye portion could be sewed in on the opposite side. The Masac 1877 patent shows a glove fastener, but if we look at Figs. 2 and 3 of the drawings we will see that the parts composing the fastener are equally applicable to use as a waistband fastener. The Whelan 1884 patent shows a hook and eye that can be used as a waistband fastener, although it is not described in connection with such use. The Delpy 1886 patent shows a corset clasp that can be used as a waistband fastener without any change or modification."

Without direct response to these propositions, and without attempt at analysis of the prior art, the brief of the appellee rests the question of the validity of the patent on the opinion of Judge Morris in the case of *Blum v. Kerngood*, 92 Fed. 992, in the United States circuit court for the district of Maryland, handed down on February 4, 1898, and on the judgment rendered in that court on May 17, 1898, in the suit of *Wheatfield*, the present appellee, against the *Eagle Clasp Manufacturing Company*,¹ whereby that company was restrained pendent lite from making or selling the hook described in the bill, "having a semicircular slot and shoulders projecting beyond the edge of the plate," as being an infringement of the *Ewig* patent, No. 408,300. The opinion of Judge Morris, after summarizing the contents of the file wrapper, proceeds as follows: "It appears by the amended specification, as well as by the amended claim, that the patentee pointed out and claimed the semicircular slot with the shoulders, e, e, as his invention or improvement. His original claim 1, which was broadly for the hook having a slot, was rejected, and the restricted claims for the semicircular slot with the shoulders was allowed. The patent examiners were clearly right in this restriction. A slot was old, but a semicircular slot, made of that shape for the purpose of presenting a straight transverse edge to the stitching, was new; and the bending of the hook so as to form the shoulders beyond the straight edge for the purpose of allowing space for the edges of the two layers of cloth to meet was new as a device for that particular purpose, in connection with a solid body plate. There was nothing new in the projecting ears on each side with perforations for thread. These ears appeared in the patent to *Ewig*, December 27, 1887, No. 375,699, and are there called a 'lip' or 'projection,' provided with one or more perforations. In the patent in suit it is merely said in the specifications that the body of the hook is provided with perforations for the passage of the threads for securing it to the garment, and in claim 1 that plate A is perforated at a, a, as shown and described. The ears, therefore, which may be used for the perforations, are not covered by anything in the specification and claim, and, in my opinion, in view of the state of the art, and *Ewig's* previous patent, could not rightly have been. The defendant's hook, which is charged to be an infringement, is like the complainant's hook, except that it does not have the semicircular slot. It has an elliptical slot, which extends as far into the body of the metal as it does into the part which forms the hook; and while it permits the edges of the two layers of cloth to be stitched across, just as the old French hook did, it does not present to the stitching any bearing to

¹ No opinion filed.

resist the pull. It is urged that such an edge is presented by the ears on each side of the hook, and that they are the equivalent of the straight edge cut out in the center of the hook. It may be that on defendant's device the edge of the ears help to remedy the absence of the center straight edge, but it must be remembered that complainant's device, although it has proven highly successful, and has gone wonderfully into use by the trade, is not a pioneer invention. Haarvig's patent, 144,334, November 4, 1873, shows a waistband fastening for pantaloons, made of flat metal attached by perforations in ears at each side, and the Weinberg patent, 60,600, December 18, 1866, exhibits a form of hook and eye fastener for the waistbands of pantaloons, and Ewig's patent, 375,699, December 27, 1887, was a device for this same purpose. There was nothing, therefore, new in the substitution of a hook and eye device of any known form for buttons for this purpose. Patentable novelty was restricted to a new form of device, or an improvement on an old form, requiring invention. All forms had for their object to resist strain, to keep device securely in place, to be slightly in appearance, and moderate in cost. In the device now in suit nothing distinguishes it from Ewig's prior patent but the semicircular slot made in the form which remedies the difficulty which Ewig says he encountered when using a wide hook, viz. that the edges of the cloth were not sufficiently supported by the threads, and with the advantage, when used, that it resulted in the body plate of the hook being more securely held in place. This semicircular slot is all that I find that was patentable in complainant's device, and, treating the patent in suit as a good patent for that, I do not find that the defendant infringes, and the bill must be dismissed."

In the opinion delivered below, which also seems not to have been reported, it is said: "It is perfectly clear that the transverse edge has a functional advantage, and, as I understand Judge Morris' opinion, he distinctly says that the word 'semicircular,' when used to describe the slot, meant a slot having this straight edge. This being true, I think the infringement is clear. The circuit court of appeals for this circuit has held that it is the duty of the trial judge to enforce the judgments of other courts, and to grant preliminary injunctions, unless new defenses are brought forward. The inquiry of the validity of the patent is no longer an open one with me after having been decided in the affirmative by Judge Morris; and, while it is true that in neither the Kerngood nor the Eagle Case did Judge Morris affirm the validity of the patent in distinct terms, I think he did so, in effect, when those two cases are taken together. The only question now open before me is, is there anything before me which was not before Judge Morris, which would have changed his judgment? The only two patents relied upon by defendant are Sherman, 60,579, and Delpy, 347,094. The first of these was not before Judge Morris in the Kerngood Case, and the latter, although before him, was not commented upon by him in his opinion; but I am very clear that neither of these patents would have altered his judgment."

Ephraim Banning and T. A. Banning, for appellants.

John P. Wilson, Arthur Steuart, and N. Grier Morse, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

In *Stover Mfg. Co. v. Mast, Foos & Co.*, 32 C. C. A. 231, 89 Fed. 333, where, as here, the appeal was from an interlocutory order of injunction granted upon ex parte affidavits, and on the authority of a prior decision in another circuit, we treated the decision of the supreme court in *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, as meaning that the review in this court in such cases should go to the merits, and added the suggestion that: "This being the scope of the appeal, the logical inference would seem to be that every application to a circuit court for an injunction or temporary restraining order

should be considered on its merits, and that a ruling or opinion of another court upon any question involved should be given only its just and reasonable weight according to the circumstances." We therefore pass to the merits of this case.

It cannot be said that in a disputed case, or on a contested hearing, before the decision below was made, the patent in suit had been adjudged valid. In *Blum v. Kerngood*, 92 Fed. 992, the patent was denied the merit of a pioneer invention, and, on the narrow margin of novelty conceded to it, the finding and decree were that there had been no infringement. Upon the question of validity it was not necessary to decide definitely, and it is not shown that the decree entered contained anything upon the point. Whatever expression there is in the opinion on that question is only an assumption or concession that the patent was valid to the extent of the very narrow construction put upon it, and at most is entitled to the weight of a dictum. The gist of the opinion as understood below and as contended here is that the word "semicircular," when used to describe the slot, meant a slot having a straight edge; and it is further contended—as it must be to make the proposition effective—that the straight edge of the slot must be the edge of the body plate over which the two layers of cloth are to be extended and stitched. Promptly upon the handing down of that opinion, suit was brought against the Eagle Clasp Manufacturing Company in the same court, and that company, according to the affidavit of the appellee, "being satisfied from an examination of the patent and the opinion of Judge Morris in the *Kerngood Case* that its clasp was an infringement of the patent, and being unable to advance any other defense, etc., was powerless to prevent the issuance of a preliminary injunction against it, and the court * * * entered a decree that the hook manufactured by the Eagle Clasp Company was an infringement of the first claim of the patent." The affidavit also says "there was no collusion" in the case, but it is evident that there was submission without contest, and that the judge gave the decree without further consideration of the question of the validity and scope of the patent. If the essential feature of the patent was that the edge of the plate next to the slot should be straight, and the slot was described as semicircular for the simple purpose of defining that line,—the form of the slot in other respects being immaterial,—the obvious suggestion is that a remarkably roundabout and questionable way was sought after to express a meaning which might have been easily declared in direct and plain words. It seems clear, however, that the word was used for no such indirect purpose. The file wrapper shows that, as first presented, neither the specification nor claim called for a slot of particular form, but simply for a hook with a slot; but by the same words now found in it the specification required that the center of the hook be cut away to form a slot through which the cloth could be "stitched substantially along its entire edge," and it follows that the amendment whereby the slot was described and claimed as semicircular could not have been studied out for the purpose of describing a straight edge for the body plate along which the overlapping cloth could be stitched. The idea of overlapping

and stitching the cloth, so as to gain all the advantages now deemed possible, was already clearly expressed in the specification; and, a straight edge being the simplest form for that purpose, it is to be presumed, in the absence of evidence on the point, that the original drawings showed a slot with an edge of that kind at its base.

But, while the specification and drawings of the patent indicate clearly enough the intention that the straight side of the semicircular slot should be next to the body of the plate, it is not explicitly so stated, and manifestly that position is not essential to the successful accomplishment of the avowed purpose of the invention. An exact semicircle of course must have a straight side equal to the diameter of the corresponding circle, but, for all that is said in the specification, that side may be the top as well as the base of the slot, and in either place is equally within the terms of the claim, unless, indeed, by a construction equivalent to a denial of invention, the claim is to be limited to the exact forms of plate and hook shown in the drawing; and, if that be done, the charge of infringement has no foundation. That the straight edge is not necessary to permit the stitching of the edges of the cloth inside of the loop, and for the purpose specified, it is easy to see. That could be done where, as in *Blum v. Kerngood*, the slot is elliptical, even though it extends into the body of the metal as far as into the hook, by stitching not directly across, as in that case it seems to have been thought necessary to do, but along the curved edge of the plate. So done, the stitching, without doubt, would furnish an adequate "bearing to resist the pull." Especially would this be so if the lower end of the slot be placed, as in one of the illustrative cuts, more nearly in line with the upper edges of the ears on either side of the hook; and in proportion as the elliptical curve is made, as it might be, to approximate a straight line, the resistance afforded by the stitching will be more nearly the same as if the line were straight. And since the *Kerngood* device, though manifestly performing, or capable of performing, in an appreciative degree, the function of the patented device, yet did not infringe, because the lower end of the slot was elliptical and cut into the body plate below the position of the straight line of the patent as much as above that line, is it to be inferred that a change in the position and in the radius of the ellipse, so that the lower part thereof would be more nearly coincident with a straight line, would have been held to constitute an infringement? If so, by what rule is it to be determined when a noninfringing curved line, though performing from the start the requisite function, becomes, by change of position and of degree of curvature, an infringement of a claim for a straight line? The evident impossibility of such a rule demonstrates the fallacy of an attempt to state a substantial distinction between the *Kerngood* device and that of the patent in respect to the possibility of stitching the two layers of cloth along the lower edges of the two forms of slot in a manner to afford effectual resistance to the pull, and to subserve the other intended functions. The difference, in respect to any of the functions, is only in degree, and does not affect the essential character of the devices. It is evident, too, that fasteners might be constructed in

various forms so as to have the so-called semicircular slot, but with body plates having other than straight edges within the slots, and yet available for all the supposed functions of that edge. As illustrated in one of the foregoing drawings, the edge might be notched or undulating; and the other forms illustrated afford examples any one of which, in respect to the particular functions in question, is the plain equivalent of the form of the patent, and in all reason should be said to infringe, if the patent had real merit. It is to be observed, further, that, while the word "semicircular" is one of definite mathematical meaning, it manifestly was not used in this patent in the strict sense. The slot shown in the drawings does not approximate a semicircle, unless reference is made only to the portion of the slot within that part of the loop which is turned back upon the plate; and, if that be the reference, it does not include the straight edge at the base, which alone has been treated as important. The reference, however, it seems clear, is to the entire slot, and that, instead of being semicircular, has a straight depth between parallel lines well-nigh equal to twice the radius of the semicircular top with which it is crowned. The base of the true semicircle, in the drawing of the patent, as well as in the other cuts shown, we have indicated by a dotted line, and there is nothing in the specification and claim which requires that the portion of the slot outside of the semicircular part shall be of any particular shape. As illustrated in the patent, it is a parallelogram, but it may be in any of the forms illustrated, and in many other conceivable shapes, without impairing the efficiency of the fastener in any respect deemed important. By the opinion in *Blum v. Kerngood* no one of those designs could be deemed an infringement, but, if the patent had genuine merit, it ought to cover them all. Our conclusion is that it contains nothing essentially new. The straight edge is fully anticipated in the Delpy clasp, and if it could, in any stage of the art, have been an inventive act to add to that device projecting ears, the anticipation is found in the Ewig patent of 1887, as well as in other earlier patents. There is certainly no merit in so bending a loop as to leave curved shoulders projecting beyond the body of the plate. It would be difficult to do the bending in a way to leave the necessary space between the plate and the loop, without producing the projecting shoulders. The prior art seems to admit of no theory on which the patent can be deemed valid. The decree below is therefore reversed.

Judge SHOWALTER did not participate in this decision.

PELZER v. NEWHALL et al.

(Circuit Court, N. D. Illinois. April 13, 1899.)

1. PATENTS—PRELIMINARY INJUNCTIONS—CONFLICTING DECISIONS.

On a motion to dissolve a preliminary injunction, when it appears that the circuit courts of appeals in two different circuits have reached opposite conclusions on the questions involved, the circuit court will adopt the reasoning of that one which impresses it as being most correct.

2. SAME—ELECTRIC LIGHT FIXTURES.

Stieringer reissue, No. 11,478 (original, No. 259,235), for improvements in electric fixtures, construed, as to claim 1, as being limited to the particular insulating device described, and therefore *held* not infringed.

This was a suit in equity by William Pelzer against Newhall and others to enjoin the alleged infringement of reissued letters patent, No. 11,478, granted March 12, 1895, to Luther Stieringer, for an improvement in electrical fixtures, which covers a device for attaching electric lighting fixtures to gas pipes by an insulated connection. The original patent, No. 259,235, was granted to said Stieringer June 6, 1882. The cause was heard on a motion to dissolve a preliminary injunction.

Poole & Brown and Richard Dyer, for complainant.

Barnes, Barnes & Bartelme, for defendants.

KOHLSAAT, District Judge. This matter comes on to be heard upon the motion of defendants for the dissolution of a preliminary injunction heretofore granted herein against defendants, restraining the alleged infringement of reissued letters patent No. 11,478, dated March 12, 1895; the preliminary injunction being on the first claim of the reissued patent. The court has before it the opinions of two circuit courts of appeals covering the question at issue in this suit, in which opinions antagonistic conclusions are reached. The court therefore feels at liberty to closely examine the reasoning of each of the said courts, and the grounds upon which they arrive at their respective conclusions, in addition to the facts brought out on this hearing, as it is admitted that the statements of fact set forth in those opinions are substantially correct, and to adopt the reasoning of either of said courts, in so far as it may impress this court as being correct, and may be applicable to this case. The decisions referred to are those of *Maitland v. Manufacturing Co.*, 29 C. C. A. 607, 86 Fed. 124, decided in the Second circuit, and *Manufacturing Co. v. Pelzer*, 91 Fed. 665, decided in the Third circuit. In view of the wide scope of the first claim of the reissued patent, which, in the mind of this court, is so broad as to cover all possible devices for the insulation of electric light fixtures from grounded pipes to which they may be attached, it is the opinion of the court that to sustain this claim would be practically to sustain a patent upon the principle of insulation itself, when applied to a combination of grounded pipes, and electric light fixtures attached thereto. Following the reasoning of the court of appeals of the Third circuit, this court is of the opinion that the first claim of the reissued patent is only valid when restricted to the particular insulating device, as distinguished from the general principle of insulation, shown in said reissue, and in the original patent upon which it is based; and, as the insulating devices used by defendants do not, in the mind of the court, infringe the devices described and set forth in the said reissue, or the original patent on which it is based, the injunction in this case should be dissolved. It is so ordered.

WHITNEY et al. v. TIBBOL et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 458.

1. STIPULATIONS—CONSTRUCTION—ADMISSIONS—SHIPPING.

A stipulation reciting that prior to the departure of a vessel on a voyage claimants made advances to her owners, and that upon her return the cargo was taken by claimants in payment of the advances, admits that the owners of the vessel owned the cargo up to the time when claimants took it, and that no freight has been paid therefor.

2. SEAMEN—LIEN FOR WAGES—LIABILITY OF CARGO FOR FREIGHT.

For their wages, seamen have a lien upon the cargo for the freight, or a reasonable charge therefor, though the vessel and cargo belong to the same person.

3. SAME—LOSS OF LIEN.

A lien in favor of seamen on the cargo for the freight is not divested by a delivery of the property to one who made advances to the owners of the vessel in fitting her out and furnishing her with supplies before she set out on the voyage.

Appeal from the Circuit Court of the United States for the Northern District of California.

Myrick & Deering and A. P. Van Duzer, for appellants.

H. W. Hutton, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellees were seamen on a voyage upon the barkentine Marion from San Francisco to Alaska. On their return to San Francisco they libeled the bark for their wages, and she was sold. Her proceeds were insufficient to pay the wages, and the appellees libeled and caused to be seized her cargo, consisting of 850 barrels of salmon in a warehouse in San Francisco, claiming that they had a lien thereon to the extent of the freight. The substance of the allegations of the libel was that the owners of the bark were the owners of the salmon, and that the latter owed freight money to the vessel, which had not been paid, in the sum of \$1,750. The appellants, C. E. Whitney & Co., answered, denying that the owners of the vessel ever owned the salmon, and denying that any freight money was due, and alleging that all freight had been paid. The district court decreed that the owners of the vessel owned the salmon, and that the seamen had a lien upon the latter for the freight, which was fixed at the sum of \$850, or at the rate of \$1 per barrel. Upon the appeal it is contended that the district court erred in ruling—First, that freight was due to the ship from the owners of the salmon; second, that the owners of the vessel were the owners of the cargo; and, third, that the seamen had a lien upon the salmon, and could seize the same in the possession of the appellants after the termination of the voyage.

The only proof that freight had been earned, and that the freight money had not been paid, is furnished in a stipulation of the parties

to the effect that, prior to the departure of the bark on the voyage in question, the appellants advanced to the owners of the vessel money and merchandise, in fitting her out and furnishing her supplies, in the sum of \$4,400; that, upon the return of the vessel, the cargo was taken therefrom and placed upon a wharf; and that the appellants took it from the wharf, and put it in a warehouse, and claimed it in payment of their advances. It follows, from this stipulation, that the owners of the vessel owned the cargo up to the time when it was delivered to the appellants. This is necessarily implied in the admission that the latter took it in payment of advances. It also is implied in the stipulation that no freight had been paid for the cargo. To whom and how could freight have been paid, when it is conceded that the whole of the cargo was turned over to the appellants in payment of what was due them? The owners of the cargo up to the time of its delivery to the appellants were also the owners of the vessel. The appellants could not have paid the freight. Under the admitted facts it was impossible that they should have done so. They had made advances to the vessel to a greater amount than the value of the cargo, and they received the cargo in part payment. The owners could not have paid the freight, for to have done so would have been to pay themselves. It is the legitimate and fair inference from the admitted facts that the freight was not paid, and if, to the knowledge of the appellants, it had in any way been paid, they should have shown the facts and the circumstances of the payment. It was admitted that the sum of \$1 was reasonable freight.

Did the seamen have a lien upon the cargo for the freight? and, if so, was the lien lost by the delivery of the cargo to the appellants? The general proposition is not disputed that seamen have a lien for their wages upon both the ship and the freight. Rule 13 of the general admiralty rules provides:

"In all suits for mariners' wages the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner and master alone in personam."

In the leading case of *Poland v. The Spartan*, 1 Ware, 134, Fed. Cas. No. 11,246, it was held that, when the cargo is owned either by the owner or the charterer of a vessel, the seamen may proceed against the cargo to recover the reasonable value of the freight money, and apply the same in satisfaction of their lien for wages. That decision has been followed in *Skolfield v. Potter*, 2 Ware, 394, Fed. Cas. No. 12,925; *The Clayton*, 5 Biss. 162, Fed. Cas. No. 2,870; *The Antelope*, 1 Low. 131, Fed. Cas. No. 484; and *In re Low*, 2 Low. 264, Fed. Cas. No. 8,558.

It is suggested that the doctrine of *Poland v. The Spartan* is discredited by the decision in *Sheppard v. Taylor*, 5 Pet. 675. In that case, it is true, the owners of the ship were also the owners of the cargo. There were in the admiralty three distinct funds, representing the proceeds of the vessel, the cargo, and the freight. The court said:

"We think there is no claim whatsoever upon the proceeds of the cargo, as that is not in any manner hypothecated or subjected to the claim for wages."

That language was used, however, in view of the fact that the freight had been segregated from the cargo, and was represented by a distinct and separate fund. Under the circumstances, of course, there could be no lien upon the cargo. But elsewhere in the opinion in that case the court said:

"Freight, being the earnings of the ship in the course of the voyage, is the natural fund out of which the wages are contemplated to be paid."

The decision in *Poland v. The Spartan* is clearly in harmony with the general principles of the admiralty law, which highly favors the seaman's claim for wages, and jealously protects his lien therefor. No valid reason is perceived for denying the lien in cases where the vessel and the cargo belong to the same owner. The fact that no freight is charged or paid in such a case opposes no obstacle to the enforcement of the lien. It imposes upon the court only the added duty of determining what, under the circumstances, would be a reasonable charge for freight. In such a case, no less than in the case where the vessel and the cargo belong to separate owners, the master and the crew have contributed to the result of the voyage,—the transportation of the cargo. They ought to have recourse to the usual funds for the payment of their wages, and the first of these is the freight. If, then, the cargo is subject to such a lien, the delivery of the possession of the cargo to the appellants did not divest it. The lien followed the cargo, wherever it might be found. *Brown v. Lull*, 2 Sumn. 443, Fed. Cas. No. 2,018; *The Rock Island Bridge*, 6 Wall. 213; *Sheppard v. Taylor*, 5 Pet. 707, 710; *The Nestor*, 1 Sumn. 73, Fed. Cas. No. 10,126; *The Bolivar*, Olcott, 474, Fed. Cas. No. 1,609.

In *Vandewater v. Mills*, 19 How. 82, it was said of a maritime lien:

"It is a *jus in re*, without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding *in rem*."

The decree will be affirmed.

METROPOLITAN TRUST CO. OF NEW YORK v. COLUMBUS, S. & H. R. CO.

(Circuit Court, S. D. Ohio, E. D. April 19, 1899.)

1. JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS—DIVERSITY OF CITIZENSHIP.

A federal court, having possession of the property of a railroad company by its receiver in a foreclosure suit, draws to itself, as ancillary to such suit, all other suits seeking to establish or enforce equitable claims or rights in the property, and a complainant in such a suit may make any one defendant to his bill, without regard to his citizenship.

2. EQUITY PLEADING—MULTIFARIOUSNESS OF BILL.

The fact that a complainant in his bill sets up two causes of action, one as trustee and one in his individual right, does not render the bill subject to demurrer, on the ground that it is multifarious, by a defendant between whom and complainant, in either capacity, the issue made is precisely the same.

3. MORTGAGES—BILL FOR FORECLOSURE—INCIDENTAL ISSUES.

The question whether one conceded to hold the legal title to property mortgaged by another has any beneficial interest therein, or merely holds the title as trustee for the mortgagor, may be litigated in a suit to foreclose the mortgage as incidental to the relief sought, and the bill is not multifarious because it joins such legal owner as a defendant, and presents the issue for determination.

4. SAME—ALLEGATION OF OWNERSHIP OF MORTGAGOR.

An allegation in a bill for the foreclosure of a mortgage that the mortgagor purchased the property from a former owner and paid for it, where it is conceded that the title of both vendor and vendee was equitable only, is a sufficient averment of the mortgagor's ownership, as against the holder of the legal title, without alleging a conveyance to the mortgagor of his vendor's interest.

5. EQUITY PLEADING—SUFFICIENCY OF BILL—ALLEGATION OF TRUST.

A bill for the foreclosure of a mortgage, which also joins a third person, conceded to hold the legal title to the mortgaged property, and asks that he be decreed to hold such title as trustee for the mortgagor, must set out the facts upon which the alleged trust is asserted.

This cause comes on for hearing on demurrer to the bill and an amendment thereto.

The bill seeks to foreclose two liens on the railroad of the defendant, the Columbus, Sandusky & Hocking Railroad Company. The first lien described in the bill (though it is junior to the other in point of priority) is that of a mortgage issued by the defendant company to the complainant company as trustee on November 9, 1895, to secure an issue of \$10,000,000 of bonds, of which \$7,445,000 were actually sold. The second lien is that of \$250,000 of receiver's certificates issued by a receiver of the common pleas court of Crawford county, Ohio, in a former foreclosure of the same railroad, and now held by the complainant in its individual character, and not as trustee. The bill avers that the lien of the certificates is the first and best lien on the railroad; that the mortgage is a lien subordinate to these certificates and others of the same class; also to certificates issued by the receiver of this court in a foreclosure suit brought by the Mercantile Trust Company to which the present suit is ancillary; also to certain six-months claims for wages and supplies to be adjudicated; and also to the mortgage upon its railroad issued by the defendant company to the Mercantile Trust Company to secure \$2,000,000 of bonds; but that it is superior to all other liens. The bill recites that in June, 1897, the Mercantile Trust Company, as trustee, filed a bill in this court to foreclose the above-mentioned mortgage, and procured the appointment of

Samuel M. Felton receiver, who took possession of the railroad, and, under orders of this court, is still in possession, and is operating the same, "and, by reason of said possession and control of said property by this honorable court through its said receiver, your complainant is unable to resort to any other court to enforce its rights, and the remedies to which it is entitled, by reason of the facts herein complained of." The bill makes defendants, in addition to the mortgagor and the Mercantile Trust Company, some 18 persons, who, the bill avers, claim some interest in the railroad by way of lien and otherwise, but all of which the bill avers are subordinate to both liens sought to be foreclosed. The prayer is that such persons be made parties, and compelled to set up their claims; that they be adjudged invalid or subordinate to complainant's liens; and that the railroad be sold free from all incumbrance arising from the same. The complainant is a citizen of New York, and several of the defendants are citizens of the same state, while the defendant mortgagor and other of its co-defendants are citizens of Ohio and other states. Among these persons are the demurrants, Edward H. Zohorst and the Second National Bank of Sandusky, citizens of Ohio. As against them, the amendment to the bill contains averments that the defendant the Columbus, Sandusky & Hocking Railroad Company is in possession of certain real estate in Sandusky; that on July 28, 1893, the Sandusky & Columbus Short-Line Company, a predecessor in title of the mortgagor, purchased from the Lake Erie Construction Company and paid for the real estate above mentioned; that at the time of the purchase "the title thereto was in the name of the defendant Ed. H. Zohorst, who held the same as trustee for the said Lake Erie Construction Company, and, from and after said purchase by said Sandusky & Columbus Short-Line Railway Company, said Zohorst held the same as trustee for said railway company. He had no other right, title, interest, or estate therein." The bill then traces the devolution of the title of the land, by the foreclosure of the Short-Line Railroad, to the defendant mortgagor. The bill further avers that Zohorst mortgaged the land to the Second National Bank of Sandusky, although Zohorst was not at the time the owner of the land, and had no title or interest therein, except as trustee for the Short-Line Company, which was the real owner, and was in possession at the time, and that of these facts the Second National Bank had full knowledge.

Seward, Guthrie & Steele, for reorganization committee.

Parsons, Shepherd & Ogden, Morrison R. Waite, and Lawrence Maxwell, Jr., for Metropolitan Trust Co.

Barton Smith, for Second Nat. Bank and Ed. H. Zohorst.

Taft, Circuit Judge (after stating the facts as above). The demurrer to the amended bill first raises the question of jurisdiction. It is said, in support of it, that, in the controversy over the rights of Zohorst and the Second National Bank, the parties must be arranged according to their interest, to determine whether the requisite diverse citizenship exists, and, under such an arrangement, the complainant, a citizen of New York, the defendant railroad company, the mortgagor, a citizen of Ohio, are on one side, and Zohorst and the bank, both citizens of Ohio, are on the other, which makes impossible jurisdiction in a federal court. The answer to the objection is that this is a dependent and ancillary bill, of which the court gets jurisdiction because it has lawful custody of the property with respect to which the complainant seeks equitable relief, and not because there is diverse citizenship of the parties. The complainant may make any one defendant to its bill, no matter what his citizenship, if his presence as a party is necessary to work out, in respect to the property held by the court, the equities to which the complainant is entitled. *Compton v. Railroad Co.*, 31 U. S. App. 486, 531 et seq., 15 C. C. A. 397, and

68 Fed. 263. The demurrer on the ground of jurisdiction cannot be sustained.

The next ground is that the bill is multifarious. The rules for determining whether a bill is open to the charge of multifariousness are rather vague, and leave much to the discretion of the court. It is doubtless true that generally two different complainants may not join separate causes of action, when each has no interest in the cause of the other. It is also true that a cause of action in favor of one in his own right is as distinct from a cause of action in favor of the same person as trustee as it is from that of a different person, and therefore that a defendant against whom a trustee attempted to unite, in the same bill, with a cause of action asserted by him as trustee, a wholly distinct cause of action, in his individual right, might object on the ground of multifariousness. In the case before us the defendant railway company might, therefore, be heard to urge this defect in the bill, because it asks for the enforcement of two different liens held in different rights. It might insist upon the right to answer separate demands by different persons in different suits. But how does this defect injure or affect the defendants Zohorst and the Second National Bank? As to them the issue made by the complainant as trustee and in its own right is the same. They are required to meet only the question whether Zohorst had any equitable interest in the land as against the defendant railroad company; and, second, if he had none, whether the bank, without knowledge of the naked character of his legal title, changed its position on the faith of his having a beneficial interest. Upon this issue, the complainant, as trustee and in its own right, has precisely the same interest, and the union of the two causes of action in the bill does not embarrass Zohorst or the bank in the slightest; for, as to them, the causes of action raise but one narrow question. The court exercises a large discretion in passing on questions of multifariousness (*Brown v. Deposit Co.*, 128 U. S. 403, 411, 9 Sup. Ct. 127; *Beach*, Mod. Eq. Prac. § 115, and cases cited); and it seems to me that the consideration suggested, to wit, that the particular defendants are not injured or affected by this defect pointed out in the bill, is quite sufficient to justify me in holding that they cannot be heard to urge it by demurrer.

The next ground of the demurrer is that in a foreclosure suit the mortgagee cannot compel one claiming an interest in the property mortgaged by paramount title to try his title in the foreclosure suit. The general principle is admitted, but it does not apply here. It is conceded that Zohorst has the legal title. The only question is whether he holds as trustee for the defendant railroad company, the mortgagor. That is a question of equitable cognizance, the settlement of which is incidentally necessary to the sale of the mortgaged property clear of incumbrance or cloud. It may be settled in a foreclosure bill. In *Brown v. Deposit Co.*, 128 U. S. 403, 9 Sup. Ct. 127, the bill was filed to foreclose a mortgage upon real estate, the legal title to a large part of which was vested in one from whom the mortgagor had agreed to buy it, and to whom all of the purchase price had not been paid. The bill sought, as ancillary relief, a decree of specific performance against the holder of the legal title upon tender of

the purchase price. It was held that the bill was not defective for multifariousness in uniting the two causes of action. The case at bar cannot be distinguished from the case cited.

It is further objected that it is not averred in the bill that the Lake Erie Construction Company ever conveyed its interest in the land to the Short-Line Company. While the allegation is not as specific upon this point as could be desired, it seems to me that the averment that the former company purchased the land from the latter, and paid for it, is sufficient to show, as to a mere equitable interest, that the interest passed from the vendor to the vendee.

The next ground of demurrer is that the bill does not set forth the facts upon which the relation of trustee and cestui que trust between Zohorst and the Lake Erie Construction Company arose. It is said that the averment that Zohorst was a trustee in holding the legal title is the averment of a legal conclusion. I think that this objection is well taken. The bill is in this aspect an action to declare and enforce a trust, and the facts upon which the alleged trust is asserted, whether by reason of an express declaration or by circumstances, should be set forth. *Grenville-Murray v. Earl of Clarendon*, L. R. 9 Eq. 11; *Jackson v. Railway Co.*, 18 Law J. Ch. 91; *Lienan v. Lincoln*, 2 Duer, 672. Upon this ground the demurrer of the defendants is sustained. Upon other grounds the demurrer is overruled. The complainant will be given 20 days in which to amend its bill, by setting out the facts upon which it claims that Zohorst had no beneficial interest in the real estate described in the amendment to the bill, and held the same as trustee for the Lake Erie Construction Company.

MORRISON v. MARKER et al.

(Circuit Court, N. D. California. April 10, 1899.)

No. 12,651.

1. FEDERAL COURTS—JURISDICTION OF PARTIES—SUITS RELATING TO PROPERTY.

A suit brought in a circuit court of the United States by a purchaser of real estate in the district at execution sale, to cancel and set aside a prior conveyance made by the judgment debtor as a cloud on his title, is essentially a suit in rem, and within the provisions of section 8 of the act of March 3, 1875 (18 Stat. 472), authorizing the bringing in by order of parties defendant who reside without the district in such cases.

2. SAME—EQUITABLE JURISDICTION—ADEQUATE REMEDY AT LAW.

A circuit court of the United States, as a court of equity, cannot entertain a suit by a purchaser of real estate at execution sale who is not in possession, to set aside a prior conveyance made by the judgment debtor as a cloud on complainant's title, on the ground that such conveyance was in fraud of creditors, although such a suit is permitted by a state statute. If the conveyance sought to be set aside was fraudulent, it was void as to creditors, and the complainant, by his purchase, acquired the legal title, and has a plain, adequate, and complete remedy at law, by an action in ejectment.

On motion for an order vacating an order directing the defendants to appear or plead, and to dismiss the suit.

John E. Richards and Louis P. Boardman, for complainant.

Deal, Tauszky & Wells, for defendants.

MORROW, Circuit Judge. The character of this suit is in controversy. The complainant contends that it is a suit in equity to remove a cloud and quiet the title to certain real estate. The defendants contend that it is in the nature of a creditors' bill to set aside a fraudulent conveyance, and is a personal action. The question is deemed by the parties to be material in determining whether the court has obtained jurisdiction over the defendants by the service of process in the action. The complainant is a citizen of the state of California, and a resident of the Southern district. Both of the defendants are citizens and residents of the state of Nevada. The property involved in the action consists of certain real estate and water rights located in Lassen county, in this district. The defendants were served with an order to appear, plead, answer, or demur to the bill of complaint, under the provisions of section 8 of the act of March 3, 1875 (18 Stat. 472), which provides:

"That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. * * * But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

It appears from the bill of complaint that, prior to the year 1889, the defendant P. N. Marker and one Charles A. Merrill were in possession of certain real property, water rights, and premises in Lassen county, in this state. A controversy arose between them in relation to their rights and interests in the property, and on February 20, 1889, Merrill brought suit against Marker in the superior court of the state in and for the county of Lassen, to determine such rights. The suit was transferred to this court, and resulted in a judgment and decree ordered on July 27, 1891, in favor of the defendant Marker. 47 Fed. 138. A decree in accordance with the order was entered on September 5, 1891. To defend this suit, Marker entered into a contract with John F. Alexander, an attorney, on the 5th day of May, 1889, wherein it was agreed between the parties that Alexander would render professional services in defense of the suit, and at its termination Marker would sell the real property, water rights, and premises, or otherwise realize money thereon, out of which he would pay Alexander the reasonable value and compensation for his legal services, counsel, and advice. It is alleged that Alexander fully performed the services, in accordance with the terms of the contract, between the 5th day of May, 1889, and the 1st day of February, 1891. On the 19th day of May, 1891, Alexander died, at Riverside, in this state. At that time,

he appears to have completed his professional services in the case, although the decree of the court in the suit in which he was employed was not entered until some months later. On the 3d day of December, 1895, Mrs. R. H. Hickman was appointed, and qualified, as administratrix of the estate of Alexander, and on the 3d day of February, 1896, she, as such administratrix, commenced an action in the superior court of California in and for the city and county of San Francisco to recover from Marker the value of the services rendered Marker by Alexander in the case of *Merrill v. Marker*, for necessary expenses incurred therein, and for other legal services rendered by Alexander. One week after the commencement of this action, to wit, on the 10th of February, 1896, and while the suit was still pending, Marker conveyed all the said real property, water rights, and premises in Lassen county to his attorney, B. F. Curler, by a bargain and sale deed. It is alleged that this deed was made by Marker for the purpose of hindering, delaying, and defrauding the plaintiff in said action out of the just debts and demands alleged and sought to be recovered therein, and to avoid the payment of his indebtedness with respect to the contract for services made with Alexander. The deed from Marker to Curler was duly recorded in the records of Lassen county. Mrs. Hickman died on the 26th day of June, 1896, and before the termination of the suit instituted by her as administratrix. The complainant herein, William A. Morrison, was thereafter, on the 21st day of July, 1896, appointed administrator of the estate of Alexander, and on the 11th day of September, 1896, was duly substituted as plaintiff in said action. Thereupon he prosecuted the suit to a judgment, which was entered on October 14, 1896, against P. N. Marker, for the sum of \$5,683. Complainant caused execution to issue upon his judgment on January 19, 1897, and levy to be made upon the property in Lassen county, which property was sold at sheriff's sale on February 27, 1897; and at that sale the complainant purchased the right, title, and interest of Marker in and to the property, for the sum of \$4,700. The property was not redeemed, and on the 17th day of June, 1898, the sheriff issued to complainant a bargain and sale deed for the same, under which complainant claims to be the lawful holder and owner of the said real property, water rights, and premises, and to be entitled to the possession thereof. It is alleged that Marker is wholly insolvent, and unable to pay his debts; that there is no other property in the state from which the judgment can be recovered than that conveyed by deed from Marker to Curler on February 10, 1896; that the defendant Curler knew the fraudulent character of the deed from Marker to him; that he has not transferred or conveyed any interest in said property purported to be conveyed to him by said deed; and that the said deed is now a cloud upon complainant's title to the said property. Complainant asks for a decree declaring the deed executed by Marker to Curler to be fraudulent and void, and that it be canceled and annulled of record; that complainant be adjudged to have a good and valid title to the property in controversy, by virtue of the said sheriff's deed; and that the title of complainant be forever quieted. The original bill was filed herein July 9, 1898, and an amended bill on October 18, 1898, when the order was made by this court directing the defendants to appear or

plead herein, which order defendants now move to have vacated and set aside, and also for an order dismissing the suit.

It is contended on the part of the defendants, in support of the motion to set aside the special order of service, that this is a personal action against them to cancel and set aside the deed of February 10, 1896, as being in fraud of the rights of the estate of Alexander, and therefore not within the purview of the publication act of March 3, 1875. But it is clear that the purpose of the suit is something more than a personal action to cancel a written instrument fraudulently executed; it is to remove a cloud from the title to real estate situated in this district, and is therefore obviously within the provisions of the statute. *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124. The motion to dismiss the suit is based upon the allegations of the bill showing that the plaintiff is not in possession of the property. This raises the question whether it is necessary for the complainant in a suit of this character to show, by an averment in the bill, that he is in possession of the premises. In *Orton v. Smith*, 18 How. 263, 265, the supreme court held that those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. In *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, the suit was in equity to have the conveyance of an adverse title declared fraudulent and void, and removed as a cloud on complainant's title. The court said:

"Having the legal title, then, but being kept out of possession by defendant's holding adversely, the remedy of the United States is at law to recover possession. Equity in such cases has no jurisdiction, unless its aid is required to remove obstacles which prevent a successful resort to an action of ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specific equitable grounds for relief. Bills *quia timet*, such as this is, to remove a cloud from a legal title, cannot be brought by one not in possession of the real estate in controversy, because the law gives a remedy by ejectment, which is plain, adequate, and complete. This is the familiar doctrine of this court. *Hipp v. Babin*, 19 How. 271; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232; *Fussell v. Gregg*, 113 U. S. 550, 555, 5 Sup. Ct. 631."

This doctrine was again declared in *Frost v. Spitley*, 121 U. S. 552, 556, 7 Sup. Ct. 1129, 1131; the court saying:

"A person out of possession cannot maintain such a bill [a bill to remove a cloud upon title, and to quiet the possession of real estate], whether his title is legal or equitable; for, if his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete; and, if his title is equitable, he must acquire the legal title, and then bring ejectment."

It is contended, however, on the part of the complainant, that section 738 of the Code of Civil Procedure of this state gives a right of action to determine and quiet the title to real property to any one having or claiming an interest therein, whether in or out of possession of the same. The section provides as follows:

"An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

It is claimed that this statute creates a new right, and prescribes a remedy for enforcing it which may be pursued in a court of the United States. This precise question was before the supreme court of the United States in *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, where it was held that a similar provision in the Code of Iowa, although construed by the courts of that state as authorizing a suit in equity to recover possession of real estate from the occupant in possession of it, does not enlarge the equity jurisdiction of federal courts in that state so as to give them jurisdiction over a suit in equity in a case where a plain, adequate, and complete remedy may be had at law. A deed in fraud of the rights of creditors was absolutely void, as against them, under the English statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, and these acts have been considered as only declaratory of the common law. Lord Mansfield, in *Cadogan v. Kennett*, Cowp. 432, and Chief Justice Marshall, in *Hamilton v. Russell*, 1 Cranch, 309, 316. The statute of California upon the subject of fraudulent conveyances is embodied in section 3439 of the Civil Code, as follows:

"Every transfer of property or charge therein made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Where a conveyance has been made with intent to delay or defraud creditors, the creditors are authorized to levy upon and sell the property as if no conveyance had ever been made by the creditor. *Bull v. Ford*, 66 Cal. 176, 4 Pac. 1175. In *Freem. Ex'ns*, § 136, the law is clearly stated, as follows:

"Whoever goes out with an execution to seek the fruits of his judgment is too apt to find that fraud has forestalled him. It then becomes his business to pursue those fruits, wherever fraud has taken them; to wrest them from the possession of his adversary, wherever they may be found; and to prepare himself to show that the refuge whence he has wrested them is still the refuge of fraud. In many instances, the aid of equity is invoked; but generally this is unnecessary; for a transfer made to hinder, delay, or defraud creditors, while, as between the parties, it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity,—not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all."

As was said in *Smith's Ex'r v. Cockrell*, 66 Ala. 64, 82:

"If property of a debtor has been conveyed by him with intent to delay, hinder, and defraud his creditors, it remains, as to his debts, as if no attempt had ever been made to convey it. As to creditors, and those claiming under them and in their right, the legal title remains in the judgment debtor until the sale and conveyance by the sheriff, and then it passes to the purchaser. This, because the fraudulent conveyance is treated as a nullity,—as if it had never been. The purchaser's title is legal, or it is nothing. If the debtor's conveyance, in defiance of which he purchased, is fraudulent, then his title acquired at the sheriff's sale is legal, without a semblance of an equitable title entering into it. So, if the debtor's conveyance is not fraudulent, the purchaser has no title, legal or equitable."

In the present case it is not alleged in the bill of complaint that there are any impediments or obstructions, other than the fraudulent deed, that will prevent the complainant from obtaining a plain, adequate, and complete remedy at law; and it is clear, upon principle and authority, that the cancellation of this deed is not a sufficient ground to give this court equitable jurisdiction of the controversy. The provision in section 8 of the act of March 3, 1875, requiring that the order of the court directing the absent defendants to appear, plead, answer, or demur shall be served on such absent defendants, "and also upon the person or persons in possession or charge of said property, if any there be," cannot be held as in any way affecting the equitable jurisdiction of the circuit court. The service here provided would be necessary and appropriate, under the statute, where the complainant out of possession is seeking, by an action at law, to enforce a legal claim to real or personal property within the jurisdiction of the court; but it would be manifestly ineffective to give the court an equitable jurisdiction which it does not otherwise possess. It follows that the bill of complaint does not state a case within the equity jurisdiction of the court, and it must therefore be dismissed; and it is so ordered.

MECKE v. VALLEYTOWN MINERAL CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1899.)

No. 301.

1. REMOVAL OF CAUSES—TIME FOR FILING PETITION.

The fact that a petition and bond for removal were filed during the vacation of the state court, and acted upon by the judge in chambers, does not affect the validity of the proceeding, but is proper where the time for the defendant to plead expires during the vacation.

2. SAME—SEPARABLE CONTROVERSY.

Where a complaint seeks to establish an indebtedness against a corporation defendant alleged to be insolvent, and also asks judgment therefor against a second defendant on the ground that it had assumed all the indebtedness of the first corporation, there is a separable controversy shown between plaintiff and such second defendant.

3. FEDERAL COURTS—JURISDICTION OVER FOREIGN CORPORATIONS.

A federal court cannot acquire jurisdiction over a corporation of another state, and which is a citizen thereof, where it is not carrying on business in the state where the court sits, by any officer or agent representing the corporation, on whom service can be made, and there is no state law under which it is subject to suit therein, merely by service on an officer of the corporation temporarily in the state.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

John H. Dillard, for appellant.

Merrimon & Merrimon, for appellees.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

GOFF, Circuit Judge. This action was brought by Herman Mecke in the superior court of Cherokee county, N. C., against the Valley-

town Mineral Company, the Roessler & Hasslach Chemical Company, and R. L. Cooper, Ben. Posey, and J. F. Abernathy, trustees. The summons was issued on the 18th day of March, 1897, returnable to the spring term, 1897, of said court, to be held in May, beginning on the 17th day of that month. It was served on the Valleytown Mineral Company on March 18, 1897, and service was accepted by the three trustees on March 25, 1897. It was not served on the Roessler & Hasslach Chemical Company. In the complaint the plaintiff alleged that A. H. Mugford and R. P. Getty purchased from S. W. Cooper and others, during the year 1895, certain land in Cherokee county, N. C., at the price of \$10,000, paying \$5,000 of said sum in cash, and giving for the residue two notes, each for \$2,500, secured by a deed of trust on the land, in which deed the defendants Cooper, Posey, and Abernathy were mentioned as trustees; that the land was supposed to contain minerals, especially talc, and that, in order to mine the same successfully, the said Mugford and Getty organized under the laws of the state of New Jersey a corporation called the Valleytown Mineral Company,—the defendant referred to,—of which the said Mugford was made manager, Getty superintendent, and the plaintiff president; that on the 2d day of October, 1895, Mugford and Getty executed and delivered to the plaintiff a certain written instrument, by which he (the plaintiff) was given a lien on the land mentioned, to secure him for the \$5,000 he had advanced on the purchase money, he at the same time agreeing to provide the means with which to pay the said two notes; that afterwards the plaintiff assigned all his rights under said paper to the defendant the Valleytown Mineral Company, and that said company then agreed to assume and pay the said unpaid purchase-money notes; that on September 26, 1896, Mugford and Getty conveyed all their interests in said lands to the Roessler & Hasslach Chemical Company, a corporation of the state of New York (which it was alleged was without an office, and also without an officer or agent, in the state of North Carolina), said conveyance having been made, it was charged, simply as security; that the plaintiff from time to time advanced to the Valleytown Mineral Company other large sums of money, amounting in the aggregate to \$19,000, which, together with \$1,000 on account of his salary, was still due him; that the Valleytown Mineral Company was largely indebted to other persons, and was insolvent, its only property being the said lien for \$5,000, assigned to it by the plaintiff, and a lease on certain mineral lands. The complaint then described the characteristics of talc mining, and alleged the inexpediency of closing the work, as well as the advantage of continuing it; and prayed that a receiver might be appointed, with authority to operate the mines, and, if necessary, to borrow money on certificates to be issued by him; and also prayed for judgment for the plaintiff, and for general relief. On the 17th day of May, 1897, in the superior court of Cherokee county, the plaintiff was given 30 days in which to file an amended complaint, and the defendants were allowed 60 days thereafter during which to file amended or original answers. The amended complaint was duly filed, in which all the allegations of the original complaint were reaffirmed, and, in addition thereto, it was alleged as follows: That the

Valleytown Mineral Company, finding itself without sufficient capital to conduct its business, and not being able to secure additional advancements from the plaintiff, sought the aid of the Roessler & Hasslacher Chemical Company, with the result that an agreement between those two corporations was reached,—to which Mugford and Getty were also parties,—by which the last-named company assumed all the obligations of the former, being those which had theretofore been assumed by the plaintiff, taking at the same time an assignment from said Valleytown Mineral Company, and also from Mugford, Getty, and the plaintiff, of their respective interests in said mining lands; that the Roessler & Hasslacher Chemical Company also then agreed to make such additional advancements of money as might be needed in said mining operations, the product of which was to be handled by that company, which was also to share in the profits realized therefrom, thereby becoming a partner in the business; that at plaintiff's insistence a further agreement was prepared, in which it was set forth that the indebtedness of the Valleytown Mineral Company to him was \$19,813.59, with interest thereon from the 15th day of October, 1896, the date of said agreement. The complaint, as amended, then renewed the prayer for judgment as in the original, and also demanded judgment against the Roessler & Hasslacher Chemical Company for the amount before mentioned, concluding with a prayer for general relief. Before the expiration of the time allowed by the order of the court within which the defendants were to file their answers, the Roessler & Hasslacher Chemical Company presented to the judge of said superior court of Cherokee county its petition to remove this cause into the circuit court of the United States for the Western district of North Carolina, together with the bond required by the act of the congress of the United States relating to such matters. Such petition was presented to the judge of said court in chambers, the regular term having adjourned, and the order of removal was allowed by him. The record having been filed in the said circuit court of the United States, the plaintiff moved to remand the same, which motion was overruled. The defendant the Roessler & Hasslacher Chemical Company then moved the court to dismiss this cause so far as it was concerned, for the reason that it was not properly before the court, which motion was granted. To this action of the court in refusing to remand and in dismissing the case as to said defendant (89 Fed. 114, 209) this appeal is prosecuted.

The motion to remand involved two questions: First. Was the petition for removal filed in time? Second. Was there a separable controversy between the plaintiff and the defendant the Roessler & Hasslacher Chemical Company? Section 206 of the Code of North Carolina provides: "The plaintiff shall file his complaint in the clerk's office, on or before the third day of the term to which the action is brought, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff." By section 207 of said Code it is provided: "The defendant shall appear and demur, or answer at the same term to which the summons shall be returnable, otherwise the plaintiff shall have judgment by default." By section 274 of the same Code the courts of said state are given the power to enlarge the time in which

the defendant must answer. *Gilchrist v. Kitchen*, 86 N. C. 20; *Gwinn v. Parker*, 119 N. C. 19, 25 S. E. 705; *Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321. The act of congress requires that the petition for removal shall be filed at or before the time at which the defendant is required to plead by the laws of the state or the rule of the state court. The insistence of the appellant that he did not apply for and that he was not given time by the court in which to file an amended complaint, and also that the defendants were not given additional time in which to plead, is not sustained by the record, and is without merit. But, so far as the appellee the Roessler & Hasslacher Chemical Company is concerned, as it had not then been summoned, it was not in fact before the court, and therefore, under the law, was not then required to plead.

The fact that the petition for removal was filed during the vacation of the state court, and that the order of removal was signed by the judge in chambers, did not render void the proceedings had thereon, but, under the circumstances of this case, such procedure was proper. *State v. Coosaw Min. Co.*, 45 Fed. 804; *Phenix Ins. Co. v. Charleston Bridge Co.*, 13 C. C. A. 58, 65 Fed. 628.

It was clearly shown by the petition for removal that the plaintiff below was, at the time his suit was instituted, as well as when said petition was filed, a citizen of the state of North Carolina, and that the petitioner was a corporation duly organized under the laws of the state of New York, and a citizen of that state, when the suit was brought, and also when such petition was filed. It also appeared that the matter and amount in dispute exceeded the sum or value of \$2,000, exclusive of interest and costs. The record therefore disclosed that the plaintiff and the petitioning defendant were citizens of different states, that the amount in controversy was sufficient to give the court below jurisdiction, and that the petition for removal was filed in due time; consequently, if such controversy was a separable one, the court did not err in refusing to remand the case to the state court.

The plaintiff below claimed: First, that the defendant the Valleytown Mineral Company was indebted to him in a certain sum of money; and, second, that the defendant the Roessler & Hasslacher Chemical Company was responsible to him for said debt because of an existing contract between the latter company and the former, to which said plaintiff was also a party. The claim first mentioned is one to which the Valleytown Mineral Company is an essential party, and while, in one sense, the Roessler & Hasslacher Chemical Company is interested in it, still such company is not a necessary party to a suit concerning it. The second claim is one as to which the appellee the Roessler & Hasslacher Chemical Company is the only contesting party. If the Valleytown Mineral Company be in fact indebted to the plaintiff, as set forth in the complaint, then that company, its creditors, and the plaintiff are together interested on one side, against the Roessler & Hasslacher Chemical Company, alone, on the other side. There is a separable controversy, and the court properly refused to remand the case.

The remaining question relates to the action of the court in dismissing the suit so far as said defendant below the Roessler & Hass-

lacher Chemical Company was concerned. The record clearly discloses the fact that said company was a corporation of the state of New York, and that it had no office and no agent in the state of North Carolina. The effort to bring that company before the court by serving a copy of the summons on one of its directors, who at the time was found in the state of North Carolina, but who resided elsewhere, was admitted in the argument of counsel for appellant to have failed in its purpose. It is true that a voluntary appearance of a defendant is equivalent to a personal service of the summons upon him, but the record in this case shows no such appearance, and we have no right to presume it. It was not shown that said company was transacting business in the state of North Carolina by either an agent or one of its officers appointed to represent it in that state, on whom process could have been served; nor was it claimed that the provisions of any North Carolina statute made foreign corporations amenable to suits in that state as a condition to their transacting business therein. The said appellee was sued in a district other than that in which it was a citizen, and, as it had neither appeared, nor been legally served with process, the court below properly dismissed the suit as to it. We find no error in the judgments complained of, and they are affirmed.

REAL-ESTATE TRUST CO. OF PHILADELPHIA v. NEW ENGLAND
LOAN & TRUST CO.

(Circuit Court, S. D. New York. March 6, 1899.)

INSOLVENT CORPORATIONS—RECEIVERS—PROCEEDS OF PLEDGED SECURITIES.

The proceeds of mortgages owned by an insolvent loan and trust company, but which had been pledged by it to trustees to secure its debentures, both principal and interest, constitute a trust fund in the hands of its receiver, which cannot be used by him for the ordinary purposes of the receivership, notwithstanding any rights therein the company might have had under its contracts while a going concern.

Application of receiver for instructions as to interest on mortgages assigned by defendant to trustees for debenture series.

Thomas M. Day, Jr., for the motion.
Frederick Goeller, opposed.

LACOMBE, Circuit Judge. The written contracts contain no provisions regulating what is to be done when the loan company becomes bankrupt. From the day it went into the hands of the receiver it has been powerless to discharge any of the functions contracted for. It happens that the receiver, the officer of the court, finds in his hands some money paid by mortgage debtors on their mortgages. To what extent the loan company might have used this, if it had continued as a going concern, and as the agent of the trustees to collect such interest, is wholly immaterial. The mortgages were all transferred to the trustees, and expressly pledged as security for the debentures. The pledge of each mortgage carried with it, not only the principal,

but also all interest which might accrue thereon. Interest and principal alike should be treated as trust funds. The general creditors have no interest in either. Instructions accordingly.

**METROPOLITAN TRUST CO. OF CITY OF NEW YORK v. COLUMBUS,
S. & H. R. CO. et al.**

(Circuit Court, S. D. Ohio, E. D. April 21, 1899.)

No. 887.

1. RAILROADS—NOTES FOR EQUIPMENT—OHIO USURY STATUTES.

By Rev. St. Ohio, § 3183, 8 per cent. is fixed as the limit of lawful interest. Section 3287 authorizes railroad companies to borrow money at a rate of interest not exceeding 7 per cent., and to issue bonds or notes for the same. By section 3290 it is provided that the directors may sell or negotiate such bonds or notes at not less than 75 per cent. of par. *Held* that, in so far as the latter sections permit railroad companies to borrow money at a rate of interest exceeding 8 per cent., their effect is to repeal the usury laws as to such companies, and that notes or lease warrants executed by a railroad company for deferred payments on equipment purchased conditionally, which were payable monthly as rental, the title to the equipment to vest in the company on their full payment, are not usurious, though their amount is greater than the stated value of the equipment with 8 per cent. interest until their maturity, but not greater than would have been required if they had borne 7 per cent. interest, and had been discounted at 75 per cent. of par.

2. SAME—AUTHORITY TO ISSUE NOTES—OHIO STATUTES.

Nor are such notes ultra vires, in view of the provisions of section 3287, Rev. St. Ohio, which authorizes railroad companies to secure their bonds or notes by a pledge of their property or income.

3. SAME—CONDITIONAL PURCHASE OF EQUIPMENT.

The Ohio act of May 4, 1885 (82 Ohio Laws, p. 238), relating generally to conditional sales of personal property, and requiring the seller, before retaking possession of the property for condition broken, under penalty of criminal prosecution, to tender to the purchaser repayment of at least 50 per cent. of the amount paid thereon, does not apply to conditional sales of equipment to railroad companies which were specially provided for by the act of March 16, 1882 (79 Ohio Laws, p. 45), recognized as remaining in force after the passage of the general act of 1885 by its amendment by the act of April 12, 1889 (86 Ohio Laws, p. 255).

4. SAME—RIGHT OF SELLER TO RETAKE PROPERTY.

A corporation making a conditional sale of equipment to a railroad company, rental to be paid therefor, and applied on the purchase price, but the title to remain in the seller until full payment, on a foreclosure of mortgages against the railroad company before full payment is entitled to take back the equipment, or, in case the mortgagees elect to retain it, to a first lien on the property of the company for the amount still due thereon.

This is a railroad foreclosure bill. The complainant, in seeking a sale under its mortgage, has brought in all persons claiming a lien on the railroad, or any part thereof, for the purpose of a sale of the road free from incumbrance. Among the defendants thus brought in is the Railroad Equipment Company. The Railroad Equipment Company claims about \$40,000 on certain so-called "lease warrants," issued to evidence the rentals due upon equipment furnished to the defendant company either by the Railroad Equipment Company or its assignors.

In each of the equipment contracts under which these lease warrants were issued the company furnishing the equipment agreed to lease it to the railway company for the period of 60 months from a certain date. The value of the equipment was stated. A cash payment of 25 or 30 per cent. was to be made upon delivery, and the balance was to be provided for in 60 consecutive monthly payments of a certain amount each, making the total agreed to be paid a sum exceeding the stated value of the equipment and 80 per cent. interest thereon. The deferred payments were to be represented by so-called "lease warrants," dated in Ohio (with two exceptions, where they were dated New York), made by the railway company to the order of the equipment company, and all payable at the city of New York, with one exception, and referring to a contract of lease of even date therewith. In case of default in payment of any of the lease warrants, the lessor was to have the right to take immediate and exclusive possession, and to sell the same at public or private sale, and apply the proceeds to the payment of any and all installments of rent for the whole of said term of 60 months, whether the installments had fallen due or not, less interest at 5 per cent. per annum. If the proceeds were more than sufficient to pay the unpaid installments of rent, with interest and expenses, then the surplus was to go to the railway company, but, if there was a deficit, the railway company was liable therefor. If the installments were all paid, then the equipment, without further conveyance or transfer, was to become the absolute property of the railway company. The company defaulted on a number of the lease warrants, and in December, 1893, an extension agreement in regard to them was made. This agreement recites the failure of the railroad company to pay the lease warrants under the contracts, the forbearance of the equipment company to take possession, and its willingness to accede to the request of the lessee, and to grant, upon certain terms and conditions thereafter set forth, an extension of time for the payment of all the said lease warrants outstanding and unpaid under said contracts, including those past due and in default. The agreement provided that the equipment company would take up the outstanding lease warrants, amounting to \$116,338.39, that the railway company would pay the equipment company at its office in the city of New York, as rentals or otherwise, for the equipment, a cash payment of \$5,857, and, in addition thereto, 60 consecutive monthly payments of \$2,347.52 each, beginning February 20, 1894, and ending January 20, 1899; making, in all, for the deferred payments, \$140,851.20. The new lease warrants were dated "Columbus, Ohio," and referred to the contract. The lease warrants, under the earlier contracts, were to be taken up and acquired by the equipment company, and held as security for the payment of the new one, and were to continue in existence, with all the rights under them, until the new contract was completed. If the contracts and warrants are valid, \$40,000 is still due on them; if invalid, because of usury, the lawful amounts have been paid. The equipment company has not offered to refund 50 per cent. of the amount paid by the railway company, or any sum. In the fourth of the original contracts, dated April 21, 1890, between the Ohio Falls Car Company and the railway company, the lease warrants were executed at Columbus, Ohio, and no place of payment is named in them. By the law of Ohio, 8 per cent. interest can be stipulated for, but, in case more than 8 per cent. is stipulated for, the interest exceeding 6 per cent. is to be credited as a payment on account of the principal. Rev. St. Ohio, § 3183. The issue arises upon the bill, answer, and replication, and evidence including a stipulation as to certain facts.

Seward, Guthrie & Steele, C. A. De Gersdorff, and Richard Reid Rogers, for reorganization committee.

Parsons, Shepherd & Ogden, Morrison R. Waite, and Lawrence Maxwell, Jr., for Metropolitan Trust Co.

James Irvine, for Railroad Equipment Co.

TAFT, Circuit Judge (after stating the facts as above). The complainant objects to the claim of the Railroad Equipment Company on three grounds: First. That it includes interest upon a loan at the rate of more than 8 per cent., which is usurious by the laws of Ohio,

and that by Ohio law in such a case the excess of interest over 6 per cent. must be credited upon the principal. Rev. St. Ohio, § 3183; McClelland v. Sorter, 39 Ohio St. 12; West v. Meddock, 16 Ohio St. 417; Bunn v. Kinney, 15 Ohio St. 40. Second. That the defendant railroad company had no power, under the Ohio law of its creation, to agree to pay more than 7 per cent. interest, wherefore the contract is void, and the Railroad Equipment Company can recover only the reasonable value of the equipment furnished, with 6 per cent. interest. Third. That the Railroad Equipment Company cannot, under the laws of Ohio, seek to take possession of the equipment covered by these contracts for purposes of foreclosure or sale without tendering to the company 50 per cent. of the amount already paid on the contracts.

1. It may admit of question whether the character of this contract, as usurious or otherwise, is to be settled by New York or Ohio law. It is conceded that under the law of New York, by a statute enacted April 6, 1850 (Bank v. Hoge, 35 N. Y. 65), a defense of usury cannot be set up by corporations. But it is not necessary to decide whether the validity of the contracts depends on New York or Ohio statutes, for I think them valid under either. By section 3287 of the Revised Statutes of Ohio, the defendant company was permitted to borrow money at a rate not exceeding 7 per cent., and to issue bonds or notes for the same, and to secure them by a pledge of its property or income. By section 3290 it is provided that the directors may sell or negotiate such bonds or notes at not less than 75 per cent. of par. It has been held by the supreme court, in the case of Junction R. Co. v. Bank of Ashland, 12 Wall. 226, that section 3290 (which was the first section of the act of the legislature of Ohio passed December 15, 1852 [51 Ohio Laws, p. 286]) was tantamount to a repeal of the usury laws as to such companies. It is said that this statement by Mr. Justice Bradley, in delivering the opinion of the supreme court in that case, was merely obiter dictum, and ignored the effect of section 3287. It is true that the question of usury was eliminated from the case by the holding that the contract was a New York contract, but the particular language was used in discussing the question whether an Indiana corporation, which had been reincorporated in Ohio, had power, under the law of Ohio, to issue bonds drawing 10 per cent. interest. The question was, therefore, directly presented to the court, and had to be decided, whether an Ohio corporation could, under the act of December 15, 1852, issue bonds drawing 10 per cent. interest, and the question was answered in the affirmative. Since that decision, the act of December 15, 1852, has been amended to its present form, as it appears in section 3290, which limits the power to a sale or negotiation of its bonds or notes at not less than 75 per cent. of par. Taking sections 3287 and 3290 together, this would really restrict the borrowing power of railroad companies to loans with annual interest at the rate of \$7 on \$75, or something more than 9 per cent. It is not claimed that the loans here in controversy exceed such a rate. It is said that the case of Coe v. Railroad Co., 10 Ohio St. 372, overrules the construction put upon section 3290 in Junction R. Co. v. Bank of Ashland. I do not think so. It was held in the Coe Case that the issue of bonds drawing 7 per cent., payable semiannually,

was not a violation of section 3287, limiting the power of railroad companies to the issue of bonds bearing 7 per cent. or less, and that under section 3290 such bonds might be sold by the company issuing them at a discount. If this implies that bonds drawing more than 7 per cent. may not be issued, it only refers to the form of the obligation, and not to the essence, for it is palpable that the sale by the obligor of the bond drawing 7 per cent. interest at a discount is nothing more than the borrowing money at a greater rate than 7 per cent. In the case at bar the obligations are not, on their face, obligations drawing more than 7 per cent. interest, and I should hesitate long to declare them void, either as usurious or as ultra vires the defendant railroad company, on a mere objection to their form, when the railroad company really has the power to do that which is, in effect, the borrowing of money at a greater rate of interest than is stipulated for in such obligations. In so far as sections 3287 and 3290 permit railroad companies to borrow money at a greater rate than 8 per cent., they do repeal the usury laws as to such companies.

2. What has been said suffices to show that the present contracts were within the power of the defendant railroad company.

3. The contention that the Railroad Equipment Company is not entitled to the relief it prays by way of return of its equipment or a payment of the amount due until it has tendered back to the defendant railroad company at least 50 per cent. of the amount paid as rental upon the contract, is based on section 2 of the act of May 4, 1885 (82 Ohio Laws, p. 238). The act relates, generally, to "cases where any personal property shall be sold to any person to be paid for, in whole or in part, in installments, or shall be leased, rented, hired, or delivered to another," on condition that title shall remain in the vendor until value of property is paid. By its first section contracts for such sales or hiring are avoided unless evidenced and executed in a certain way, and filed, as chattel mortgages are required to be filed, with the clerk of the township, or, in certain cases, with the county recorder. By the second section the vendor or hirer is forbidden to take possession of the property on condition broken without tendering back the sum of money paid thereon by the vendee or lessee, less a sum, not exceeding 50 per cent., as compensation for the use. By the third section, violation of section 2 is made punishable as a misdemeanor. I do not think that this act has any application to personal property used in the equipment of railroads, although the terms used are general, and broad enough to include it. I base my conclusion on the act of March 16, 1882 (79 Ohio Laws, p. 45), passed three years before the act above referred to, and amended since the passage of that act. The legislature of Ohio thereby added three sections to the chapter of the Revised Statutes on "Railroads." By the first of these, all contracts for the conditional sale "of railroad equipment, rolling stock, or other personal property (to be used in or about the operation of any railroad) were avoided as against creditors or innocent purchasers for value unless recorded in the office of the secretary of state. By the second section it was declared lawful in contracts for renting such property to stipulate that the rental might be applied on the purchase money, and that the title should not

pass until the vendor had been paid, if such contracts were filed as required in the first section. By act of April 12, 1889 (86 Ohio Laws, p. 255), passed four years after the general conditional sale statute, the sections relating to conditional sales of railroad equipment were supplemented by a provision that they should extend and apply to contracts made by others than railroad companies for the purchase or rental of railroad equipment designed for use on railroads in Ohio or other states. A consideration of the two statutes satisfies me that the act of 1885 applies generally to sales of all personal property except railroad equipment. That is provided for in the special legislation of 1882 and 1889. In the opinion of the legislature, certainly, the law of 1885 did not impliedly repeal that of 1882, because it is recognized as being in force by the law of 1889. The subject of conditional sales of personal property on the installment plan to individuals, in the course of which small money lenders had, before the law, been guilty of great oppression to their poor and helpless creditors, is a very different one from the securing of liens on the immensely valuable equipment and rolling stock of railroads. In the former case the debtor is so easily oppressed that he needs the protection of the law. In the latter the contracting is between two great corporations, able to deal at arm's length. It was entirely natural, therefore, that the legislature should regard the regulation of railroad equipment conditional sales as one not affected by a general law regulating conditional sales of personal property, and should not have introduced a saving clause in the latter act. The railroad equipment act is complete in itself, and the provisions of the general act are in no respect germane or natural amendments to it. The recording in the secretary of state's office is necessary, because the equipment generally has no situs in any particular township; and yet, if the general act applies, the township recording provisions must in some way be given operation. It would certainly be a strange provision of law subjecting an equipment company to criminal prosecution for attempting to resume possession of its property upon payment for which a railroad company had defaulted. Such paternal protection for defaulting railroad companies would be novel in modern or ancient legislation. And yet, if the act of 1885 is an amendment or supplement to that of 1882, such a result follows. The equities of this case are with the Railroad Equipment Company on this issue, and a decree should be entered permitting it to take back its equipment, or, if complainants and the receiver conclude such equipment is needed to operate the road, then the equipment company must be given a lien on the corpus of the property in preference to the first and second mortgages.

SOUTHERN PAC. R. CO. v. GROECK et al.

(Circuit Court, S. D. California. April 3, 1899.)

No. 374.

PUBLIC LANDS—SOUTHERN PACIFIC RAILROAD GRANT.

Under the resolution of congress of June 28, 1870 (16 Stat. 382), which authorized the Southern Pacific Railroad Company to construct its road and telegraph line as nearly as might be on the route shown by the map theretofore filed by it in the interior department, and provided that upon the construction of each section, and its inspection and approval, a patent should be issued under the act of July 27, 1866 (14 Stat. 292), making a grant of lands to aid in the construction of the road, for the lands embraced within the grant and coterminous with the completed sections, the failure of the company to complete one section of the line does not affect its rights under the grant to the lands opposite to and coterminous with the completed sections, which include the right to select indemnity lands along such sections and within the indemnity limits.

This was a suit in equity by the Southern Pacific Railroad Company against Otto Groeck and others to recover certain land, claimed under a grant made by congress, and held by defendant Groeck under a patent subsequently issued to him by the land department therefor.

Wm. Singer, Jr., for complainant.

W. B. Wallace, for defendants.

ROSS, Circuit Judge. In its different stages this case has been three times under the consideration of this court, and once by the circuit court of appeals for this circuit. 68 Fed. 609; 74 Fed. 585; 31 C. C. A. 334, 87 Fed. 970. It was first presented to this court on demurrer to the original bill; next, upon a plea filed by the defendants to the amended bill, which the complainant caused to be set down for argument, and which was thereafter argued, submitted, and disposed of by the opinion reported in 74 Fed. 585; and then upon a plea interposed by the defendants to the second amended bill, which the complainant likewise caused to be set down for argument, and which was thereafter argued and submitted, resulting, for the reasons given in the former opinion, in an order sustaining the plea, with leave to the complainant, if it should be so advised, to reply to the plea, and take issue in respect to the matters of fact therein alleged. 93 Fed. 991. A replication was thereafter filed by the complainant, and an agreed statement of facts entered into by the respective parties, upon which, together with the second amended bill of complaint and the answer thereto, the case is now submitted for final decision. The subject in controversy is a piece of land which was settled upon by the defendant Groeck on the 2d day of September, 1885, as government land, and which he was, against the protest and after a contest by the complainant, permitted by the land department to enter as such, and for which a patent was issued to him by the government of the United States on the 11th day of April, 1890. The complainant, claiming to be entitled to the land by virtue of a congressional grant, seeks by the suit to obtain a decree that the title conveyed by the patent to Groeck is held in trust for it, to compel the conveyance thereof to the

complainant, and to enjoin the defendants from asserting any title thereunder.

The grant under which the complainant claims the land is that of July 27, 1866 (14 Stat. 292), by which, among other things, the Southern Pacific Railroad Company was authorized to connect with the Atlantic & Pacific Railroad at such point, near the boundary line of the state of California, as it should deem most suitable for a railroad line to San Francisco, and, subject to certain conditions, exceptions, and limitations, was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of said road, to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such road should be designated by a plat thereof filed in the office of the commissioner of the general land office; and where, prior to said time, any of said sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, the act provided that other lands should "be selected by said company in lieu thereof under the direction of the secretary of the interior, in alternate sections designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including reserved numbers." The original bill alleged, among other things, that on the 24th day of November, 1866, the complainant, by its board of directors, accepted the grant upon the terms and conditions contained in it, which acceptance was filed with the secretary of the interior December 27, 1866, and that on the 3d day of January, 1867, complainant filed with the secretary a map of the route of its road, as located and surveyed, which map was accepted by the secretary, and on the same day transmitted by him to the commissioner of the general land office to be filed in that office, which was done on that day; that on the 22d day of March, 1867, the commissioner transmitted a copy of the map to the register and receiver of the local land office at Visalia, Cal., in which district the land in controversy is situated; and that the register of the local land office acknowledged its receipt by letter of date March 30, 1867. The original bill also set forth the joint resolution of congress of June 28, 1870 (16 Stat. 382), by which complainant was authorized to "construct its road and telegraph lines, as near as may be, on the route indicated upon the map filed by said company in the department of the interior on the 3d day of January, 1867," and alleged that the road was completed by the complainant upon the line as shown upon that map, and, as constructed, ran through Tulare county, which is within the district of lands subject to sale at Visalia, Cal., and was completed within the time limited by the acts of congress, which fact was duly reported to the president, and by him accepted and approved; that the land in controversy is more than 20, but within 30, miles of the complainant's road as so located and constructed, and that when its route was definitely fixed the said land had not been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of or appropriated by the United States for any purpose, but that the United States then had full title thereto;

that the entire indemnity limits along the grant to the complainant are insufficient to supply the losses sustained by it within the granted limits; and that the commissioner of the general land office, in his annual report to the president and to the interior department for the year 1883, "has attested and certified to the fact that the land within the indemnity limits of said act of July 27, 1866, will by no means supply the loss of lands within the twenty-mile limits to said railroad company under said act." The original bill further alleged that on the 13th of July, 1891, complainant selected the land in controversy in its indemnity list No. 43, at the land office in Visalia, which office refused to approve the selection, although complainant offered all the fees for the purpose of listing, selecting, and securing a patent of the land, and that a like refusal has been made by the commissioner of the general land office and by the secretary of the interior. Similar allegations were made in both the amended and second amended bills.

This court held, in the opinions referred to, that upon the filing by the complainant in the general land office of its map of the general route of the road authorized to be built, the granting act itself operated to withdraw the lands within the indemnity, as well as the primary, limits of the grant, from sale or other disposition, for the benefit of the grantee; that the piece of land in controversy, being within the indemnity limits of the grant to complainant, was not subject to settlement by Groeck; and that therefore the action of the officers of the land department, awarding and patenting the land to him, was erroneous. That ruling of this court was sustained by the circuit court of appeals in the opinion reported in 31 C. C. A. 334, 87 Fed. 970, and as it then appeared that the complainant had completed the road so authorized to be built, and had filed in the general land office maps showing its definite location, judgment would therefore have followed for the complainant as prayed for, but for the fact that the complainant, having waited nearly 25 years after the withdrawal of the land in controversy for its benefit, and more than 5 years after the defendant Groeck's adverse entry upon it, before attempting to select the land in controversy, and having waited for more than another year before instituting suit therefor, the entire delay and neglect being its own, and in no respect caused by any failure or neglect on the part of the government or of any of its officers, it was here held that the complainant was guilty of such laches as made it proper for a court of equity to refuse its aid; this court being of opinion that, notwithstanding Groeck's settlement was without right, and notwithstanding the proceedings in the land office awarding and patenting the land to him were erroneous, there must always be on the side of a complainant invoking the aid of the equity powers of a court of justice, not only conscience and good faith, but reasonable diligence as well. In this latter view the circuit court of appeals held that this court was in error, and accordingly reversed its decree, with directions for further proceedings not inconsistent with its opinion. If, therefore, the facts as now presented be in substance the same as those considered on the former hearings of the cause, there

will be nothing left for this court to do but to give judgment for the complainant.

On the previous presentation of the cause it appeared that, while the map filed by the complainant in the general land office on the 3d day of January, 1867, was a map of the general route of the road authorized to be built, and while it appeared that it actually constructed the road in sections prior to the filing of any map of its definite location, it also appeared that such map of definite location was filed in the general land office in sections subsequent to the completion of the road. Thus, in the opinion of the circuit court of appeals (31 C. C. A. 334, 87 Fed. 971), that court, in stating the facts, said:

"The appellant [Southern Pacific Railroad Company] commenced to build its road during the year 1870, and completed the construction in different sections between that date and the year 1889; the last section, extending from Huron westerly to Alcalde, having been constructed during the year 1888."

And in the opinion of this court on demurrer to the original bill, reported in 68 Fed. 609, 611, it is said:

"The bill also sets forth the joint resolution of congress of June 28, 1870 (16 Stat. 382), by which complainant was authorized to 'construct its road and telegraph lines, as near as may be, on the route indicated by the map filed by said company in the department of the interior on the 3d day of January, 1867,' and alleges that the road was built by the complainant upon the line as shown upon that map, and, as constructed, ran through Tulare county, which is within the district of lands subject to sale at Visalia, Cal., and was completed within the time limited by the acts of congress, which fact was duly reported to the president, and by him accepted and approved; that the land in controversy is more than 20, but within 30, miles of the complainant's road as so located and constructed, and that when its route was definitely fixed the said land had not been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of or appropriated by the United States for any purpose, but that the United States then had full title thereto; that the entire indemnity limits under the grant to the complainant are insufficient to supply the losses sustained by it within the granted limits, and that the commissioner of the general land office, in his annual report to the president and to the interior department for the year 1883, 'has attested and certified to the fact that the land within the indemnity limits of said act of July 27, 1866, will by no means supply the loss of lands within the twenty-mile limits to said railroad company under said act.'"

The agreed statement of facts upon which the case is now submitted shows, among other things: That on January 3, 1867, the complainant filed a map of the general route of the entire railroad which it was, by the act of July 27, 1866, and the joint resolution of congress of June 28, 1870, authorized to construct, in the office of the commissioner of the general land office, and that on that day the secretary of the interior and the commissioner duly accepted and approved the said map, and the general route shown thereon. That the complainant commenced to build its railroad during the year 1870, and completed the construction of that portion thereof extending from San Francisco to Tres Pinos, and from Alcalde to Needles, by way of Goshen and Mojave, in several different sections, prior to the year 1889,—the last section thereof, extending from Huron westerly to Alcalde, being constructed during the year 1888,—and that all of such railroad was constructed along the line shown on the general route

map of January 3, 1867. That the complainant filed maps in several sections of the definite location of said railroad (except that portion between Alcalde and Tres Pinos), along the line shown on the said general route map, being the same line upon which it was constructed, and that the said maps of definite location were accepted and approved by the secretary of the interior on the following dates, to wit: Of the first section thereof, on August 7, 1871; of the second section thereof, October 26, 1871; of the several sections of the road extending from Huron to Mojave, at various dates between January, 1878, and December 31, 1884; and of the section of the road extending from Huron westerly to Alcalde, on April 2, 1889. That, as each of the said sections were constructed, they were examined, respectively, by commissioners appointed by the president of the United States for that purpose, who duly reported to the president that each of the sections had been completed in a good, substantial, and workmanlike manner, in all respects as required by the act of congress; and that the president duly accepted and approved all of those reports. That all of the said reports were so made, accepted, and approved between August 7, 1871, and November 8, 1889, inclusive; the latest being the report upon the section of road extending from Huron to Alcalde, which was accepted and approved, as aforesaid, on November 8, 1889. It further appears from the agreed statement that the piece of land in controversy is situated opposite to and coterminous with this latter section of the complainant's road, and is within 30 miles thereof.

I am of opinion that the joint resolution passed by congress on June 28, 1870 (16 Stat. 382), distinguishes this case from those relied upon by the counsel for the defendants; for that resolution declared that the Southern Pacific Company might construct its road and telegraph line, as near as might be, on the route indicated by the map filed by it in the interior department on the 3d day of January, 1867, and that:

"Upon the construction of each section of said road in the manner and within the time provided by law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July 27, 1866, and upon the report of the commissioners to the secretary of the interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

Congress itself thus provided for the building of the complainant's road along the line designated by the map filed by it in the general land office on the 3d day of January, 1867; and the complainant, having so built all of its road along that line, except the portion between Tres Pinos and Alcalde, has earned the public lands situated opposite to and coterminous with the portions so completed within the place limits of the grant, and the right to select within its indemnity limits such of the public lands as are necessary to make good the losses sus-

tained by it within the primary limits of the grant. The complainant's failure to build that portion of the road between Tres Pinos and Alcalde is a matter for the consideration of congress. There will be a decree for the complainant.

CENTRAL TRUST CO. OF NEW YORK v. WORCESTER CYCLE MFG.
CO. et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 133.

1. MORTGAGE—FORECLOSURE—EVIDENCE.

In a suit to foreclose a mortgage given to secure certain bonds, where the mortgage recited that defendant company had an indebtedness, and the treasurer testified that the bonds were issued in exchange for the notes of the company, that the notes had been issued for cash received, that the notes passed through the hands of the witness, that a number of the bonds had been pledged to parties who made demands on the witness for payment of the coupons due, and that the demand had not been complied with, in the absence of evidence to the contrary, this is sufficient to show that the bonds were issued for value, and the holders were entitled to their rights under the mortgage.

2. CHATTEL MORTGAGE—DESCRIPTION OF PROPERTY.

Under Gen. St. Conn. § 3016, providing that when any manufacturing establishment, with its machinery, shall be mortgaged, and a particular description of the personal property executed and recorded, the retention of such personal property shall not impair the title of the mortgagee, a mortgage was given to secure "all machinery, apparatus, tools, appliances, and other plant, materials, fuel, devices, patents, patent rights, and all other property, real, personal or mixed, of any name or nature whatsoever," of the party of the first part, situated in the town, "whether now owned or hereafter acquired by such party." *Held* not the particular description required by the statute, so as to render the mortgage valid where the mortgagor remains in possession.

3. RECEIVER IN FORECLOSURE.

The appointment of a receiver in a foreclosure suit does not constitute the taking possession of the property by the chattel mortgagee, as against other creditors, so as to cause a surrender and delivery of the property by the owner to the mortgagee, and perfect his rights before the intervention of other claims then made, but the receiver holds for all parties interested.

4. PREMATURE FORECLOSURE.

Where a mortgage provides that until default for six months the party of the first part shall be permitted to possess and enjoy and operate the property, and that the trustee named therein, on written request of the holders of the bonds, at his option, and whenever entitled to do so by the terms thereof, may institute proceedings to foreclose this mortgage, a suit to foreclose for unpaid interest is prematurely brought unless the default has continued for six months.

5. SAME—OBJECTIONS WAIVED.

A provision in a mortgage that on default an action to foreclose shall not be brought within six months is for the benefit of the mortgagor, and creditors cannot object where foreclosure is sought within that time.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This cause comes here upon appeal from a decree of the circuit court, district of Connecticut, dismissing the bill, which was brought

to foreclose a mortgage made by defendant corporation to complainant as trustee for bondholders. The facts sufficiently appear in the opinion.

Michael H. Cardozo, for appellant.

Seymour C. Loomis and E. C. Perkins, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The Worcester Cycle Manufacturing Company, a New Jersey corporation, was heretofore engaged in business in the state of Connecticut, owning certain real and personal property therein. On or about September 1, 1896, it executed a mortgage to the complainant trust company to secure a proposed issue of \$500,000 5 per cent., 25-year gold bonds, of which, as the complaint avers, \$320,000 was issued. The property thus mortgaged is described as:

"All and singular, the lands and premises, factories, shops, and other structures, and the appurtenances thereunto belonging, and the machinery, apparatus, and other plant, constructed and to be constructed, together with all the real estate and other property, real, personal, or mixed, of the party of the first part, more particularly described as follows: [Here follows a specific description of several parcels of real estate situated in Massachusetts, and in the town of Middletown, Connecticut]. And also all the real estate, lands, storage, grounds, yards, and other premises, all factories, works, shops, warehouses, sheds, and all other structures and erections of the said party of the first part situated in the said city of Worcester, and in said city of Middletown, whether now owned or held, or hereafter to be owned, constructed, or acquired. And also all machinery, apparatus, tools, appliances, and other plant, materials, fuel, devices, patents, patent rights, and all other property, real, personal, or mixed, of every name or nature whatsoever, of said party of the first part, situated in said city of Worcester, and in said city of Middletown, whether now owned, or hereafter to be owned, acquired, or used, by said party of the first part. And also all the things in action, contracts, claims, and admissions of the said party of the first part, whether now owned, or hereafter to be acquired, in connection with or relating to the said lands and premises, factories, shops, and other structures, and said plants, machinery, and apparatus. And also all the licenses, rights, privileges, consents, easements, and franchises of the said party of the first part, including the franchise to be a corporation, whether now possessed or hereafter to be acquired by the said party of the first part, and used or enjoyed in connection with the said lands and premises, factories, shops, and other structures, and said plant, machinery, and apparatus."

The mortgage contains the provisions usually found in documents of this character. Such of them as are relevant to a decision of this case will be hereafter referred to. The mortgage was duly recorded in the office of the town clerk of Middletown on or about September 5, 1896. The first installment of interest came due March 1, 1897. The company defaulted in its payment, and also failed to pay the taxes upon its real estate. Thereupon, and in June, 1897, this suit to foreclose the mortgage was brought. Defendant answered the bill August 2, 1897; averring that all the matters and things in said bill stated are true. A receiver of the property described in the bill was appointed. The record does not disclose the date of this order, nor the date of its entry. It may fairly be inferred, however, that the receiver was appointed some time in June or July, 1897. The precise date is immaterial. He forthwith entered into possession

of the property, and has since held the same. On November 5, 1897, the appellee Goodrich was appointed trustee in insolvency of the cycle company by the probate court of Middletown, Conn. Thereupon Goodrich, as such trustee, filed a petition in the United States circuit court for the district of Connecticut, seeking to intervene in the foreclosure suit. The petition was granted (86 Fed. 35), with a proviso that the intervener should be heard only as to the sufficiency of the bill. Upon appeal this court modified the decision of the circuit court, so as to allow the intervener "to be heard by proof and argument to support the claim of the parties whom he represents, viz. the creditors of the defendant." He thereupon filed an answer, and the issues raised were disposed of in the circuit court at final hearing upon pleadings and proofs (90 Fed. 584, 91 Fed. 212); and it is from such decision that this appeal is taken.

The contention of the trustee, Goodrich, is: First, that the mortgage indebtedness was not sufficiently proved; second, that the mortgage, when made, was void as against the creditors of the mortgagor; third, that the appointment of a receiver, and his taking possession of the property, were not equivalent to a taking possession thereof by the mortgagee; fourth, that the suit to foreclose the mortgage was prematurely brought.

1. The defendant cycle company was formed by the consolidation of two New Jersey corporations, under an agreement and act of merger which provided that the property of the two constituent companies should become the property of the consolidated company, and that all debts and liabilities of either of said corporations should thenceforth attach to said new or consolidated company, and might be enforced against it to the same extent as if said debts and liabilities had been incurred or contracted by it. The minutes of the meeting of the stockholders of the new company of August 20, 1896, and of the meeting of its directors of August 24, 1896, both showed that the issuing of the bonds and the making of the mortgage were duly authorized; and on September 3, 1896, a resolution was adopted authorizing the delivery of the 320 bonds to the defendant cycle company. They were so delivered by the trust company,—being handed over to the treasurer of the cycle company,—and none of them have been returned for payment or cancellation. The mortgage recites that the defendant company had a floating indebtedness, incurred in its business, amounting to upwards of \$300,000. The treasurer testified that the floating indebtedness referred to was the indebtedness of the old company; that the 320 bonds were all issued in exchange for notes of the old company; that these notes had been issued by the old company for cash received principally from Camille Weidenfeldt, or Lawson, Weidenfeldt & Co.; that, except for some that was received prior to his term of office (he was treasurer of the old company from January 1, 1896), the cash advanced on the notes passed through witness' hands; that quite a number of the bonds issued for these notes were pledged with the American Exchange Bank, Seligman, and others, who made demand upon the witness for payment of the coupons due on March 1, 1897. This certainly made out a *prima facie* case; and, in the absence of any evidence impugning the good

faith of the transaction, it must be held that the bonds were issued for value, and that the holders are entitled to the rights and remedies which the mortgage secured to them.

2. In *Rood v. Welch*, 28 Conn. 157, it is stated that:

"By the well-settled law of Connecticut, a mortgage, as well as an absolute sale, of personal property capable of immediate delivery, is, as against creditors and subsequent purchasers, fraudulent and void, unless the possession of the property accompanies and follows the transfer."

In that state, however, as in others, the modern requirements of business have led to provision being made by statute for the recording of mortgages of a certain kind of chattels, as a substitute for an open change of possession. The relevant clauses of that statute (section 3016, Gen. St. Conn.) are as follows:

"When any manufacturing or mechanical establishment, together with the machinery, engines, or implements, situated and used therein, * * * shall be mortgaged by a deed containing a condition of defeasance, and a particular description of such personal property, executed, acknowledged and recorded as mortgages of lands, the retention by the mortgagor of the possession of such personal property shall not impair the title of the mortgagee."

The description of personal property in the mortgage now under discussion, which, it is contended, is a "particular" one, within the meaning of this statute, reads as follows:

"And also all machinery, apparatus, tools, appliances, and other plant, materials, fuel, devices, patents, patent rights, and all other property, real, personal, or mixed, of every name or nature whatsoever, of said party of the first part, situated in the * * * said city of Middletown, whether now owned, or hereafter to be owned, acquired, or used, by said party of the first part."

Whether this is a "particular description," within the meaning of the Connecticut statute, is to be determined by reference to the decision of the Connecticut supreme court of errors. *Gaylor v. Harding*, 37 Conn. 508, was an action in trover for a quantity of machinery and manufacturing implements. Plaintiff was the trustee in insolvency of a woollen manufacturing company. Defendants claimed the property under a mortgage of the insolvents made prior to the insolvency, and had taken possession under a decree in foreclosure in a suit begun subsequently to the trustee's appointment. The mortgage covered a certain piece of land, with the buildings thereon, "together with, all and singular, the privileges and appurtenances thereunto belonging; together, also, with all the machinery, tools, and implements contained in the said buildings; * * * also, all machinery, tools, and implements which may from time to time be added to or substituted for those now upon said premises and in said buildings; a schedule of the principal part of said machinery, tools, and implements being hereunto annexed." It appears from the statement of facts that none of the property claimed in the trustee's suit was more particularly described in the schedule, but that certain pieces of machinery included in the claim are the same, or similar in kind, and used for similar purposes with some of those enumerated in the schedule appended to the mortgage. The remaining articles claimed were all in use in the mill, or liable to be required for use at any time, and were necessary to the successful and convenient operation of

the mill. A part of the property in dispute was used, or designed to be used, as implements of, or in connection with, the machinery named in the schedule. The court says, "None of the property in dispute is particularly described in the mortgage deed, nor enumerated in the schedule thereto attached," and holds that defendants can take no benefit of the provisions of the statute. Judgment was directed for the value of "so much of the property described in the declaration as is personal estate"; advising that a further hearing be had, to ascertain whether "portions of the property are not permanent fixtures, which pass as part of the real estate." This decision seems determinative of the case at bar. Our attention is called to no case in any way qualifying its conclusion that mere general words of description are not enough, but that under the statute there must be sufficient to identify the property. The two authorities cited on complainant's brief do not touch the point. In *Rowan v. Manufacturing Co.*, 29 Conn. 282, it appears from the statement of facts that the mortgage "specifically described" a large quantity of machinery, and the title of the mortgagee to certain after-acquired property was held good because said mortgagee had afterwards taken possession of the factory with such subsequently acquired property. "Whatever effect was to be given to the provision in itself, it became operative upon possession being taken by the mortgagee." *Walker v. Vaughn*, 33 Conn. 583. In *Buck v. Seymour*, 46 Conn. 156, the question as to sufficiency of description arose, not under the General Statutes, but under the charter of a railroad company. The description of the personal property in the case at bar is certainly no more "particular" than it was in *Gaylor v. Harding*, *supra*; and the mortgage as to personal property must be held void, because unaccompanied with possession, and not in accordance with the provisions of the statute. If void for imperfect description as to the personal property in possession, it is difficult to see upon what principle it could be sustained as to similar property subsequently acquired.

3. It is held, however, in Connecticut, as in other states, that a surrender and delivery of the property by the owner to the mortgagee, before the intervention of any other claims upon it, perfect the right of the mortgagee to the property, irrespective of any infirmity in the description in the mortgage deed. *Buck v. Seymour*, 46 Conn. 156. It is contended by the defendant here that the taking possession of the property by the receiver appointed by the court is in all respects the same as if the mortgagor had turned over the property to the mortgagee, and in support of that contention a long line of authorities is cited in which the phrase is used, "the possession of the receiver is the possession of the party ultimately held to be entitled to the property." The appellant, we think, gives too much weight to a form of words which may have been used appropriately enough in the cases from which they are cited, but which certainly were not intended to be authority for the proposition that the intervention of the court operates to change the rights of any parties to the suit, whether they were originally parties, or are made such by subsequent order of the

court. The sense in which the words quoted were understood by the courts which used them is apparent from the following excerpts:

"The effect of the appointment [of a receiver of mortgaged premises] is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and, when the party entitled to the estate has been ascertained, the receiver will be considered his receiver." *Wiswall v. Sampson*, 14 How. 52. "He is an officer of the court. His appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. It is the court itself which has the care of the property in dispute." *Booth v. Clark*, 17 How. 322. "A receiver derives his authority from the act of the court, and not from the act of the parties at whose suggestion or by whose consent he is appointed, and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property." *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013.

See, also, *High, Rec. § 134; Coates v. Cunningham*, 80 Ill. 467.

The property is taken by the court, and is put into the hands of its officer to hold for the benefit of "whom it may concern." He holds and manages it for the benefit of the party to whom the court may ultimately decide that it belongs, but it would be a perversion of the whole theory of custodia legis if the mere appointment of a receiver were itself determinative of that "ultimate decision." The proposition here contended for is an instance of reasoning in a circle. Conceding the soundness of the conclusion expressed ante,—that as to the personal property the description was imperfect, and the mortgage therefore fraudulent as to creditors, the appellant's argument may be thus stated: "I cannot show myself to be ultimately entitled to the property unless I can prove a mortgage superior to the rights of creditors. The mortgage I have proved is void as to creditors unless I can show that I have taken possession. The possession of the receiver must be considered to be my possession only because I am ultimately held to be entitled to the property, but the reason why I am ultimately held to be entitled to the property is the very assumption that the receiver's possession is my possession." The property is put into the hands of the receiver only to preserve it from harm, to secure its accretions, and to insure its delivery unimpaired to the successful litigant, but the custody of the receiver should not be held to make any change in the status of any litigant's title. In the case at bar, so far as the personal property is concerned, it cannot be said that the mortgagee is the successful litigant. The creditors, in the person of their trustee, Goodrich, who has been made a party litigant, have prevailed, since they have shown that, down to the time the court seized the property, nothing which mortgagor and mortgagee had done had operated to impair their rights to proceed against the res. If the mortgage were fraudulent as against creditors then, it remains fraudulent, although an officer of the court has taken charge of it temporarily.

4. It is contended that the suit was prematurely brought. The mortgage provides (article 2) that:

"Until default shall have been made in the performance of, all and singular, the covenants and agreements, * * * and until any such default shall have continued for a period of six months, the said party of the first part shall be suffered and permitted to possess, manage, operate, and enjoy the property, * * * and to take and use the incomes, rents," etc., "* * * as if this indenture had not been made."

Article 3 provides that, if default in the payment of interest shall continue for six months, the principal may become due. Article 4 provides that in case default shall be made in the payment of coupons, and shall continue for six months, the trustee under the mortgage may enter into possession. Article 5 provides that if any default shall be made, and shall continue as aforesaid, the trustee may sell and dispose of the property. Article 6 declares that:

"The provision of article 5 is cumulative to the ordinary remedy of foreclosure in the courts, and the trustee herein may, at his discretion, and shall upon the written request of the holders of a majority in value of the bonds, * * * at the option of said trustee, and whenever entitled to do so by the terms thereof, institute proceedings to foreclose this mortgage," etc.

If the only provisions here were those contained in articles 3, 4, 5, and 6, as above set forth, the authorities cited by complainant (*Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 36 Fed. 221, and *Same v. Chicago, P. & St. L. Ry. Co.*, 61 Fed. 372) would be in point. But in the latter of these cases the second article reserves possession to the mortgagor "until default," not until default and six months' continuance thereof. In the former there is no article containing provisions similar to those contained in article 2 of the mortgage now before us. Moreover, in neither of these cases, nor in any of the others cited (*Dow v. Railroad Co.*, 20 Fed. 260; *Farmers' Loan & Trust Co. v. Winona & S. W. Ry. Co.*, 59 Fed. 957; *Same v. Chicago & N. P. R. Co.*, 61 Fed. 543), did the mortgage contain any equivalent of the following clause, which is here found (as a proviso to article 6) at the close of all the above-cited provisions as to rights and remedies in the event of default:

"Neither the trustee nor the holder or holders of the bonds intended to be hereby secured, or any of them, shall sell the premises hereby mortgaged, or intended to be, or any part thereof, or institute any suit, action, or proceeding in law or equity for the foreclosure hereof, or for the appointment of a receiver, otherwise than in the manner herein provided."

It would seem that language could be no plainer; and we are clearly of the opinion that a suit to foreclose, even for unpaid interest, is prematurely brought, unless such default has continued for six months. These provisions, however, postponing foreclosure for six months, are wholly for the benefit of the mortgagor. They are intended to secure to it an opportunity to provide means to pay up its indebtedness, if it can and if it chooses. It need not avail of the provisions, however; and, if it does not take advantage of this objection, no one else can. *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512. Other creditors have nothing to do with these clauses in the mortgage. They were not inserted for their benefit, and they cannot be heard to de-

mand that the mortgagor shall insist upon the objection, so as to secure further time, when further time is neither required nor wished for. The situation is not changed by the circumstance that the creditors are represented by the trustee in insolvency of the debtor. To hold that he may insist upon using his position as representative of the debtor to harass and delay the secured creditor, in the interest of the unsecured creditors, when these very unsecured creditors themselves, if individually intervening, would have no right so to do, would be a perversion of equity. Inasmuch as the mortgagor defendant has not raised the objection that the suit is prematurely brought, the clauses above cited are no bar to recovery.

The decree of the circuit court is reversed, with costs, and cause remanded, with instructions to proceed with the foreclosure as to the real estate, and to dismiss the bill as to the personal property. The circuit court will determine, as to any disputed item, whether it is to be considered real or personal property, and will dispose of it in conformity to this opinion.

UNITED STATES ex rel. STEWART v. HOWARD et al.

(Circuit Court, W. D. Missouri, W. D. April 25, 1899.)

1. CLERKS OF CIRCUIT COURTS—BONDS—RIGHT OF INDIVIDUAL TO SUE ON AS RELATOR.

The bond required from a clerk of a circuit court of the United States by Rev. St. § 795, conditioned generally for the faithful discharge of the duties of his office, among which are receiving, keeping, and paying out money pursuant to the requirements of the statutes and the orders of the court, which money, from the nature of the court's jurisdiction and its practical exercise, is necessarily largely that of private suitors, must be held by legal intentment to have been provided for the protection of such suitors, as well as of the government, and the statutes by implication authorize a suitor to put the bond in suit in the name of the United States, to his use, for the redress of wrongs within its purview.

2. SAME—RECEIPT OF MONEY IN OFFICIAL CAPACITY—ORDER OF COURT.

A recital in the record of a circuit court in a cause, signed by the judge, that a sum of money tendered to the plaintiff by the defendant's pleading had been paid into court, when it was in fact paid to the clerk on the same day, is a sanction of the payment by the court at the time, which is equivalent to an express order for its receipt, and, coupled with further recitals in the record during the progress of the cause treating the money as in the custody of the court, shows that it was in the hands of the clerk in his official capacity, and he is liable on his bond for its misapplication.

3. SAME—FAILURE TO DEPOSIT MONEY IN REGISTRY OF COURT.

The facts that the statutes of the United States (Rev. St. §§ 995, 996) require all money paid into any federal court or received by its officers in any cause to be at once paid into the registry of the court, to be drawn out only on an order of a judge, and that a clerk, in violation of such provisions, failed to deposit money so received by him, but appropriated it to his own use, constitute no defense to an action against the sureties on his official bond for its recovery.

4. SAME—RIGHT OF ACTION ON BOND.

A judgment in favor of a plaintiff for the amount of a tender made by defendant, where the money had been paid into court, vests the plaintiff with the right to such money and all legal remedies for its enforcement, and he may maintain an action on the bond of the clerk for its misappropriation.

This is an action by the United States, at the relation and to the use of David D. Stewart, against Frederick Howard and others on a bond given to the United States.

J. V. C. Karnes, L. C. Krauthoff, and New & Krauthoff, for plaintiff.

Sanford B. Ladd, Frank Hagerman, and Danl. B. Holmes, for defendants.

ADAMS, District Judge. This is a suit instituted against the defendants, as sureties on the official bond of the late Warren Watson, as clerk of this court, to recover a sum of money alleged to have been deposited with him as such clerk by Henry county, Mo., on the 3d day of March, 1891, in a suit then pending in this court, in which the relator was plaintiff and Henry county was defendant, and to have been afterwards embezzled by him. The defenses are two: First, that the relator is not authorized to sue on the bond in question, because the United States of America is the sole obligee, and no statute of the United States authorizes a suit thereon at the relation or to the use of an individual; second, that the clerk did not take possession of the money tendered by virtue of his office as such clerk.

These two defenses will be considered in the order stated.

Section 795 of the Revised Statutes of the United States provides as follows:

"The clerk of every court shall give bond in the sum to be fixed and with sureties to be approved by the court which appoints him, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."

No language is here found which expressly authorizes any person who may be wronged by the act of the clerk to resort to this bond or to use the name of the obligee, the United States of America, in a suit on the bond to his use, for the redress of his wrong, but the question arises whether such right is given by necessary legal intendment. The bond, with the condition as found in the statute, is the only one which can be required of a clerk of this court. *U. S. v. Tingey*, 5 Pet. 115. It must be observed at the outset that this condition is comprehensive in its scope, and manifestly contemplates a security for the discharge, on the part of the clerk, of all such duties as the law imposes upon him. Among these duties are receiving, keeping, and paying out money pursuant to the requirements of a statute or an order of court. Such duties are imposed by sections 995 and 996 of the Revised Statutes of the United States. It is true the duty is imposed on the clerk, whenever he receives money, to forthwith deposit the same in the registry of the court in the name and to the credit of the court; but it clearly appears from the statutes just referred to that it is made the duty of the clerk to receive money, to deposit money in the registry of the court, and to pay it out only as and when ordered by the court. For the faithful performance of these duties, and each of them, the bond is required of the clerk, and the sureties on such bonds become the clerk's sponsors therefor. Now, it is well known, both from the character of the jurisdiction conferred upon circuit courts, as well as from the practical administration and exercise

of such jurisdiction, that the money involved in litigation in such courts belongs almost exclusively to individual suitors, and rarely ever to the United States. It is the district court which affords the usual jurisdiction for asserting the rights or redressing the wrongs of the United States as such. So far as the clerks of circuit courts are concerned, their duties, with respect to receiving, depositing, and paying out money, concern mainly individual suitors other than the United States. The condition of the bond in question should therefore be construed in the light of these facts, and, when legislative authority is conferred to require from a clerk a bond conditioned for the faithful discharge of his duties, it is not doubted that the legislature intended that the obligation of such bond should have relation, at least, to that duty which, above all others, requires a guaranty for its faithful performance, namely, the faithful accounting for moneys which may come into the clerk's hands by virtue of his office. Such duties and obligations being imposed upon the clerk, the bond required of him ought, if possible, to be commensurate therewith.

It is held in the case of *Washington Corp. v. Young*, 10 Wheat. 406, that no person can be authorized to use the name of another without his assent, given in fact or by legal intendment. It is my opinion that, in imposing upon clerks of the circuit court the duties above alluded to, which so necessarily and vitally affect the interests of suitors in its courts, and in requiring from such clerk a bond for the faithful discharge of such duties, the United States, by necessary legal intendment, thereby consents to the use of its name by suitors wronged by official misconduct of the clerk, in a suit against the clerk or his sureties on his official bond. This implied authority or necessary legal intendment becomes the more apparent when it is considered that the clerk's office is an agency of the United States government, ordained and established for the use and convenience of its people. The money intrusted to its clerk is, in a large sense, money which the government has undertaken to keep for its people. When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even though perhaps the government may not be subjected to a suit for its recovery, it clearly owes a highly moral and meritorious obligation to the loser, in the nature of a responsibility for the act and misconduct of its agent, and one which the national congress might regard as sufficient to move it to a private act for his relief.

Considering all these things, it seems unreasonable to say that all congress intended, by providing for a bond from clerks of the circuit court, was to secure the United States itself against damage by official misconduct. On the contrary, the language of the act, construed in the light of the duties imposed upon the clerk, and in the light of the obligations of the United States in the performance of its governmental functions connected therewith, conduces plainly to the result that such bond is intended for security for all suitors in this court, and, being so intended, an implied authority necessarily arises permitting such suitor to put the bond in suit in the name of the United States, to his use, for the redress of wrongs within the purview of the bond.

The next question to be considered is whether Clerk Watson had the money in question in his possession by virtue of his office as clerk. It is contended that it was intrusted to him by Henry county to keep good a tender before that time made, and much research and learning have been exhibited to show that this was but a private or personal transaction between the clerk, as an individual, and Henry county, and that the money was never in custodia legis, and never in the hands of the clerk by virtue of his office. It is contended that the statutes of the state of Missouri (sections 2937 and 2939) in relation to tender have no application, under the federal statutes in relation to costs and the practice in the federal court, to the facts of this case. To all these suggestions, and to all the authorities relied upon, I have given attentive consideration, but there is one view of the facts which, in my opinion, is conclusive of the question now under consideration. The money appears to have been received by the clerk with such sanction of the court as, in my mind, is equivalent to an order to that effect made by the court. The facts disclosed by the agreed statement are as follows:

Henry county having, before the suit was brought against it by Stewart, made a tender of a certain amount in full satisfaction of the cause of action sued upon, when it came to answer the petition of Stewart in this court alleged as follows:

"And defendant says it at all times has been ready and willing to pay plaintiff said sum (\$2,525), and now here again tenders to plaintiff said sum in full payment of said bonds and unpaid interest due thereon, * * * and now brings the said sum into court."

This answer was filed on March 3, 1891. On the same day there was entered on the records of the court the following:

"This day comes defendant, by its attorney, and files answer, and tenders to plaintiff and deposits with the clerk the sum of \$2,525 in payment and satisfaction of his cause of action in the petition set forth."

It further appears as a fact that on said 3d day of March, 1891, Henry county did hand to Warren Watson, clerk, the sum of \$2,525 as in said pleading and entry of record stated. It further appears that after reply was filed in due course, and on July 2, 1894, the following proceedings were had in said cause: A jury having been waived, the hearing was proceeded with, the evidence heard, and the cause submitted to the court; and afterwards, on February 11, 1895, the following further proceedings were had and entered of record in said cause, that is to say:

"A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and arguments of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment, on the 1st day of September, 1887; and that after the plaintiff instituted this action in this court, and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of the plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of \$1,010."

The findings as to the second and third counts are precisely similar to the one just now quoted, except as to the amounts, the second count

being for \$1,010, and the third being for \$505. The judgment of the court, after finding such facts, proceeds as follows:

"It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of \$2,525, the aggregate amount found to be owing him under the three counts of the petition, and that the plaintiff pay the costs of this action, and that execution issue therefor. And it further appearing to the court that the said sum of \$2,525 so paid into court as aforesaid was paid to and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk aforesaid."

The authorities show, and it is conceded to be the law governing this case, that the money in question must have been delivered to the clerk by some direction of the court, in order to be so in his possession by virtue of his office as to render his sureties liable for its misapplication; but I cannot construe the facts set forth above, as they appear in the pleadings, record, and judgment in the case of *Stewart v. Henry Co.*, without being brought irresistibly to the conclusion that said money was paid to the clerk with such sanction of the court at the time as is equivalent to an express order to that effect. It is common knowledge that the record book is the mouth-piece of the court. It is under the direct control of the court, and no entry is made without the sanction of the court. In fact, it appeared affirmatively at the hearing of this case that the record of proceedings on March 3, 1891, showing a deposit of the money in question with the clerk, was signed by the judge of the court. The subsequent record entries in the case show that the court at all times regarded the money as under its control. It would be sticking in the bark, ignoring altogether the substance of things, to hold that the record in that case does not disclose the taking of the money in question into judicial custody.

But it is said that, under the Statutes of the United States (sections 995 and 996), it is not lawful to deposit money with the clerk, and that, therefore, Clerk Watson did not have possession of the money in question under the law, and hence not at all. Section 995 reads as follows:

"All moneys paid into any court of the United States or received by the officers thereof in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer or assistant treasurer or a designated depositary of the United States in the name and to the credit of such court."

Section 996 reads as follows:

"No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn."

These sections clearly deal with the custody of money after the same may have been received by the officers of the court. In other

words, they cannot be construed as a prohibition upon receiving money by the officers of the court. The very language of section 995 makes this clear. It refers to moneys which may be "received by the officers" of the court. This is further made clear by the fact that the court acts alone through its officers, and I know of no method of taking money into legal custody except by and through the instrumentality of the court's officers. It is common practice, when the court is about to take money into judicial custody, to order it paid to the clerk. His duty then arises, under section 995 above quoted, to deposit it forthwith in the registry of the court. If he fails to do so, he violates his duty, and this is exactly what Clerk Watson did. On receipt of the money in question, he was required by law to forthwith deposit it in the registry of the court. Instead of doing so, he deposited it to his individual credit in some bank where he was keeping his individual account. He thereby violated the law, failed to perform his duty as clerk, and his subsequent use of the money for his own private purposes is but further evidence of his conversion of the same to his own use. When the court subsequently rendered final judgment in the case of *Stewart v. Henry County* it practically ordered this money to be paid to the plaintiff. The right to said money, and all legal remedies for the enforcement of the right, were thus vested in the plaintiff. It may or may not be, as claimed by defendant's counsel (as to which I express no opinion), that plaintiff has a present subsisting right enforceable against Henry county for the payment of his judgment. The assertion of such right, if it exists, would be grossly inequitable, and the court is not inclined to so rule this case as to unnecessarily invite such proceeding. It results that plaintiff is entitled to judgment for the penalty of the bond, with an assessment of damages in the sum of \$2,525, with interest thereon from the date of the institution of this suit at the rate of 6 per cent. per annum.

UNITED STATES v. SCHOONMAKER et al.

(Circuit Court, W. D. Texas, El Paso Division. April 8, 1899.)

CONTINUANCE—SUFFICIENCY OF APPLICATION.

An application for continuance by a plaintiff on account of the absence of a witness, in addition to showing the diligence of the party to obtain the attendance of the witness, should disclose the substance or effect of his testimony, that it may appear not only that it is material, but that it will tend to support plaintiff's cause of action, and also that the personal presence of the witness is necessary.

On Motion for Continuance.

Henry Terrell, U. S. Dist. Atty.

T. J. Beall, for defendants.

MAXEY, District Judge. The district attorney brought this suit in behalf of the government to recover of D. W. Schoonmaker and the sureties on his bond the sum of \$1,138.95 for the alleged failure on the part of Schoonmaker to construct a frame cavalry stable at Ft. Bliss

according to the provisions of his contract. The parties to the contract were Schoonmaker, in his own behalf, and George Ruhlen, assistant quartermaster of the United States army, representing the government.

The question for determination arises upon a motion made by the district attorney to continue the case for want of the testimony of Quartermaster Ruhlen. This is the third application made by the government for a continuance. The petition in the cause was filed on the 6th of March, 1897. On April 8th following, the cause was continued by agreement of counsel, and on October 5, 1897, it was continued on the application of the defendants. On April 5, 1898, and again on October 5, 1898, it was continued upon the application of the government. As before stated, the government is now seeking a continuance for the third time. The present application of the district attorney, premitting certain correspondence therein mentioned, is as follows:

"Now comes Henry Terrell, United States attorney, Western district of Texas, representing the plaintiff herein, and asks the court to continue this cause for the following reasons, to wit: One Lieutenant Colonel George Ruhlen, chief quartermaster United States volunteers, is the chief witness for plaintiff in this cause, and his testimony is material herein, in this: That the cause of action is for a breach of contract in the construction of certain cavalry stables for plaintiff at Ft. Bliss, Texas; that the said Lieutenant Colonel George Ruhlen was, on the part of plaintiff, in charge of said construction; that, upon the breach of said contract by defendant, the said Ruhlen, representing the United States, took charge of said work, and completed same; that he alone knows and is able to testify as to the condition of the accounts between plaintiff and defendant, and as to what balance is due the said plaintiff for said breach; that it is and has been impracticable to take the testimony of the said Ruhlen by deposition on account of the character of said Ruhlen's testimony, the same being a long and intricate account of debits and credits, covering the construction of said stables, partly by defendant, and partly by plaintiff, and hence impossible to give the court a clear understanding of the rights of plaintiff and defendant without the personal presence and oral testimony of said Ruhlen. The plaintiff further says that he has used all diligence to secure the attendance of the said Ruhlen, as appears by the following correspondence with the solicitor of the treasury: * * *. The facts in the knowledge of Colonel Ruhlen cannot be obtained from any other source. That the said George Ruhlen is now stationed, by order of the war department of the United States, at Honolulu, Hawaiian Islands, United States. The plaintiff is anxious to dispose of the case, but for reasons set forth cannot safely go to trial. This application is not made for delay, but that justice may be done. * * *"

The correspondence above referred to discloses that on September 16, 1898, the district attorney requested the attorney general to secure, through the war department, the presence of Col. Ruhlen at the October term, 1898, of the court. On September 27th, the war department advised the attorney general that Col. Ruhlen was on duty at Honolulu, and could not attend the court. On the 28th of January, 1899, the district attorney applied to the solicitor of the treasury to have Col. Ruhlen report as a witness at El Paso, and in this letter it is said by the district attorney that, " * * * in order to try the case, it will be necessary to have Major George Ruhlen, U. S. army, ordered to El Paso to testify. It is impracticable to take his testimony by deposition. The court has set case for first day in April of the term, and,

unless the government is ready, he will grant motion to dismiss. I trust the department will render me promptly all aid possible to get this case ready. I inclose copy of petition." The solicitor of the treasury, in his reply of January 31, 1899, informed the district attorney that he had requested the secretary of war to detail Col. Ruhlen to attend the trial; and, on the 28th of February following, the solicitor wrote further that the quartermaster general had notified him that Col. Ruhlen was then stationed at Honolulu, and it would be against the interests of the public service to take him away from his duties. From the correspondence, it is apparent that the district attorney has used reasonable diligence, without effect, to secure the presence of Ruhlen. But is that alone sufficient? There is nothing in the application to show to what Ruhlen would testify, if present. For aught that appears on the face of the papers, Ruhlen's testimony might disclose that the government has no case against the defendants. In other words, neither the substance nor effect of what Ruhlen would testify to is set out in the application; and hence it is not shown that the government would be able to make out its case, as alleged, were Ruhlen present as a witness. The materiality of his testimony is not disclosed. The district attorney doubtless regards him as a material witness; for it is alleged in the application "that he alone knows and is able to testify as to the condition of the accounts between plaintiff and defendant, and as to what balance is due the said plaintiff for said breach." But upon which side of the ledger does the balance stand? If the defendants are really indebted to the government, the application for continuance should disclose the fact, and, further, that Ruhlen's testimony would establish, at least *prima facie*, the cause of action.

But for another reason the application should be denied. The court is not satisfied that Ruhlen's personal presence is either indispensable or necessary. The district attorney insists that the court would be unable to obtain a clear understanding of the rights of the parties from the deposition of the witness, because of the fact that it would be necessary to state a long and intricate account of debits and credits, which could not be satisfactorily done except by the witness on the stand. The reverse would be more nearly true. In order to thoroughly understand intricate accounts, they must be stated in writing; and such work may be more intelligently and accurately done by a party in the quiet and privacy of his own office. While litigants should be accorded all reasonable opportunities to prepare their causes for trial, the court is of the opinion that it would be neither right nor just to the defendants, under the circumstances of this case, to grant a further continuance of the cause. The application will therefore be denied. Ordered accordingly.

CHIATOVICH v. HANCHETT et al.

(Circuit Court, D. Nevada. April 7, 1899.)

No. 634.

COSTS IN FEDERAL COURTS—TAXATION—SUFFICIENCY OF AFFIDAVIT.

Rev. St. § 983, providing that in federal courts "the amount paid printers and witnesses * * * shall be taxed * * * against the losing party," does not require any affidavit to be attached to the memorandum of costs filed by the successful party; and where a rule of court provides for such an affidavit, and what it shall contain, an affidavit which complies with such rule is sufficient, though it does not state in terms that the fees of the witnesses have been actually paid.

On appeal from an order of the clerk taxing costs.

M. A. Murphy, for plaintiff.

Torreyson & Summerfield, for defendants.

HAWLEY, District Judge (orally). Defendants claim, and the clerk held, that the fees of witnesses should not be allowed because there is no affidavit filed which shows that the witnesses' fees had been actually paid. Section 983 of the Revised Statutes provides that "the amount paid printers and witnesses * * * shall be taxed * * * against the losing party." The cost bill in the present case is accompanied by an affidavit, "on behalf of the plaintiff, * * * that the items in the above memorandum contained are correct, * * * and that the said disbursements have been necessarily incurred in the said action." It will be noticed that section 983 does not provide that any affidavit shall be attached to the memorandum of costs. Section 984 does provide for an affidavit, as to the fees of certain officers, "that the services charged therein have been actually performed"; but the fees of witnesses are not mentioned. In the absence of any rule of court upon the subject, it was at an early day, in some of the districts, held that an affidavit ought to be made to the memorandum of costs to the effect that the witnesses' fees had been paid. In course of time, regular rules were adopted in the various circuits, declaring what the substance of the affidavit to the memorandum should be, and was doubtless adopted in order to secure uniformity in the several districts. Rule 17 of this court provides what the affidavit shall contain. The affidavit in the present case complies with this rule. Of course, the losing party would have a right to show by affidavit, or otherwise, that the witnesses had not been paid. Rule 18 of this court provides how that may be done, and the proceedings to be taken are separate and independent from the affidavit that is required by rule 17. In the present case there is no pretense that the witnesses have not been paid, but the objection is based solely upon the ground that the affidavit does not conform to the language of the statute. It is purely technical, and, in the light of the rules of this court, cannot be sustained. The action of the clerk in refusing to allow the fees of witnesses because the affidavit did not in direct terms state that they "have been paid" is set aside, and he is directed to allow the witnesses' fees. In all other respects the taxation as made by him is approved.

HADDEN et al. v. DOOLEY et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 25.

On rehearing. For former opinion, see 92 Fed. 274.

Henry B. Twombly, for appellants.

Edward W. Paige, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The contention of the appellees upon the rehearing is that the statement of facts in regard to the service of the Hadden attachment on May 21, 1895, was not sustained by the testimony, and that it did not appear when the warrant was delivered to the sheriff, or that any one but the appellants knew of it until after May 25th. The court had found that the removal of the 45 cases to Brooklyn was for the purpose of preventing the appellees from completing their attachment of the goods. Upon examination of the record, it appears that in answer to the question: "I show you a warrant of attachment (Plaintiffs' Exhibit 47). When was that received in the sheriff's office?"—the deputy sheriff said, "That was received May 21st." Plaintiffs' Exhibit 47 was not the Hadden & Co. warrant, but the Rice warrant, of attachment, which was obtained May 16th, and was attempted to be served on May 18th; and, if there was no other or explanatory testimony, the contention of the appellees would be supported. The entire testimony of the deputy sheriff shows that the reference to Exhibit 47 was a clerical error or a mistake; that the warrant for the Hadden attachment was delivered to the sheriff on May 21st; that a copy was on the same day delivered to Thompson, who had the immediate charge of the goods, and who represented that they did not belong to the silk company; that subsequently Hadden & Co. gave to the sheriff a bond. And it appears from the testimony of Thompson that after May 21st, and before May 25th, he knew that the 45 cases were to be removed by the bank, and that he had given instructions to permit such a removal, if desired by the bank's representatives. There was no error in the statement of the facts, or in the inferences from them which were given in the opinion. We find no reason for altering the conclusions of the court, and its previous decision is affirmed.

STEEL et al. v. LORD.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 114.

PROCEEDINGS IN ERROR—SCOPE OF REVIEW—FAILURE TO WAIVE JURY IN WRITING.

Unless there is a written waiver of trial by jury in an action at law in a circuit court, Rev. St. §§ 649, 700, do not apply; and where findings made by a referee are ordered to stand as the findings of the court, the only question that can be reviewed by an appellate court is the sufficiency of the findings to support the judgment.

In Error to the Circuit Court of the United States for the Southern District of New York.

James F. Kilbreth, for plaintiffs in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. Frank J. Lord, of the city of New York, brought an action at law in the supreme court of the state of New York against the members of the firm of Steel, Young & Co., of London, England, which was removed to the United States circuit court for the Southern district of New York. The plaintiff subsequently died, and the cause was revived in the name of Louise MacFarland Lord, as his executrix. In pursuance of a stipulation between the parties, it was ordered by the circuit court that the "action be, and the same is hereby, referred to Hamilton Odell, Esq., as referee to hear and determine." The case was heard by the referee, who made a finding of facts, which were made the findings of the court; and judgment was entered for the plaintiffs in accordance with the amounts as found by the referee.

The assignment of errors contains exceptions to the referee's various findings of fact, and to his rulings in regard to the admission of testimony, but contains no assignment that there was error in the judgment upon the facts as found. The rule of the supreme court in *Shipman v. Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886, is precisely applicable to this case:

"As the court in its judgment ordered his [the referee's] findings to stand as the findings of the court, the only question before this court is whether the facts found by the referee sustain the judgment. As the case was not tried by the circuit court upon a waiver in writing of a trial by jury, the court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested."

The cases of *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, and *Paine v. Railroad Co.*, 118 U. S. 152, 6 Sup. Ct. 1019, are to the same effect.

The earlier case of *Boogher v. Insurance Co.*, 103 U. S. 90, to which attention is called by the plaintiff in error, contains nothing which is not in harmony with these decisions. The court found that it sufficiently appeared that a written stipulation of the waiver of a jury had been filed, and held that, therefore, the provisions of sections 649 and 700 of the Revised Statutes were applicable, and that, in addition to the question whether the facts found were sufficient to support the judgment, the appellate court could pass upon the rulings of the trial court, in the progress of the trial before it, which were presented by a bill of exceptions, but that exceptions to the sufficiency of the evidence before the referee to support the findings could not be re-examined. The judgment is affirmed.

LANGAN v. PALATINE INS. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. May 2, 1899.)

INSURANCE—ACTION ON POLICY—PLEADING.

The question of the validity of an award of appraisers appointed under the provisions of a fire insurance policy to appraise a loss thereunder cannot be raised, in an action to recover the amount of the loss, by a demurrer to the petition which alleges the regularity of all the proceedings.

This is an action on a policy of insurance against fire. Heard on demurrer to petition.

R. C. Langan, M. A. Walsh, and J. S. Darling, for plaintiff.
George S. Steere and Hayes & Schuyler, for defendant.

SHIRAS, District Judge. From the record in this case it appears that on the 9th day of January, 1898, the defendant company issued to plaintiff a policy of insurance in the sum of \$5,000 upon a certain dwelling house situated in the city of Clinton, Iowa; it being provided in the policy that, in case of damage by fire, the insured should, within 60 days after the happening of the fire, furnish to the company certain proofs of loss, and that, "in the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating, separately, sound value and damage, and, failing to agree, shall submit their difference to the umpire, and the award in writing of any two shall determine the amount of such loss;" it being also further provided that the loss shall not become payable until 60 days after the required proofs of loss, including the award of appraisers in case one is had, have been received by the company. It is further averred in the petition that on the 23d day of January, 1898, the insured property was destroyed by fire; that thereupon written notice of the fire was given to the defendant company, and on the 6th of March, 1898, proofs of loss were furnished the defendant, and that on the 9th day of March, at the request of the defendant, a written agreement was entered into providing for an appraisement of the loss sustained; that each party selected an appraiser, and these two selected an umpire or third appraiser; that, the two appraisers originally appointed failing to agree, the matters in difference were submitted to the umpire, and on the 30th day of June, 1898, an award in writing, signed by one of the parties originally selected as appraiser and by the umpire, was returned, fixing the total loss to the plaintiff at the sum of \$20,095; that in making such appraisement the appraisers in all respects observed the requirement of the agreement for arbitration. To this petition a demurrer is interposed, setting forth a number of grounds upon which it is claimed that the award is void, but the difficulty in thus submitting the case is that the court cannot assume the facts to be otherwise than is averred in the petition, and upon its face a cause of action is stated.

The theory of defendant seems to be that the award signed by two of the appraisers must be held to recite all the facts upon which the appraisal is based, but that is not its purpose. If the defendant intends to dispute the validity of the award, it must be done by filing an answer. The court cannot assume that notice of the taking the appraisal was not given to the defendant, or that in any other respect such omissions or errors occurred as would be sufficient to invalidate the award. Demurrer is therefore overruled.

HOLMES v. MONTAUK STEAMBOAT CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 126.

1. **SHIP BROKERS—COMMISSIONS—SALES—OPTIONS—LOSS OF VESSEL—INSURANCE.**

A charter party gave the charterer the option of purchasing the vessel at any time during the charter, and required the charterer to keep the vessel insured, and provided that a "commission of five per cent. on the full amount of charter, also on sale of steamer, when sold, is due, on signment hereof, to [the broker who negotiated the charter], ship lost or not lost." Held that, where the ship was lost before an exercise of the option, the broker was not entitled to a commission on the insurance money, as for a sale.

2. **SAME.**

It was immaterial that the charterer had intended to exercise the option.

3. **PAROL EVIDENCE—CONTRACTS—PROVINCE OF COURT.**

In an action for a commission on the insurance money, the broker sought to show an oral agreement entitling him thereto, and introduced the charter party in evidence. Held, that there was no ambiguity or obscurity in the instrument requiring a resort to facts aliunde to insure a correct construction thereof, and the court properly instructed that it did not provide for the commission sued for, leaving it to the jury to find whether there was an oral contract.

4. **SAME—ADMISSIONS BY AGENT—CORPORATIONS.**

The broker, having testified that after the loss of the vessel he held a conversation with defendant's president respecting the commission, he was asked, "What took place between you?" Held, that an objection thereto was properly sustained, where it did not appear how long after the loss the conversation took place, nor that the president had express authority to make admissions as to past transactions, nor that it was part of his duty to do so.

5. **TRIAL—REQUESTS FOR INSTRUCTIONS—TIME.**

Requests for instructions covering the entire case should be presented before the colloquial charge.

6. **SAME—BURDEN OF PROOF—INSTRUCTIONS—IMPLIED CONTRACTS.**

In an action for commissions for services as broker, where defendant admitted that plaintiff was entitled to a certain commission, which had been paid, and plaintiff claimed a further commission under an oral agreement which defendant denied, a charge that plaintiff must produce the greater weight of evidence was not objectionable on the ground that, after it appeared that plaintiff had rendered services and that they had been accepted, he was not bound to show by a preponderance of evidence that he was to be paid therefor.

7. **SAME—OBJECTIONS—WAIVER.**

Though a charge that, "if your minds happen to be just even, that would show the evidence did not preponderate either way," and the ver-

dict should be for defendant, is open to the construction that a verdict should be brought in for defendant if the jury stood six to six, it was not available error, where the attention of the trial court was not called to it by special objection.

b. SAME—CHARACTERIZATION OF WITNESSES.

It is not error for the court, in the charge, to characterize a witness as a well-known and capable member of the bar.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon a writ of error by plaintiff below to review a judgment of the circuit court, Eastern district of New York, entered upon a verdict of a jury in favor of defendant below. The facts sufficiently appear in the opinion.

Geo. B. Adams, for plaintiff in error.

Wm. A. Jenner, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. On January 14, 1896, a written charter party, drawn up by plaintiff, was executed by defendant and the Key West & Miami Steamship Company, by which defendant agreed to let, and the Key West Company agreed to hire, the steamboat Shelter Island for four months from February 1, 1896, to be employed between Key West and Biscayne Bay, for \$100 a day. The charter party further provided that the Key West Company should redeliver the steamboat to the defendant, at the termination of said agreement, in the same good condition as received, ordinary wear and tear excepted; that the charterers should have the option at any time during the charter to purchase the steamboat for the sum of \$60,000; that, if charterers should exercise such option and purchase said steamboat, all charter money paid should be applied on purchase; that charterers should give a "New York banker's guaranty for the full amount of all charter, charter moneys to be paid during the period of this charter, to insure payments when due, and for the faithful performance of all other conditions of this charter party"; that the charterers should "cause insurance to cover value of said steamboat herein expressed to be effected, in a company satisfactory to the owners of said steamboat, against fire and all marine risks, including collision and damage done to other vessels or received by said steamboat other than by collision, in the name of, and for the benefit of, the owners of said steamboat, and shall pay the premium therefor." The charter party also contained the following clause:

"Commission of five per cent. on the full amount of charter, also on sale of steamer, when sold, is due, on signment hereof, to Samuel Holmes, 66 & 68 Broad street, New York, ship lost or not lost, by whom the vessel is to be reported."

Holmes, the plaintiff, was the broker through whose intervention the charter was made.

On the signing of the agreement the Key West Company paid to defendant \$3,000 in cash and \$9,000 in notes. It also effected insurance in conformity with the terms of the charter party, and paid the premiums therefor. The plaintiff duly received \$600, being 5 per

cent. on the \$12,000 so paid by charterers. The steamboat was delivered to the Key West Company on or about February 12, 1896; and while on her way South she foundered at sea, becoming a total loss. Substantially the full amount of insurance was paid to the defendant by the insurance companies.

After setting out briefly the negotiations of plaintiff and the terms of the charter party, including the one last above quoted, as to payment of commission to the plaintiff, the complaint avers that:

"Defendant further promised and agreed, in consideration of the services rendered by plaintiff as hereinbefore set forth, that if the steamboat should be lost before the option to purchase the same was exercised by the Key West & Miami Steamship Company, or before a purchase of the same was actually made by said Key West & Miami Steamship Company, the defendant would pay to the plaintiff 5 per cent. on the insurance money which it might collect and receive under policies of insurance taken out under said agreement; and said services were rendered by plaintiff on the faith of said promise, and in full reliance thereon."

This averment is specifically denied by the answer, and is the only issue in the cause. Plaintiff and another witness gave testimony tending to show such an agreement to pay 5 per cent. on insurance moneys, and were contradicted by three witnesses called by defendant. A number of letters and telegrams passing between the parties to the suit or to the charter party were put in evidence, but none of them contained any reference to the particular subject of controversy. The case was sent to the jury, to find, from these letters and telegrams, from the charter party itself, and from the testimony of the witnesses as to the oral conversation, whether any agreement such as the complainant declared upon was in fact made.

The first assignment of error is to the court's refusal to direct a verdict in favor of the plaintiff. Plaintiff contends that, although the charter party was not a contract between plaintiff and defendant, it was conclusive evidence of a contract between them, by the terms of which plaintiff was entitled to commission on the insurance money paid upon loss. The clause relied upon is, "Commission of five per cent. on the full amount of charter, also on sale of steamer, when sold, is due, on signment hereof, to Samuel Holmes, * * * ship lost or not lost;" and the theory of plaintiff is that, "in all fairness," the phrase "amount of charter" means all that is obtained by the owner under the charter. But, although the premiums of insurance which the charterers agreed to pay may perhaps be said to be obtained by the owner under the charter, the moneys paid by the insurance companies upon loss of the vessel were obtained under a different and independent contract with the companies themselves. Indeed, it might be very doubtful whether, if the Key West Company had exercised its option, and subsequently bought the steamboat, the purchase money could be held to be "amount of charter," since an additional contract was necessary to its production. All such doubt, however, was resolved by the addition of the clause, "also on sale of steamer, when sold." It is argued that the "narrow construction given * * * excludes the broker from all remuneration for his important services, except for the amount paid on account of the contract." The important services rendered were twofold: First,

such as produced the charter party, with the obligations that contract imposed upon the charterers, to which extent 5 per cent. on the amount of their obligations was a full remuneration; and, second, such as were directed towards procuring a purchaser of the boat at \$60,000, but no such purchaser was in fact procured, and the boat was never sold. The language of the clause as to commissions above quoted is clear, plainly expressed, and wholly unambiguous; and the contention that it covers the insurance moneys paid upon loss, because it required the charterers to pay the premiums, is wholly without merit. Inasmuch as there was a conflict of oral testimony as to whether defendants had agreed to pay plaintiff commissions on the insurance moneys, the court properly submitted that question to the jury.

2. It is next contended that the "charter was at least ambiguous, and it was for the jury to construe it in the light of all the evidence." This assignment of error is based upon several exceptions to the charge, which, in one way or another, instructed the jury that the charter party did not contain any provision for the payment of commissions on insurance moneys. A single excerpt will be sufficient. The court, in response to a question by a juror, charged as follows:

"Suppose the plaintiff had come here, and put this charter party alone in evidence. That would not have sustained the plaintiff's case. The plaintiff must have an agreement, outside of this charter party, providing for the payment of the five per cent. on the insurance money which he claims. While you are determining whether such an outside agreement was made, you will consider the charter party. You may take into consideration what is recited in the charter party with reference to his commission, either for the plaintiff or against him, only you will put upon these words the interpretation that the court has, so far as this: That the court says those words mean that the plaintiff should have five per cent. on the amount of the charter and five per cent. on the amount received if the sale were consummated, and that they did not in any way imply or signify that he was to have five per cent. on insurance money."

To this instruction plaintiff duly excepted.

We find no error here. There was no ambiguity or obscurity in the charter party; no such doubt as to its meaning as would require a resort to facts aliunde to insure a correct interpretation. The charter party was not a contract between the parties to this suit. It bound neither of them. Each side was entirely free to introduce evidence contradicting its express provisions, or supplementing them, or showing that it incorrectly expressed the true intention of the signers, or of either of them. Both sides availed of such privilege, and did examine witnesses who testified pro and con as to a contract to pay Holmes commission on the insurance money. The court submitted the question whether or not there was such a contract to the jury, instructing them that they had three classes of evidence which they should consider:

"First, the letters which passed between Mr. French, or other officers of the defendant, and this plaintiff; second, this charter party; third, the parol or oral conversation which happened at the office of the plaintiff on January 15, 1896, when this charter party was passed."

The jury were left entirely free to find that there was an agreement to pay commission on the insurance money, although the charter party

was silent on that subject; but they were told, and rightly told, that the charter party was silent on that subject. Considered merely as an instrument of evidence,—and that is all the charter party was in this case,—a written instrument which is not obscure or unambiguous must be taken as declaring exactly what it purports to declare, although the jury, weighing it with the other evidence in the case, may reach the conclusion that its declaration, like the oral statements of some witness, is inaccurate. The proposition is well expressed in *Barreda v. Silsbee*, 21 How. 146:

“Where the effect of a written agreement collaterally introduced as evidence depends, not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury.”

In the case at bar the court construed the instrument, and instructed the jury as to its meaning, and then left it to them to find the inferences of fact to be drawn from the making and signing of that instrument, considered in connection with all the other evidence in the case.

3. It will not be necessary to review at length all the exceptions to refusals to charge as requested. They but present the question already discussed in different forms.

4. The exceptions to the charge may next be considered.

The court charged:

“As the plaintiff must produce the greater weight of evidence, if your minds happen to be just even, that would show the evidence did not preponderate either way. Under those circumstances, it would be your duty, if you did not go beyond that point, to bring in a verdict for the defendant.”

Plaintiff duly excepted. He contends that the burden was not upon the plaintiff, after it appeared he had rendered services and they had been accepted, to establish by a preponderance of evidence that he was to be paid for his services. No one, however, disputed an obligation to pay him 5 per cent. on the full amount of the charter, and 5 per cent. on sale, when made. The point is too trivial to merit consideration. It is further contended that the jury were thus instructed that, if they stood six to six, they should bring in a verdict for defendant. The language used is open to that construction, although it is more likely to be understood as expressing the meaning intended to be conveyed, viz. that, if their minds reached no conclusion either way, their votes should be for defendant. The attention of the court should have been called to this particular ambiguity of expression, which would have been at once made clear. Probably this was not done because such defect was not then apparent to the mind of the exceptant. An exception to the entire clause was no doubt taken as claiming error in charging that plaintiff had the burden of proof. The second and eleventh exceptions cover a question of measure of damages, which need not be considered. The third covers that portion of the charge (quoted ante) as to the meaning of the charter party, which has been already discussed. The fourth exception is to so much of the charge as instructed the jury that they will find nothing in the correspondence that defendant agreed to pay 5 per cent. on the insurance money. As matter of fact, the correspondence contains

nothing on that subject; but the judge merely told the jury "he thought" they would find nothing there, and expressly instructed them that on that point they must follow their own recollections. The fifth, sixth, seventh, eighth, tenth, and twelfth exceptions are to the court's instructing the jury as to the meaning of the charter party. They have been already disposed of. The ninth is to the characterization of one of the witnesses as a "well-known and capable member of the bar." This exception is without merit.

5. A few exceptions to the exclusion of evidence remain to be considered. Plaintiff had testified that after the loss of the vessel he had a conversation respecting his commission with Mr. Cook, the president of the defendant. He was then asked, "What took place between you?" Upon objection, the court, stating that the question was whether a conversation with the president of the company after the loss occurred would be binding on the company, excluded the evidence "for the present." At the time this ruling was made, it did not appear how long after the loss the conversation took place, nor that the president was present at the conversation at which it is contended the payment of the commission was assented to, nor that he had any express authority to make admissions as to past transactions, nor that it was any part of his duty so to do. In this state of the evidence, the broad question, calling for any and all statements made by the president in reference to plaintiff's claim for commissions, was properly excluded. Examination of the record on appeal in *Hoag v. Lamont*, 60 N. Y. 96, cited by plaintiff to sustain his exception, shows that the cases are in no respect parallel. *Lamont, Walldridge, and Andrews* were parties to a contract with plaintiff's assignors whereby the latter were to sell the former's product on commission, which commissions were guarantied to reach a fixed sum. *Lamont, Walldridge, and Andrews* subsequently formed a company (of which they became directors; Walldridge, president) to continue the manufacture. Plaintiff's assignors called on Walldridge to ask if their contract was assumed by the new corporation, and he told them it was, and that they should go on with the business as agents of the company, whereupon they rendered the services for which the action was brought. Exception was taken to the exclusion of a letter sent by the firm of Smith & Hicks to the president of the charterers, dated January 8, 1896, which stated that Smith was a director of defendant, and that the price of the Shelter Island was \$50,000; also, some conversation in regard to the same which took place at the time the charter was executed. Neither had any bearing on the question whether or not there was an agreement to pay plaintiff commission on insurance moneys. Some evidence was also excluded as to a conversation between the president of the Key West Company and the captain of the Shelter Island while on her way South, indicative of a desire to exercise the option to purchase. It was immaterial. The option never was exercised, nor the sale effected, and the state of mind of the Key West Company subsequent to the execution of the charter party could throw no possible light upon the agreement entered into between plaintiff and defendant at or prior to such execution. The judgment of the circuit court is affirmed.

NEW YORK, N. H. & H. R. CO. v. O'LEARY.

(Circuit Court of Appeals, First Circuit. April 14, 1899.)

No. 266.

1. TRIAL—OBJECTION TO EVIDENCE—STATEMENT OF GROUNDS.

The rule applied that all objections to the admission of evidence must be so specific as to give the other side full opportunity to obviate them at the time, if it can be done.

2. MASTER AND SERVANT—ACTION FOR PERSONAL INJURIES—INSTRUCTIONS.

In this action by a servant against the master to recover for personal injuries, as the request for an instruction as to contributory negligence was based on an incomplete statement of the facts in issue and bearing on the question, it was properly refused.

3. FEDERAL COURTS—RULES OF DECISION—FOLLOWING STATE DECISIONS.

The rule applied that questions arising under a common-law count for negligence in a declaration by a servant against the master for personal injuries are not governed, in a federal court, by the decisions of the courts of the state, but are to be determined upon a consideration of all the authorities, and of the principles underlying the general law of master and servant.

4. MASTER AND SERVANT—SAFETY OF APPLIANCES—CARE REQUIRED OF SERVANT.

Railway Co. v. Archibald, 18 Sup. Ct. 777, 170 U. S. 665, applied, to the effect that an employé has a right to assume that the employer will use reasonable care to make appliances safe, and is not required to exercise ordinary care to ascertain their condition, but assumes the peril only from defects known to him or plainly observable by him.

5. SAME—RESPONSIBILITY OF MASTER FOR ACTS OF AGENTS.

The rule of Railway Co. v. Barrett, 17 Sup. Ct. 707, 166 U. S. 617, applied, to the effect that, so far as relates to the safety of machinery and appliances furnished by a master for use by the servant, the neglect of the master's agent is his neglect.

6. REVIEW—HARMLESS ERROR.

It is settled that errors in the giving or refusal of instructions which, under the verdict rendered, could not have prejudiced the plaintiff in error, are not ground for a reversal of the judgment.

7. MASTER AND SERVANT—ACTION BY SERVANT FOR INJURIES—REVIEW.

A declaration by a servant against a railroad company, to recover for personal injuries, contained three counts,—the first two based on statutes of the state, and the third a common-law count for negligence. The allegations of facts contained in each of the first two counts were sufficient, if established, to support a recovery under the third count. A general verdict for plaintiff was rendered, in an amount within that recoverable under either count. *Held*, that it was immaterial to defendant to which count the verdict was ascribed, or whether there was error in the giving or refusal of instructions relating to the statutory counts, as the facts necessarily found supported a judgment for plaintiff on the third count.

8. APPEAL—HARMLESS ERROR.

Where the whole case relating to any particular question is expressly stated as such on a writ of error, as in the case at bar, it will be held that exceptions taken at the trial before the jury with reference to any particular question, by the party against whom the verdict was rendered, will not avail that party if it is apparent that a verdict in his favor on that question would have been required by the rules of law to have been set aside by the court below.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Robert W. Nason and Thomas W. Proctor, for plaintiff in error.
Edward H. Pierce, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The plaintiff below (now defendant in error) was a brakeman on the freight trains of the plaintiff in error (defendant below). The accident occurred in December, 1897, on the Providence Division, on the main line of the railroad of the plaintiff in error, between two stations, each of which is within the limits of the city of Boston. It is a matter of common knowledge, of which the jury was entitled to avail itself, that on this portion of the line a very large amount of traffic is done; thus making reasonable diligence on the part of the plaintiff in error in caring for its roadbed and its appurtenances to include great promptness and vigilance. The cause of the accident was a guy, supporting a derrick, which was stretched over the tracks of the plaintiff in error by one O'Connell, who was working outside the line of the railroad, under a contract with the city of Boston, changing the location of Stony brook. O'Connell had previously had a guy over the track, but on December 15, 1897, he moved his derrick, and, in that connection, stretched another guy, or moved the old one; the record on this point not being clear, and it not being a matter of any importance for this case whether it was one or the other. O'Connell testified that he had obtained permission from the plaintiff in error, through its superintendent, to move the guy, or to run the additional one, whichever it was. His testimony as to this was not contradicted nor questioned. This is important, showing that O'Connell was not a trespasser in stretching the guy, and that the plaintiff in error knew in advance that it was to be stretched, and so had the opportunity of exercising proper vigilance and care to prevent it from being set so low as to endanger the operation of its railroad. The guy was stretched on the afternoon of December 16th. There was evidence pro and con on the issue whether instructions had been given by the section foreman that the guy must be at least 22 feet above the track. But its height had not been measured, and the record does not show that the flagman who was left by the section foreman to watch the work was given any instrument with which he could measure it. The plaintiff below testified that he came into Boston on a freight train that night on track 2, there being four tracks at that point, and that he did not observe the guy, nor come in contact with it. He would not necessarily have done the latter unless he had been standing on a car, and the guy might have been higher over track 2 than over 3, where he was injured. The next morning his train ran out on track 3, and while he was standing on the top of a car, with his back to the head of the train, exchanging signals with the conductor, the guy struck him in the neck, and caused the injury for which this suit was brought. There was no evidence nor presumption that he either saw the guy in its new position, or that he could have seen it unless he omitted attending to his duties as a brakeman exchanging signals.

There are three counts in the declaration. The third is the usual

count at common law, charging negligence on the part of the plaintiff in error, and alleging care on the part of the defendant in error. Each of the other counts closes with the allegation that it is based on St. Mass. 1887, c. 270. The first refers to that part of the statute which relates to the condition of "ways, works and machinery" of an employer, and the second to that part which relates to the negligence of a person in the service of a common employer, "entrusted with and exercising superintendence." The damages claimed under the third count were \$20,000, and under each of the others \$4,000, the maximum allowed by the statute. The verdict was a general one for \$3,625. Each of the counts which refer to the statute alleges every fact necessary to hold the plaintiff in error liable under the common-law count; so that, as also the damages awarded were less than the statutory maximum, the condition of the plaintiff in error could not have been in any manner impaired by the fact that the jury, in determining its verdict, let it turn on the statutory counts rather than on the common-law count, or vice versa. This observation relates, not only to the question of damages, but to all the other matters involved in the suit.

There were sundry exceptions taken by the plaintiff in error to the rulings of the court on matters of evidence, and a great many exceptions to its rulings and refusals to rule in connection with its charge. The bill of exceptions states that it contains all the evidence except that relating to the extent of the injuries to the defendant in error, which is not material to any exception taken. We are therefore in a condition to determine, not merely how far any ruling or refusal to rule was theoretically correct, but how far it affected the proper result of the suit.

During the course of the trial the court admitted, subject to exception by the plaintiff in error, evidence of the contents of a letter from the road master of the plaintiff in error, permitting the derrick to be moved, and giving directions to the section foreman to send a flagman to do the necessary flagging. This evidence was admitted after the witness, who was the section foreman, had been asked whether he could find the letter, and had answered with an unqualified "no." The only objection found in the record is as follows: "The witness was asked by the plaintiff the contents of the letter. To this the defendant objected." It is impossible to tell from this whether the objection was to the subject-matter of the letter, or to the admission of its contents without further evidence of its loss. The witness' positive answer that he could not find the letter was sufficient to justify the court in admitting proof of its contents, in the absence of anything showing that either party desired to examine the witness further. But, independently of this, if the defendant below had intended to object on the ground that the original of the letter should be produced, it should have stated the grounds of the objection, in order that the court or the other party might have been put on guard, and have made further examination of the witness, if it was deemed proper, and thus possibly have entirely obviated all doubts. The rule has been laid down over and over again by the supreme court, and in such explicit terms as ought to terminate all assignments of errors of this character. It applies wherever the evidence objected to

could be admitted under any circumstances. A full statement of it will be found in *Noonan v. Mining Co.*, 121 U. S. 393, 400, 7 Sup. Ct. 911; and a reference to the general principles underlying it is given in *Railroad Co. v. O'Reilly*, 158 U. S. 334, 335, 15 Sup. Ct. 830. Its pith is that all objections in the course of a trial must be so specific as to give the other side full opportunity to obviate them at the time, if, under any circumstances, that can be done. The defendant below also objected, in the same general way, to a conversation between one Gaffney, who had charge of the work for O'Connell, and the section foreman, in which the latter forbade the work until a permit from the corporation's officials should be obtained. It would be sufficient to say, also, to this, that this objection was in general terms. All the testimony of this class, however, including the letter, was wholly immaterial, and could not in any way have prejudiced the defendant below. Its effect, and the only effect which any of it could have had, was to satisfy the jury that O'Connell was not a trespasser in stretching the guy, and that the defendant below consented to its being done, and so had notice in advance thereof, as we have already said. This was proved by the testimony of O'Connell to which we have already referred, and therefore we have no occasion to consider further this line of exceptions.

The plaintiff in error requested the following instruction:

"If the plaintiff, knowing that work was going on beside the track with the derrick, and that the guy was stretched across the track, which was likely to be moved, paid no attention to it at all, he cannot be said to have been in the exercise of due care, and cannot recover."

The defects appearing on the face of this are frequent in requested instructions, which, instead of merely stating a rule of law, attempt to set out in detail, hypothetically or otherwise, the facts in evidence. It gives only a portion of the elements of the case, in any view of it; and, on this partial statement, it requests the court to take this issue from the jury. It forgets that the plaintiff below had a right to assume that, if the guy was moved, the defendant below would see to it that it was not left in a dangerous position, and also that there was no evidence that he paid no attention "at all," or that he had, or would have had, any opportunity to learn when the guy would be moved, or that he had, under the circumstances, any opportunity to pay any attention to the matter of its changed position. The court properly instructed the jury that it might consider the fact that this work was going on as an element, in passing on the degree of care used by the plaintiff below, which, on the proofs, was all that the court was required to do, so far as concerns the subject-matter of this request. To have gone further, as the defendant below requested, would have been to have taken from the jury the issue of the plaintiff's care on an incomplete statement of facts.

So far as the statute applies to the first and second counts of the declaration, the plaintiff in error is correct in maintaining that the questions are local, and are ordinarily to be determined by the decisions of the state courts. But so far as concerns the relations to this case of the common law, in *Railroad Co. v. Baugh*, 149 U. S. 370, 13 Sup. Ct. 914, as well as elsewhere, the supreme court holds

that questions of this character are to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant. In *Railway Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, the court, at pages 671 and 672, 170 U. S., and pages 779 and 780, 18 Sup. Ct., observed that an employé has a right to assume that the employer will use reasonable care to make appliances safe, and has a right to deal with those furnished, relying on that assumption. The court also upheld the court below in striking from a requested instruction expressions charging on the employé, in this particular, the necessity of the exercise of ordinary care in ascertaining the condition of his employer's appliances, and left resting on him the peril only of defects "known to him or plainly observable by him." This decision emphasizes the insufficiency of the requested instruction.

The plaintiff in error has treated the case, so far as it depends on the common law, as a question of the relations of common employés to each other. It presents no such issue. The law on this topic is epitomized in *Railroad Co. v. Baugh*, *ubi supra*; and *Railway Co. v. Barrett*, 166 U. S. 617, 619, 17 Sup. Ct. 707, rules on the precise point here. There it is said that, so far as the safety of machinery and appliances for the use of employés is concerned, the neglect of the agent of the principal is his neglect. On this rule, a large portion of the requested instructions of the plaintiff in error drops out.

The plaintiff in error contends that the guy complained of was not within the statute, so far as it relates to "ways, works or machinery," and that, also, there was not sufficient evidence for the jury of any negligence of any person intrusted with superintendence, within the statutory meaning. Evidently the learned judge who tried the case in the court below felt difficulties in resting it on either the first or second count, and apparently he did not consider it of importance whether or not they were taken into consideration. He observed that "the case stated in three ways in the declaration may well apply to the facts"; and also he said that whether or not the guy was a defect, within the statute, it was such a defect at common law as would hold an employer liable under the circumstances detailed by him. Therefore it seems to us that, on the evidence in the record, the court did not deem it necessary to distinguish between the several counts. Only one verdict was rendered, and, as we have already said, the plaintiff in error could suffer no detriment by its being assigned to either of the counts. The plaintiff in error nevertheless has assigned a number of errors based upon requests to the court to take the first and second counts from the jury. Under the circumstances which we have explained, the refusal of these requests could not have prejudiced it, and therefore the exceptions based thereon are immaterial, and could not require us to set aside the verdict. *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 301; *Sullivan v. Mining Co.*, 143 U. S. 431, 434, 12 Sup. Ct. 555. Indeed, the case comes, in this particular, within the strict rule of the supreme court, inasmuch as it appears beyond doubt that these alleged errors could not have prejudiced the plaintiff in error. *Railroad Co. v. O'Reilly* (already cited) 158 U. S. 334, 337, 15 Sup. Ct. 830. In *Sullivan v. Mining Co.*, at page 434, 143 U. S., and page 556

12 Sup. Ct., the supreme court uses the following expressions: "Upon all the facts in the case, the judgment was one which must necessarily have been rendered." In the case at bar the "facts" were those found by the jury. To whichever count it assigned its verdict, it must, as we have already said, have found all the facts alleged in the third count, and therefore, in any event, sufficient to support the verdict. It therefore becomes unimportant whether or not the court was in error on the question whether the guy concerned "ways, works or machinery," or in regard to the alleged negligence of a person charged with superintendence in the statutory sense. In any view of the case, facts enough being found to sustain the verdict on the third count, the judgment must stand.

We can go further. On the whole case there is, as we have already said, the uncontrovertible presumption that the defendant below, in operating this part of its line, was bound to great vigilance and care. There is undoubted evidence that it knew that the guy was to be stretched over the track; that it had ample opportunity to provide in advance that it should be set at a proper height; that omission to accomplish this was negligence towards the plaintiff below; that there was no evidence, within the expressions of *Railway Co. v. Archibald*, already cited, that he knew of the defect, or that it was plainly observable by him; and the circumstances of the case show that, performing his duties as he was required to perform them, he could not easily have known it. So that, on the whole case, if the verdict had been for the defendant below, the court below would have been required, as the rule is now practically applied, to have set it aside. On the whole, on the uncontrovertible facts of the case, a verdict and judgment for the plaintiff below were the only verdict and judgment which could properly have been rendered; and therefore the rule applies which is stated in *Decatur Bank v. St. Louis Bank*, already referred to, at page 301, that, to warrant the reversal of a judgment, there must not only be error, but the error must be such as to have worked injury to the party complaining.

All the other alleged errors are covered by what we have already said, or are so clearly not errors as not to require any expression of our views about them. The judgment of the circuit court is affirmed, with interest, and the defendant in error recovers his costs in this court.

CHOCTAW, O. & G. R. CO. v. COLORADO FUEL & IRON CO.

(Circuit Court of Appeals, Third Circuit. May 2, 1899.)

No. 10, March Term.

SALE—PERFORMANCE OF CONTRACT—PLACE OF DELIVERY.

Defendant railroad company purchased from plaintiff rails to be used in the construction of its road, to be delivered, at its option, at either one of two points on its road; the freight to be paid by defendant, and deducted from the purchase price. One of the points of delivery was further from the place of shipment than the other, and could be reached by either of two railroads, while but one of them reached the nearer point. Defendant made a private contract with the latter road, by which it

agreed to bill the rails to the further point at a fixed rate, but to actually deliver them at the nearer point, the defendant to transport them the remainder of the distance on its own road, and to receive a portion of the freight. Defendant then notified plaintiff to ship the rails to the nearer point, which it did. *Held*, that when the rails reached such point, and were there delivered to defendant, their delivery under the contract was complete, and defendant was not entitled to credit on the price for any freight beyond that actually paid to such point. If delivery was to be made at the further point, plaintiff had the right to ship by either road, and to whatever benefit it might have secured through the competition, of which right it was deprived by the direction given.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Samuel Dickson, for plaintiff in error.

A. B. Shearer, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. This action was brought by the Colorado Fuel & Iron Company against the Choctaw, Oklahoma & Gulf Railroad Company upon a written contract dated August 22, 1894, wherein the plaintiff sought to recover a balance alleged to be due to it on account of the price of steel rails delivered to the defendant under the contract. By the stipulations of the contract the defendant had the option to have the rails in question delivered either at El Reno or Oklahoma City, and in pursuance of written orders from the defendant the plaintiff delivered the rails at El Reno. Under the terms of the contract the defendant agreed to advance and pay the freight on the rails for the plaintiff at the points of delivery, and had the right to take credit therefor, and deduct the same, with interest, from the price of the rails. This provision as to freights is as follows: "The freight charged on the rails to be paid by the said second party as billed, and credit given to it by said first party in the monthly settlements; interest at 6 per cent. to be allowed said second party for such payments on account of freights." The only matter in controversy between the plaintiff and defendant in respect to the rails delivered at El Reno was as to the amount of money the defendant was entitled to take credit for and deduct from the price of the rails in settlements with the plaintiff as freights paid by it for the plaintiff on the deliveries at El Reno. The defendant deducted \$4.15 a ton, while the plaintiff contended that the defendant should have deducted only \$3.75 a ton,—the total difference being \$3,637.74. Under the instructions of the court (which are here assigned for error), the jury allowed the defendant credit for freight paid by it on deliveries at El Reno at the rate of \$3.75 a ton only. The verdict shows that the jury found that the rate of freight actually paid by the defendant on the rails delivered at El Reno was not \$4.15 a ton, but only \$3.75. This was indisputably established by the evidence. The defendant, however, claimed to be allowed the greater rate as against the plaintiff under an arrangement entered into between the railroad company which transported the rails to El Reno and the defendant company. The nature of that arrangement, with

the attending circumstances, we now proceed to explain. The mills of the plaintiff where the rails were manufactured, and from which they were to be shipped, were situated at Pueblo, Colo. Shipment of the rails from Pueblo to the defendant's line of road could be made by either one of two routes of transportation, both open to the plaintiff, namely, by the Chicago, Rock Island & Pacific Railroad, which intersected the defendant's line at El Reno, or by the Atchison, Topeka & Santa Fé Railroad, which intersected the defendant's line at Oklahoma City. The distance between El Reno and Oklahoma City is 29 miles, and that portion of the defendant's line between these points was completed and in use at the time of the delivery of these rails. Oklahoma City is to the eastward of El Reno, and these rails, it seems, were intended for use on the defendant's line eastward of Oklahoma City. The defendant company got the Chicago, Rock Island & Pacific Railroad Company to name a rate on the rails of \$4.15 a ton from Pueblo to Oklahoma City upon the understanding that the latter company should transport the rails from Pueblo to El Reno at the rate of \$3.75 a ton, and that the defendant company should transport the rails upon its railroad from El Reno to Oklahoma City at the rate of 40 cents a ton. This was altogether a private agreement between these two companies. The defendant company notified the plaintiff to deliver the rails at El Reno, which the plaintiff proceeded to do, shipping over the Chicago, Rock Island & Pacific Railroad, the only line available for the shipment under the notification. The brief of the plaintiff in error (the defendant below) contains the following statement explanatory of the transaction:

"The defendant, desiring to secure an Oklahoma City delivery, and at the same time assure to the Rock Island the haul of the rails (which latter could only be accomplished by notifying the plaintiff to deliver at El Reno, as otherwise the shipment might have been made over the line of the Santa Fé Company directly to Oklahoma City), directed the plaintiff to deliver the rails at El Reno, having, however, previously reached an understanding with the Rock Island Company that it would consign and bill the rails on the through rate to Oklahoma City."

The learned trial judge instructed the jury, in substance, that the freight paid by the defendant to the Chicago, Rock Island & Pacific Railroad Company for the transportation of the rails from Pueblo to El Reno was what the defendant had a right to deduct under the contract sued on, and that the arrangement between the two railroad companies did not justify any greater deduction from the price of the rails; that, when the defendant elected to receive the rails at El Reno, and the plaintiff delivered them there, the plaintiff had performed its whole contract obligation; and that the expense of the after-transportation of the rails from El Reno to Oklahoma City was to be borne by the defendant company itself. These instructions, we think, were right. The contract of August 22, 1894, contemplated and provided for the reimbursement of the defendant for freight actually paid by it. This is the stipulation of the parties, and defines their rights in this particular. We cannot accept the suggestion that the delivery of the rails at El Reno was to the defendant in its capacity of a carrier. We think it quite clear that the delivery of the rails was under the contract of sale, and to the defendant as purchaser, and in

no other character. The defendant company had the option to direct delivery either at Oklahoma City or El Reno. It elected El Reno as the place of delivery, and so notified the plaintiff company. Accordingly, delivery was there made. That terminated the transaction. The plaintiff had no further concern in the disposition of the rails. The defendant company is not now to be heard to say, as against the plaintiff, that El Reno was not the place of delivery, but that Oklahoma City was. It cannot be affirmed with any degree of certainty that the arrangement between the two railroad companies wrought no detriment to the plaintiff. The notification to deliver at El Reno shut up the plaintiff to one route, and, it seems, was intended to do so. If the plaintiff had been notified to deliver at Oklahoma City, it would have had the choice of two routes of transportation. That fixed freight rates of \$4.15 a ton had then been established on these two lines from Pueblo to Oklahoma City is not satisfactorily shown. The weight of the evidence, we think, tends rather to the contrary conclusion. The president of the defendant company himself, speaking of the Chicago, Rock Island & Pacific people, testified: "After they made this arrangement with us, in order to enable them to the more conveniently carry it out, as I understand, they issued the tariff showing a rate of \$4.15 to Oklahoma City." Again, he stated: "They made no rate to El Reno. * * * The only published rate was to Oklahoma City." There is evidence to show that freight rates from Pueblo to Oklahoma City were then the subject of special contract, and that by the Atchison, Topeka & Santa Fé Railroad the plaintiff could have had the rails transported to Oklahoma City for \$3.75 a ton. The defendant had no right to deprive the plaintiff of an opportunity to procure that rate. The judgment of the circuit court is affirmed.

NEW YORK, N. H. & H. R. CO. v. KELLY.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 106.

RAILROADS—INJURY TO TRESPASSER ON TRACK—CARE REQUIRED.

A railroad company cannot be held responsible for running over a trespasser asleep upon its track, in the absence of wanton negligence on the part of its employes in charge of the train; and a recovery is not warranted by evidence showing that plaintiff's intestate, while drunk, lay down upon the track of defendant's road and went to sleep, and was run over and killed by a train, when the engineer and fireman were keeping a proper lookout, and saw the object, but at first believed it to be merely a coat, and, as soon as they were near enough to distinguish that it was a person, used every effort to stop the train.

In Error to the Circuit Court of the United States for the Southern District of New York.

H. W. Taft, for plaintiff in error.

M. P. O'Connor, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury.

The action was brought to recover damages for the death of William Fealy, the plaintiff's intestate, upon the theory that his death was caused by the negligence of the defendant. He was killed by the train of the defendant while he was lying upon its track. The evidence indicated that while intoxicated he had left the highway, and gone some distance along the track, and laid down between the rails, and fallen asleep, lying parallel with the rails; that, as the train of the defendant approached the place, it was running at a speed of about 25 miles an hour; that, after it had rounded a curve a quarter of a mile away, the engineer saw an object on the track, which he supposed to be a man's coat; that he and the fireman of the engine watched the object, in doubt as to what it was; that when about 150 feet away the fireman exclaimed "My God! It's a man!" and the engineer then applied the air brakes, and stopped the train as soon as it could be stopped, but not before it had struck the deceased.

The instructions of the court to the jury submitted the case to them upon the theory that if the engineer or fireman supposed, or ought to have known, that the object seen by them on the track was a man, and did not then blow the whistle or slow up the train so as to have it under control, the jury might find the defendant guilty of negligence. He refused to instruct the jury, as requested by the defendant, that the defendant was not responsible for an error of judgment on the part of the engineer or fireman as to what the object on the track was, if they exercised reasonable care in looking to see what it was; and he also refused to instruct them that, if the engineer believed that the object was a coat or a bundle, he was not negligent in acting upon that supposition until he discovered it to be incorrect. The assignments of error challenge the correctness of these rulings.

We are of the opinion that the case was presented to the jury by the trial judge under a wrong theory of the liability of the defendant. A railroad company ought not to be held responsible for running over a trespasser, who, sober or drunk, has located himself between its tracks and gone to sleep, in the absence of wanton negligence in the management of the train on the part of the employes in charge. The engineer owes it to the passengers on the train, and to persons lawfully upon the track, to keep a lookout, in order to prevent injury to them; but he owes no such duty to a trespasser. If, seeing him, and realizing that he will not probably remove himself from in front of the train in time to escape injury, the engineer then does what he reasonably can to avoid injuring him, he has done his full duty.

In *Valley Co. v. Howe*, 3 C. C. A. 121, 52 Fed. 362, it was held that an engineer backing his train at night in search of cars which had broken from it owed no duty to keep a lookout with respect to a brakeman asleep upon the track, and that the company was only chargeable with negligence in case of want of care by the engineer after discovering the brakeman. In *Button v. Railroad Co.*, 18 N. Y. 248-259, where the plaintiff's intestate was killed while lying upon the track of the defendant, the court, by Harris, J., said that the jury should have

been instructed that the question for them to decide was whether, by the exercise of reasonable care and prudence after the deceased was discovered, the driver might have saved his life. In *O'Keefe v. Railroad Co.*, 32 Iowa, 467, where an intoxicated man lying down on the defendant's track was run over by an engine which had no headlight, the court charged the jury that he could not, under these circumstances, recover, "unless they found that the defendant or its agents had knowledge that he was thus lying in time to prevent the accident, or could have known with the exercise of ordinary caution." The latter part of the instruction was held to be erroneous, and the judgment was reversed on that ground. In *Railroad Co. v. Tartt*, 12 C. C. A. 618, 64 Fed. 823, the court held that there could be no recovery for the death of a person killed by a train while walking along the track for his own convenience merely, unless it was caused by the employes of the defendant willfully, or by negligence so gross as to imply willfulness. In the case of *Blanchard v. Railroad Co.*, 126 Ill. 416, 18 N. E. 799, it was held that where a person was killed by a train while wrongfully on the railway track, walking there for mere convenience or pleasure, not at a public crossing, the company was not liable "unless his death was caused willfully and wantonly, or by such gross negligence as is evidence of willfulness." In *Johnson v. Railroad Co.*, 125 Mass. 75, it was held that a person injured while trespassing on a railroad track, by coming in collision with a train, was guilty of negligence, which, as matter of law, precluded his maintaining an action therefor unless the injury was willfully inflicted. In *Railroad Co. v. Bennett*, 16 C. C. A. 300, 69 Fed. 525, the court held that the only duty which a railroad company owes to those who, without its knowledge or consent, enter upon its tracks, not at a crossing or other like public place, is not wantonly or unnecessarily to inflict an injury upon them after its employes have discovered them. Other cases affirming the general proposition are *Denman v. Railroad Co.*, 26 Minn. 356, 4 N. W. 605, and *Yarnall v. Railroad Co.*, 75 Mo. 575.

Upon the evidence in the case, if the trial judge had seen fit to direct a verdict for the defendant, we should not have been disposed to disturb the ruling.

The judgment is reversed.

MUTUAL RESERVE FUND LIFE ASS'N v. BEATTY.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 459.

1. APPEAL—REVERSAL—DECISION AS LAW OF CASE.

Where a case has been once before an appellate court, and reversed, the decision becomes the law of the case, and the same questions will not be again reviewed on a subsequent appeal or writ of error.

2. LIFE INSURANCE—ACTION ON POLICY—EVIDENCE.

On an issue as to whether a life insurance company had by its course of conduct waived the right to insist on a forfeiture of a policy because the assured failed to pay an assessment within the time stated in the written notice, the fact that the assured had not been financially able at all times to meet the payments promptly is immaterial.

8. BANKRUPTCY—EFFECT OF DISCHARGE—NEW PROMISE.

Though the remedy for the enforcement of a debt is lost by the discharge of the debtor in bankruptcy, the moral obligation to pay remains, and is a good consideration for a new promise, and such new promise may be oral.

In Error to the Circuit Court of the United States for the Northern District of California.

This is an action at law brought by George W. Beatty, defendant in error (plaintiff below), as beneficiary in a certain certificate or contract of insurance issued by the plaintiff in error on the life of Edwin L. Smith, of San Francisco, Cal. It is alleged in the complaint "that on the 15th day of May, 1884, at the city of New York, state of New York, said defendant made and issued its certificate of membership to one Edwin L. Smith, of the city and county of San Francisco, state of California, in consideration of certain matters and payments in said certificate mentioned, and hereby referred to, for the use and benefit of the plaintiff herein, George W. Beatty (creditor), by which said certificate said defendant insured the life of said Edwin L. Smith in the sum of \$4,000, payable to the plaintiff herein, George W. Beatty, as his interest may appear, if living at the time of the death of said Smith, otherwise to the legal representatives of said Smith, within ninety days after receipt of satisfactory evidence to the said defendant of the death of said Smith during the continuance of said certificate, upon certain conditions in said certificate contained; that on the 10th day of December, 1890, at the city of Oakland, county of Alameda, state of California, said Edwin L. Smith died intestate, a resident of Alameda county, California; that said plaintiff, George W. Beatty, paid the admission fee, all dues for expenses, and all mortuary assessments mentioned in said certificate, as required by it to be paid, up to the 3d day of May, 1889, amounting in the aggregate to \$1,013.07, and offered and was ready to pay all subsequent dues and assessments, but that said defendant willfully refused to receive the same, and said plaintiff gave to said corporation defendant immediate notice of the death of said Edwin L. Smith, and also on or about the 15th day of January, 1891, plaintiff gave and furnished to said corporation defendant, in writing, at its place of business in the state of New York, satisfactory evidence of the death of said Smith, * * * and requested payment to him of said sum of \$4,000 on the 23d day of February, 1891; that the plaintiff herein, George W. Beatty, as a creditor of said Smith, had a valuable interest in the insurance of the life of said Edwin L. Smith at the time of effecting the said insurance, to wit, \$5,000, and he ever since has had, and now has, such valuable interest, as a creditor of said Smith, and that there is now due, owing, and unpaid to said plaintiff, George W. Beatty, the sum of \$1,013.07, for money so paid and expended by him as yearly dues and assessments, as hereinbefore set forth, with interest thereon at the rate of seven per cent. per annum, in addition to said \$5,000 so owing to him as aforesaid, and that no part of which has been paid." The defendant, in its amended answer, admits that it issued the certificate mentioned in the complaint, but denies the other material allegations of the complaint, and alleges, among other things, that the certificate of membership of the said Edwin L. Smith, and all the rights of the said Edwin L. Smith, and of the plaintiff herein, became and were and are subject to the terms and provisions of the constitution and by-laws of the defendant association, all of which are referred to and made a part of the answer; that in and by said constitution and by-laws it was, among other things, provided as follows: "On the first week day of the months of February, April, June, August, October, and December of each year, or at such other dates as the board of directors may from time to time determine, an assessment shall be made, upon the entire membership in force at the date of the last death, of the audited death claims prior thereto, for such a sum as the executive committee may deem sufficient to meet the existing claims by death; the same to be apportioned among the members according to the age of each member. A member failing to receive a notice of an assessment on the first week day of February, April, June, August, October, and December, for his share of the losses occurring during

the time specified, it shall be his duty to notify the home office, in writing, of such fact. A failure to pay the assessment within thirty days from the first week day of February, April, June, August, October, and December, or within thirty days from the day of the date of such periods as may be named by the directors, shall forfeit his membership in this association, with all rights thereunder; and the certificate of membership shall be null and void." It is further alleged "that on the first week day of April, 1889, to wit, April 1, 1889, an assessment or mortuary call of \$39.12 was duly made by the defendant association upon the said Edwin L. Smith, under said certificate, and a due notice thereof, according to the usual course of business of the defendant association, was on said day deposited and mailed in the post office of the city of New York, state of New York, with postage paid thereon, addressed to George W. Beatty, the plaintiff herein, at Los Gatos, Santa Clara county, California; that being the post-office address of the said Edwin L. Smith, and of the said plaintiff, upon the books of the defendant association. And this defendant alleges that the said Edwin L. Smith and the said George W. Beatty, the plaintiff, for more than thirty days after the giving of said notice as aforesaid, and for more than thirty days after the date of the same, failed and neglected to pay said assessment or mortuary call, or any part thereof, and said assessment or mortuary call is not, and never has been, paid, and by reason thereof said certificate is null and void, and became and was null and void prior to the death of the said Edwin L. Smith, and prior to May 3, 1889, to wit, from and after May 2, 1889, and that prior to May 3, 1889, to wit, from and after May 2, 1889, the said Edwin L. Smith ceased to be a member of the defendant association; that the dues for expenses, which by the terms of said contract were to be paid on or before the 6th day of May in every year during the continuance thereof, amounted to the sum of \$8 for each year; that the dues upon said certificate for the year 1889, amounting to the sum of \$8, became due and payable on or before the 6th day of May, in the year 1889, but that the said Edwin L. Smith and the said George W. Beatty, the plaintiff, failed and neglected to pay the amount of such dues, or any part thereof, and said dues are not, and never have been, paid, and by reason thereof said certificate is null and void, and became and was null and void prior to the alleged death of said Edwin L. Smith, and prior to May 8, 1889, and that prior to May 8, 1889, to wit, from and after May 7, 1889, the said Edwin L. Smith ceased to be a member of the defendant association, and by reason thereof said certificate is null and void, and became and was null and void prior to the date of the alleged death of the said Edwin L. Smith; that, upon and according to its information and belief, the said George W. Beatty, plaintiff, was not a creditor of the said Edwin L. Smith at the time the certificate of membership referred to in said complaint, and upon which this action has been brought and is now pending, was applied for."

The trial of the cause was had before a jury. It appears from the testimony that the certificate in question was issued May 15, 1884, and the assessments levied thereon by the plaintiff in error prior to the assessment in controversy were 28 in number, and were designated as mortuary calls numbered 15 to 42, inclusive, amounting to \$981.50. There were also dues for expenses amounting to the sum of \$8 for each of the years 1884, 1885, 1886, 1887, and 1888, amounting to \$40. These assessments and dues for expenses were paid by the defendant in error, the insured contributing a portion of the funds required to meet the demands as they came due. Mortuary call No. 43 was for \$39.12, and was made on April 1, 1889, becoming due May 1, 1889. The dues for expenses for 1889, amounting to \$8, were due on May 6, 1889. On May 3, 1889, the defendant in error tendered payment of both claims, in the sum of \$47.12* to the local agent of the plaintiff in error at San Jose, Cal., who refused to accept the same on behalf of the company, but did receive the amount on deposit in the bank with which he was connected, giving a conditional receipt therefor, and reported the matter to the home office of the association, in the East. The association declared the contract of insurance forfeited by the failure of the defendant in error to pay mortuary call No. 43 within the period of 30 days provided in the notice.

The plaintiff (defendant in error here) was called as a witness on his own behalf, and testified, among other things, that he was the party named in the

certificate of insurance as the beneficiary; that he had paid six calls or assessments after they became due, to wit: "Call No. 16 was paid 34 days late; that is, it was received in New York 34 days after it should have been,—the health certificate being given. Call No. 17 was received 9 days after time. I paid them directly to the company in New York. Call No. 20 was paid 5 days late, direct to New York, with a common receipt. Call No. 25 was paid to the home office, in New York, 49 days late. Call No. 42 became due, under the notice, March 4, 1889. I paid it on March 20, 1889. The notice of call No. 43 reached me the first week in April. Five notices were received before the money was received in New York of a subsequent assessment. As to call No. 43, I was in Los Gatos at the time, and on the last day of April there was a legal holiday, which prevented my entering the bank. I went to the bank, and could not enter. On the 1st day of May they had a local celebration of some kind, and the bank at Los Gatos was closed. It was May Day. I could not draw the money to pay the assessment. On the 2d I drew the money, and started for San Jose, but on my way I was called to see one of my parishioners, and was detained some little time. Reached San Jose a few minutes after 3 o'clock. Found the bank closed. Asked some gentlemen who were standing there if they knew where Mr. Park lived [Park was local agent at San Jose], but they did not seem to know; and, having paid others late, I believed it would make no difference, so postponed it until next morning. I called in the morning, after the bank opened, about 10 o'clock, and received a conditional receipt from Mr. Park for \$39.12, the amount of that call. I paid the annual dues on May 6th, when they fell due. Between that time and the date of Mr. Smith's death I wrote to them several letters, and received several letters from them. I am positive I received notice of call No. 44. I am under the impression I received 45, because of my correspondence. I am not certain as to 45. When I got 44, I went to see Mr. Park, the local treasurer of the company, and tendered him the payment for that. He refused to accept it, saying that the money for No. 43 was still in his hands, and there was no need to take any more until he had come to some understanding about that. These notices of mortuary calls were substantially the same. They would vary in relation to some statements about the condition of the society. Otherwise they were the same. At the time that this application for insurance was made, which I think was in February, 1884, Mr. Smith owed me about \$5,000, counting interest. He never paid that, nor any part of it. He paid for a time, after 1884, \$60 a year on interest. Mr. Smith died on December 10, 1890. I communicated that fact to the company immediately, and sent them proof of death." Upon cross-examination the witness testified: "I forwarded the money for call No. 26 from Boston. I was not in San Jose. I was pastor there, but had gone East. I cannot recall the circumstance how this call happened to be forwarded late. I was in New York. I called for the secretary, and he introduced the assistant. I spoke to him about my difficulty, and the distance to California, and getting money there in time, and in that conversation he said they were not particular, as the places were far distant in California; that a few days did not seem to make any difference. I told him this one I should forward from there. I don't know that I have any reason for the cause of my delinquency. I tried to forward them in time, but I did not always do it. Call No. 42, which was due and payable on the 3d of March, was paid on or about the 20th of March, 1889, to Mr. Park. At the time I handed him the money for that call, he said something about my being late. He asked me for a certificate of health, which I refused to give, saying I did not think I should have him re-examined every month or two. He was getting to be an old man, and I thought it was not just. He gave me the receipt. He did not tell me at that time that he would receive the money conditionally. There was some conversation about the certificate of health, but I objected to giving it. I did not write to the company about it. It was already paid. The reason why I left the payment of call 43 to the last moment was because I thought and believed, from their past dealings, that, inasmuch as I could not get there, it would be immaterial. That is one reason. The other reason was, I was building a church, and was exceedingly busy, and money was scarce at times, so I postponed it late, for several reasons."

The deposition of Frederick T. Braman was taken on behalf of the defendant. He testified, substantially, that he was the secretary of the defendant; that there was default made in the payment of mortuary call No. 42, while said Smith was a member; that this call became due March 4, 1889, and was paid on March 20, 1889, whereupon defendant sent a certificate of health, to be signed by the said Smith and returned to defendant, which plaintiff refused and wholly failed to do; that mortuary call or assessment No. 16 was due and payable within 30 days from October 1, 1884; that it was not paid or tendered to the association within that time, but was subsequently tendered and accepted, and the policy reinstated, under and subject to the terms and conditions of a health certificate, and the receipt issued thereupon; that the health certificate was furnished, and the delinquent payment accepted and receipt issued on December 5, 1884; that mortuary call or assessment No. 17 was due and payable within 30 days from the 1st day of December, 1884; that it was not paid or tendered within that time, but was forwarded to and received by defendant on January 10, 1885; that it was accepted, and the policy reinstated conditionally, and dependent upon and subject to the terms of the conditional receipt which was issued and forwarded to, and accepted by, the plaintiff; that mortuary call or assessment No. 20 was due and payable within 30 days from June 1, 1885; that it was not received by the association until July 6, 1885, but, inasmuch as the postmark upon the letter in which it was inclosed showed that it had been forwarded within the 30 days allowed, it was accepted by the association as though actually received within the 30 days' grace, it being the rule of the association, in such cases, to regard the payment as made on the day the remittance is mailed, and, if so mailed within the time allowed, the payment is considered as made in time, and a regular receipt issued therefor, although the remittance may not be actually received at the home office until after the expiration of the time; that mortuary call or assessment No. 25 was due and payable within 30 days from the 1st day of April, 1886; that it was not paid or tendered until June 8, 1886, when it was accepted and the policy reinstated only upon a health certificate being furnished; that mortuary call or assessment No. 26 was due and payable within 30 days from the 1st day of June, 1886; that a remittance was received within that time, which apparently covered the amount of this call under the policy in question; that mortuary call or assessment No. 42 was due and payable within 30 days from February 1, 1889; that it was not tendered or paid until March 20, 1889, when it was received conditionally, pending the furnishing of a health certificate, and subject to such certificate being satisfactory to, and accepted by, the association.

C. T. Park testified on behalf of the defendant, in substance, among other things, that he was the local agent of the association at San Jose, Cal.; that he remembered when call 42 was made, and explained the circumstances of its payment as follows: "Plaintiff's Exhibit D [being C on this trial] is the receipt I gave him. It came to be given in this way: This call was due about March 1, 1889. He did not come to pay it within the time mentioned for the payment of that call. He came after this call was due, and offered me the money, which I declined to receive, for the reason that the instructions were very definite and specific. * * * Mr. Beatty offered this money to me after the expiration of the time mentioned for that call, and I declined to receive it and issue the receipt. I told him I would receive the money as an individual, or as an officer of the bank, and retain it for him, and notify the company that he had tendered it, and, if they instructed me to issue a receipt, I would do so. The company wrote back to me, instructing me to accept this payment, and requested me, at the same time, that Mr. Beatty should furnish a certificate of health. Mr. Beatty declined to furnish such a certificate, and I interpreted the instructions to mean to obtain it if possible. At all events, on the 20th day of March I issued this receipt, and remitted the amount to the company."

The foregoing is a sufficient reference to the testimony to explain the questions that will be discussed.

Upon the conclusion of the testimony, counsel for defendant moved the court to instruct the jury to return a verdict for the defendant. This instruction the court refused to give, and thereupon gave the instructions contained

in the record. The instructions to which exceptions were taken will be referred to later on in this opinion. The jury rendered a verdict in favor of the plaintiff (defendant in error) for \$3,563.68, with interest and costs.

I. B. L. Brandt, for plaintiff in error.

George E. Bates, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge (after stating the facts as above). There are 28 assignments of error, and 17 specifications of error in support of one of these assignments, making 44 separate and distinct grounds which the plaintiff in error has assigned for a reversal of the judgment in favor of the defendant in error by the court below. The assignments of error relate to the admission of testimony over the objections of the plaintiff in error, the refusal of the court to instruct the jury as requested by the plaintiff in error, and the giving of instructions by the court to the jury over the objections of the plaintiff in error. This is the second time this case has been brought to this court, and, in the view we take of the questions involved, it will only be necessary to discuss such assignments of error as present questions arising upon the last trial.

Upon the first trial in the court below, after the testimony had been closed, counsel for defendant moved the court to instruct the jury to return a verdict for the defendant on a number of specified grounds,—among others, that it did not appear from the evidence that the plaintiff was a creditor of the insured, or that the plaintiff had an insurable interest in the life of the insured; that it appeared from the evidence that the assessment or call No. 43 was duly and regularly levied; that notice thereof was sent to the plaintiff; that he had received such notice; that call No. 43 was dated the 1st day of April, 1889; that it was to be paid on or before the 1st day of May, 1889; that no payment was made on that day, and that the evidence disclosed that tender thereof was made on the 3d day of May, 1889, but at that time the plaintiff was in default, and under the terms of the contract of insurance, as well as the application for such insurance, and according to the provisions of the constitution and by-laws and regulations of the association, the plaintiff was in default, and the insured had ceased to be a member thereof on account of the nonpayment of that call; that delinquency could not be tolerated or redeemed, except at the option of the company; that no excuse for avoiding forfeiture of a life policy, after delinquency in the payment of the premium, could be heard or entertained by the courts, and the courts could not grant relief against forfeiture in cases like the case at bar. The court instructed the jury to return a verdict for the defendant on the grounds stated in the motion of counsel for defendant, and a verdict and judgment were accordingly rendered in favor of the defendant. The plaintiff thereupon sued out a writ of error, and the case was taken to the circuit court of appeals. The opinion of

the circuit court of appeals upon the writ of error is reported in 44 U. S. App. 527, 21 C. C. A. 227, 75 Fed. 65. It was there held: That if an insurance company has by its course of conduct, acts, or declarations, or by any language in the policy, misled the insured in any way in regard to the payment of premiums, or created a belief on the part of the insured that strict compliance with the letter of the contract as to payment of the premium on the day stipulated would not be exacted, and the insured in consequence fails to pay on the day appointed, the company will be held to have waived the requirement, and will be estopped from setting up the condition as cause for forfeiture. In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the nonpayment of the premium on the day specified, the test is whether the insurer, by his course of dealing with the insured, or by the acts and declarations of his authorized agents, has induced in the mind of the insured an honest belief that the terms and conditions of the policy declaring a forfeiture in the event of nonpayment on the day and in the manner prescribed will not be enforced, but that payment will be accepted on a subsequent day, or in a different manner; and when such belief has been induced, and the insured has acted on it, the insurer will be estopped from insisting on the forfeiture. That a waiver is often a mixed question of law and fact, and each case must necessarily depend upon its own peculiar circumstances, conditions, and surroundings. But in all cases where there is any substantial evidence of a waiver of any of the rules or regulations of the insurance company, or of any of the provisions of its charter or by-laws, the question as to whether there has been a waiver or not should be submitted as a matter of fact, under instructions of the court, for the jury to decide. That one party to a contract ought not to be permitted to make an outward show of continued leniency, repeated with such uniformity or in such a manner as to put another off his guard, and then, afterwards, by a sudden change in his course of conduct, declare a forfeiture, when the other party has been misled, and is helpless to avert the consequences. That such a course of dealing may be pursued by insurance companies and mutual benefit associations as will estop them from saying that there was no agreement to receive any premiums or calls after the same became due, after the companies have permitted their policies or certificates to stand open and remain uncanceled, and especially after they have accepted payments of premiums or assessments overdue. The following authorities were cited as establishing these principles: *Bac. Ben. Soc.* § 433; *Insurance Co. v. Eggleston*, 96 U. S. 572, 577; *Insurance Co. v. Doster*, 106 U. S. 30, 35, 1 Sup. Ct. 18; *Insurance Co. v. Unsell*, 144 U. S. 439, 449, 12 Sup. Ct. 671; *Dennis v. Association*, 120 N. Y. 496, 505, 24 N. E. 843; *King v. Association*, 87 Hun, 591, 597, 34 N. Y. Supp. 563; *Insurance Co. v. Warner*, 80 Ill. 410; *Association v. Windover*, 137 Ill. 417, 27 N. E. 538; *Silverberg v. Insurance Co.*, 67 Cal. 36, 39, 7 Pac. 38; *Association v. Jones*, 84 Ky. 110, 117; *Sweetser v. Association*, 117 Ind. 97, 101, 19 N. E. 722; *Girard Life Ins. Co. v. Mu-*

tual Life Ins. Co., 86 Pa. St. 236. The court held that there was sufficient evidence to justify the submission of the case, upon the facts, under proper instructions from the court on the law, to the jury, and that the court below erred in instructing the jury to find a verdict for the defendant. The judgment of the circuit court was accordingly reversed, and the case remanded for a new trial. Upon the second trial the issues were the same as upon the first, and the testimony introduced upon both sides substantially the same upon both trials. It is clear that the decision of the circuit court of appeals upon the former writ of error is the law of the case, and, so far as the court has considered the questions at issue, they must be deemed to be *res judicata*, and not open for review at this time. The law upon this subject has been established by numerous decisions. The supreme court of the United States, in *Roberts v. Cooper*, 20 How. 481, affirms this rule, in the following language:

"On the last trial the circuit court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled, on a second writ of error in the same case, to review our own decision on the first. It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit, if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. See *Sizer v. Many*, 16 How. 98; *Corning v. Nall Factory*, 15 How. 466; *Himely v. Rose*, 5 Cranch. 313; *Canter v. Insurance Co.*, 1 Pet. 511; *The Santa Maria*, 10 Wheat. 431; *Martin v. Hunter's Lessee*, 1 Wheat. 304; and *Sibbald v. U. S.*, 12 Pet. 488."

To the same effect are *Supervisors v. Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 461; *Stewart v. Salamon*, 97 U. S. 361; *Republican Min. Co. v. Tyler Min. Co.*, 48 U. S. App. 213, 25 C. C. A. 178, 79 Fed. 733.

It is contended, however, by counsel for the plaintiff in error, that the decision of this court on the former writ of error was not in accordance with the law as declared by the supreme court of the United States in *Thompson v. Insurance Co.*, 104 U. S. 252, and that, as the law of that court is binding upon this court, the rule of *stare decisis* cannot be followed, as against the authority of that court. The answer to this proposition is that *Thompson v. Insurance Co.* was submitted to the court and fully considered in the former case, and, while not referred to in the decision, it was deemed to be inapplicable to the facts before the court in this case, and the cases cited by the court indicated the distinction. To the extent, therefore, that the present assignment of errors involves questions that have already been determined by this court, they cannot be considered. What questions have been so determined? The motion made by counsel at the close of the testi-

mony upon the last trial, that the court should instruct the jury to return a verdict for the defendant on the grounds specified in the motion, was the same motion, based upon substantially the same grounds, as was made at the close of the testimony upon the first trial. This motion, it has been determined by this court, should have been denied. The questions so determined and involved in the motion as made upon the second trial will not, therefore, be further considered. Counsel for the plaintiff in error also requested the court, upon the second trial, to give certain other instructions. In so far as the questions involved in these instructions have been considered in the former case, they will not be further reviewed. We will now proceed to consider the remaining assigned errors relied upon by the plaintiff in error in his brief:

In the course of the cross-examination of the plaintiff, he testified concerning the delay in paying assessment No. 16, in 1884, and said, among other things, that he was a minister, and was in possession of a church at that time in San Jose. He was then asked by counsel for defendant, "What was your salary at that time?" The court asked how that was material. Counsel explained that he proposed to show that it was owing to the financial inability of the plaintiff that he could not pay the delinquent assessments when they respectively came due. He also proposed to discredit the testimony of the witness. After some discussion with the court as to the materiality of the question, the court held that the fact called for by the question was not material. The question at issue, to which the testimony is claimed to have had relation, was as to whether there was a waiver of the rules and regulations of the association requiring the payment of the assessment within the time specified in the notice of the assessment. The contention of counsel for the plaintiff in error appears to be that, had the witness been permitted to testify as to his salary, he would have disclosed the fact that it was so small (a fact subsequently admitted by the witness in his testimony) that he was not financially able to pay the assessments as they became due. It certainly requires no argument to show that this fact did not tend to prove that there was no waiver of the rule requiring punctual payments of assessments. But counsel, in his brief, contends that plaintiff's default in making payments was because of his financial inability to pay the assessments as they became due, and not because of the statement which he testified had been made to him by the assistant secretary of the association, that punctual payments were not required of California members, and that it was for the purpose of bringing out this contradiction that the question was material and relevant. Counsel has evidently overlooked the fact that this last statement of the witness was drawn from him on cross-examination some time after he was asked the question as to his salary. It is not perceived how an immaterial fact drawn from a witness on cross-examination could, under any circumstances, become relevant and material to contradict a subsequent statement made by the same witness on cross-examination. The ruling of the court was unquestionably correct.

The defendant, in its answer, denied that the plaintiff was a creditor of the insured. The plaintiff testified upon this point that, in certain stock transactions, Smith had become indebted to him in 1876; that subsequently Smith became a bankrupt in the United States district court, and was discharged from his debts in 1878. In these proceedings plaintiff appeared as having a claim against the bankrupt for the sum of \$2,814.35, and as consenting to his discharge. In the application of Smith to the Mutual Reserve Fund Life Association for membership in the association, dated February 19, 1884, he set forth, among other things, that the name of the person for whose benefit the certificate was issued was Rev. George W. Beatty, that his relationship to the applicant was that of creditor, and that the applicant owed Beatty quite a large sum of money, and this was the only method of recovery. This application was signed by Edwin L. Smith and George W. Beatty; and, upon the representations contained therein, the association issued to Smith the certificate of membership in controversy, in which it was provided that upon his death the sum of \$4,000 was payable to George W. Beatty, creditor, as his interest might appear, if living at the time of said death; otherwise, to the legal representative of the member. The original debt having been discharged by the bankrupt proceedings, it became material to inquire whether the plaintiff was in fact a creditor of the insured at the time of the insurance. In addition to the evidence of that fact, as contained in the terms of the written application for the insurance, the plaintiff testified that he had several conversations with Smith, after his discharge in bankruptcy, in regard to the amount he owed him. The witness was then asked to state what Smith said in regard to paying the debt he owed the witness, if anything. Counsel for the defendant objected that the question was irrelevant, immaterial, incompetent, and inadmissible, on the ground that Smith had been discharged in bankruptcy from this debt, by and with the written consent of the plaintiff. When a debt has been discharged by proceedings in insolvency or bankruptcy, the remedy to enforce the payment of the debt is gone; but the moral obligation to pay it still remains, and is a good consideration for a new promise to make such payment, and the new promise may be oral. *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13. The objection was properly overruled.

It is also assigned as error that the widow of Edwin L. Smith, who was called as a witness in behalf of the plaintiff, was permitted to testify, over the objections of counsel, as to the circumstances under which the insurance was made payable to plaintiff as a creditor, and what her husband said about it. This objection was too general. It does not indicate the specific grounds upon which it was made, and must therefore be disregarded. But, aside from the insufficiency of the objection, the testimony was admissible for the reasons given in sustaining the ruling of the court in overruling the previous objection.

It is next assigned as error that the court instructed the jury as follows:

"If you find from the evidence that the conduct of the company in the matter of accepting payments of prior assessments or calls was such as to lead the plaintiff, as a reasonable and prudent man, to believe that strict compliance with the provisions of the policy with relation to payment of calls would not be exacted, and that a delay of a few days after the time for the payment of calls or assessments had matured would make no difference to the company, and that such delayed payments would be accepted by it, and if you further find that plaintiff acted upon such belief in not offering to pay call 43 within the time allowed by the policy, then you would be authorized to find that the defendant had waived its right to insist upon a forfeiture of the policy because of such delay in paying call No. 43; and in that case the plaintiff would be entitled to a verdict. Upon this point relating to the waiver by defendant of strict performance of the terms of its policy on the part of the plaintiff, I instruct you that you are to consider all of the evidence, and put yourself in the position of plaintiff, as disclosed by such evidence, and then, as reasonable men, draw your own conclusion as to what the plaintiff had a right to believe from the defendant's prior dealings with him in relation to the payment of delinquent assessments. The right to insist upon a forfeiture for nonpayment of money due at a particular time may be waived; and if you believe that the course of dealing between the plaintiff and defendant in regard to the payment and receipt of delinquent assessments was such as to produce in the mind of the plaintiff, as a reasonable and prudent man, an honest belief that a few days' delay would make no difference to defendant in the payment of mortuary calls, and that plaintiff acted upon such belief in delaying his offer to pay call 43, then you would be authorized to find that defendant waived a strict compliance with the conditions of the policy in regard to the time for the payment of such call. This rule or principle of law is founded upon the principle that one party to a contract ought not to be permitted to make and show a continued and repeated leniency in receiving delinquent payments, and in such a way as to put another off his guard, and then, by an instant change of conduct, declare a forfeiture, after the other party has been misled, and is helpless to avert the consequences. It is a question for you, gentlemen of the jury, as reasonable men, to consider, whether the company, by its conduct and previous course of dealing, led the plaintiff, as a reasonable and prudent business man, to believe that he could make payment a few days after the time specified in the notice for the making of mortuary calls or assessments. The court cannot say to you, as a matter of law, that one receipt of money after the time when, under the strict terms of the policy, it should have been paid, would make a waiver, or that twenty would. It is not in the number. The question is for you to determine, from the whole course of business, whether the plaintiff, as a prudent business man, had a right to believe that it was immaterial to the defendant whether he paid mortuary calls on the day named in the notices, or a few days thereafter, either directly to the home office, or to the local treasurer of the defendant in this state. It is also claimed by plaintiff that even if you should find that the forty-third call was not paid in time, and that the prior conduct of the company did not excuse a delay, that defendant had nevertheless waived a forfeiture on account of the nonpayment of such a call within the specified time in another way, namely, by making a subsequent mortuary call and assessment, and sending notice thereof to plaintiff. As to that, I instruct you as follows: Imposing an assessment or mortuary call upon the certificate or policy issued to a policy holder, and sending notices of such assessment to a policy holder after the insurance company has knowledge of the fact of previous nonpayment within the time fixed by the policy, and which delay in payment would entitle it to consider the policy no longer binding, without its assent, is a waiver of the right to claim a forfeiture for nonpayment of previous calls within the time fixed by the policy, and which forfeiture it otherwise might have the right to insist upon. If, therefore, you find from the evidence that subsequent to call 43 an assessment was imposed upon plaintiff on account of the policy sued on in this action, and notice of such assessment sent to plaintiff, that would be treating the policy as in full force by the company at that date; and you will find that there was no forfeiture of the policy on account of nonpayment of mortuary call 43, and the plaintiff would

be entitled to recover, if thereafter, and within the time allowed by the policy, he offered to pay to the defendant, or its authorized agent, the amount of such subsequent assessment or call. And in this connection I charge you that the fact that all the notices calling for the payment of assessments contain the following condition, to wit, 'The sending of this notice shall not be held to waive any forfeiture or expiration of membership caused by nonpayment of any previous annual dues or mortuary calls,' will not alter the legal effect of the notice; and the court instructs you that the legal effect of such notice cannot be overcome by inserting therein a provision like that referred to."

These instructions were all clearly within the law as declared by this court on the former appeal. There was evidence tending to establish the fact of a waiver of the right of the association to insist upon a forfeiture of the contract of insurance because of the delay in paying mortuary call No. 43. The claim of waiver was based upon the testimony that prior delays had been waived by the association, and the contract continued in force by the collection of assessments thereon. It appeared that mortuary calls numbered 16, 17, 20, 25, 26, and 42 were not paid within the 30 days provided in the notices of assessments; that for calls numbered 16, 17, and 25 conditional receipts were issued, and the conditions complied with by the insured, but for calls numbered 20 and 26 regular receipts were issued by the home office, in New York, and for call No. 42 a regular receipt was issued by the local agent at San Jose. The claim of waiver was also based upon the testimony of the defendant in error that the assistant secretary of the association, in New York, had informed him that they were not particular as to the exact date of payment made by parties residing at distant points. This testimony was contradicted by the officers of the association, but it was for the jury to determine which of these statements was true. The claim of waiver was also based upon the testimony of the defendant in error that subsequent to the making of call No. 43 an assessment was imposed by the association upon the insured, designated as mortuary call No. 44, and that notice of this assessment was sent to the defendant in error. This testimony was also contradicted by the officers of the association, but it was for the jury, in the light of all the circumstances, to determine which of these statements was true. Upon the evidence as introduced at the trial, it was the duty of the court to submit the question of waiver and forfeiture to the jury for its determination, in accordance with the principles declared by this court in its opinion in the case; and this the lower court did, in clear, concise language, and with such proper and necessary explanation and qualification that the precise issue was fully and accurately defined. We find no error in these instructions.

It is assigned as error that the court refused to give certain instructions requested by the plaintiff in error. It will be unnecessary to discuss these instructions. So far as they relate to the substantial rights of the parties, they are disposed of by what has been said concerning the instructions which were given by the court. Judgment affirmed.

EDGELL v. HAM et al.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1899.)

No. 696.

USURY—MORTGAGE.

When a mortgage on real estate, not usurious on its face by the *lex loci rei sitæ*, is foreclosed, the conveyance to the purchaser cannot be attacked for usury in the mortgage.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Mississippi.

This is an action of ejectment to recover 3,600 acres of land situated in Coahoma county, Miss. George S. Edgell brought the suit against J. Sam Ham, the tenant in possession. His landlords, W. H. Carroll, trustee of the Union & Planters' Bank, J. C. Neely, H. M. Neely, and S. H. Brooks, partners under the firm name of Brooks, Neely & Co., were made parties defendant on their motion. They pleaded not guilty. The plaintiff read in evidence a deed of trust executed by J. T. Jefferson to W. G. Wheeler, trustee, of date March 10, 1886, embracing the lands sued for. This deed of trust secured three notes of Jefferson, payable to F. W. Dunton, for \$2,705 each, dated "Burke's Landing, Miss., March 10th, 1886," payable, respectively, November 1, 1886, November 15, 1886, and December 1, 1886. They bore interest from maturity until paid at the rate of "ten per cent. per annum." The deed of trust recited that Jefferson was "of the county of Coahoma and state of Mississippi," and that Wheeler and Dunton were of New York. It contained a power of sale. It provided for the substitution of another trustee, and that the "contract embodied in this conveyance, and the notes secured hereby, shall in all other respects be construed according to the laws of the state of Mississippi, where the same is made." It was acknowledged before a commissioner for Mississippi at Memphis, Tenn. It was filed for record in the proper office in Coahoma county, Miss., May 13, 1886. The plaintiff also read in evidence Dunton's letter to Wheeler, dated September 7, 1887, declaring the notes due, default having been made in the payment, and directing sale; Wheeler's resignation as trustee, dated September 7, and the appointment of B. J. Martin as trustee. This appointment was recorded in "Book DD, page 458, of the Record of Land in Coahoma County." The plaintiff then read in evidence the record in the case of Jefferson v. Martin. This was a suit by J. T. Jefferson against B. J. Martin and F. W. Dunton in the chancery court of Coahoma county, Miss. The purpose of the bill was to enjoin the sale under the deed of trust, and to have it declared void for usury, under the statutes of either Tennessee or New York. By this bill Jefferson alleged that the "negotiations were commenced, the contract completed, and the notes executed in pursuance thereof, in the state of Tennessee, and were made payable in the state of New York." Jefferson's deposition, taken in the Mississippi suit, was also read in evidence. It tended to show that the loan, and contract to secure it, were made in Tennessee. The decree of Hon. W. R. Trigg, chancellor, decided that the contract should be governed by the laws of Tennessee, reduced the interest to 6 per cent. per annum, and ascertained a balance to be due of \$4,909.06, and dissolved the injunction, so as to allow a foreclosure as to the sum so found due. On appeal to the supreme court of Mississippi, this decree was by that court affirmed on March 11, 1895. The bond given by Jefferson to obtain the injunction had on it, as sureties, H. M. Neely, S. H. Brooks, and J. C. Neely. The plaintiff then read in evidence the following conveyance:

"B. J. Martin to Geo. S. Edgell. Deed.

"By virtue of, and pursuant to, the terms and provisions of a deed of trust of date March 10th, 1886, executed by Joshua T. Jefferson to W. G. Wheeler, trustee, to secure certain indebtedness therein mentioned,—said trust deed being of record in the clerk's office of Coahoma county, Miss., in Deed Book W, pages 381 et seq., of the land records of said county, at Friarpoint,—and

pursuant to a decree of the chancery court of said county of Coahoma, in the First district, in the case of J. T. Jefferson vs. B. J. Martin, Trustee et al., entered on the — day of December, 1893, dissolving the injunction theretofore issued in said cause, and holding the said trust deed, and the notes thereby secured, a valid security for the sum of \$4,909.06, and authorizing the foreclosure of said trust deed for said amount, which said decree was affirmed by the supreme court of Mississippi, the undersigned, as substituted trustee, after advertising the time, place, and terms of sale as required by said trust deed, this day offered for sale to the highest bidder for cash the following lands embraced in said trust deed, to wit: Lots two, three, four, five, six, and seven in section twenty-four; all of section twenty-five; lots one, two, three, four, and five in section twenty-six; all of fractional section thirty-four; lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve in section thirty-five; all of section thirty-six; all in township twenty-eight, range six west; lots three, four, five, six, seven, eight, and nine in section thirty; and all except the east half of the northeast quarter of section thirty-one in township twenty-eight, range five west; and lots one, two, three, four, five, six, seven, eight, nine, ten, and eleven in section three, including all accretions by the river, in township twenty-seven, range six west, containing thirty-six hundred acres, more or less; all of said lands lying in Coahoma county, Mississippi,—and struck off and sold the same to Geo. S. Edgell, at the price of five thousand dollars. The undersigned first offered said lands in subdivisions of not exceeding one hundred and sixty acres, and then offered said lands as an entirety, and the said sum of five thousand dollars bid for said lands as an entirety by the said Geo. S. Edgell, exceeding the sum bid for the said lands, when offered in subdivisions as aforesaid, the same was struck off to him at the said sum of five thousand dollars, which was the last, highest, and best bid therefor: Now, therefore, in consideration of the premises, and the said sum of five thousand dollars, the undersigned, who was duly substituted as trustee in the place of said W. G. Wheeler, resigned, hereby conveys and specially warrants all of the above-described lands to the said Geo. S. Edgell. Witness his signature this 20th day of April, 1895.

"B. J. Martin, Trustee."

This deed was duly and legally acknowledged and recorded.

The defendants read in evidence: A deed of trust from J. T. Jefferson to E. L. McGowan, trustee, conveying said lands, of date February 18, 1891. Toof, McGowan & Co. are the beneficiaries of this deed. It contained power of sale. Deed of E. L. McGowan, Jr., trustee, to W. H. Carroll, J. C. Neely, S. H. Brooks, and H. M. Neely, conveying said lands, of date March 25, 1896. Deed of trust from J. T. Jefferson to D. A. Scott, conveying said lands, dated February 26, 1891. This deed contained power of sale, and said Brooks, Neely & Co. are the beneficiaries. Deed of D. A. Scott, trustee, to Brooks, Neely & Co., conveying to them said lands, of date January 2, 1893.

The defendants examined J. T. Jefferson as a witness and he testified as follows: "Shortly before the execution of the notes and trust deeds of March 10, 1886,—the notes payable to F. W. Dunton, and the trust deed to W. G. Wheeler, as trustee,—I called on F. W. Dunton, in New York City, and arranged with him to get the money called for by said notes. This was down in the city of New York, and the terms were all agreed on there. When I got back to Memphis, Martin, Dunton's agent residing there, drew up the papers; and I signed and executed them, and delivered them to Martin. I was a resident of Memphis, Tenn., at the time of the transaction, and have been for many years. I still reside there. From 1891 to 1896 I spent the most of my time in Arkansas. Was engaged in planting there, in connection with J. C. Neely, of Memphis. Every Saturday evening I would go up to Memphis on the boat, and return on Monday evening. I do not know why the notes to Dunton were dated 'Burke's Landing, Mississippi.' They were executed and delivered to B. J. Martin, Dunton's agent in Memphis, Tenn., who, I suppose, sent them to Dunton. I owned a plantation, at that time in Coahoma county, Miss., called the 'Burke Place,' or the 'Burke's Landing Plantation.' Dunton loaned me the money to run the place, but I don't know that it was all used that way. Might have used some of it in my business in Memphis. I didn't

spend a great deal of my time on my plantation. If I had spent more of my time there, I might have been better off. I did not read over the trust deed before I signed it, and didn't notice that I was described as being 'of Coahoma county, Miss.,' or that it stated that the contract was made in Mississippi. Prior to that time I had signed and acknowledged two deeds of trust, each securing \$25,000, that contained the same provisions, but I didn't read over any of them. They were prepared and presented to me for execution, and I executed them without examining them." The plaintiff, in rebuttal, examined B. J. Martin, whose evidence tended to show that the agreement between Dunton and Jefferson for the loan was not concluded in New York, but was finally agreed on after the witness had examined the sufficiency of the security offered. "Jefferson was then planting in Coahoma county, Mississippi, on the Burke Place, and the money was loaned him to aid him in carrying on his planting operations there." The plaintiff also offered in evidence two letters written by J. T. Jefferson,—one to F. W. Dunton, dated January 12, 1889, and one to B. J. Martin, dated January 18th, in both of which he referred to the debt evidenced by the notes and mortgage. In the former he said: "* * * If your claim is not paid in full by November or December, 1889, I will ask no further favor. I will pay the interest, up to December 1st, that is due on the two notes." In the letter of January 18th he referred to the "notes due Mr. Dunton," and said, "If Dunton will give me fifty days, I will fix up one of his notes." E. L. McGowan testified as follows: "Jefferson came to me some time in July, 1891, and informed me of the advertisements of sales, and that Col. Gantt had advised him that said notes and trust deeds were void, and that as we had a trust deed on same lands, next in order to theirs, to secure notes and accounts and indorsements, we should enjoin the sale, and have these mortgages canceled. He and I went to the office of McDowell & McGowan, where he went over the facts relating to said prior mortgages and our trust deed on the lands. Judge McDowell advised the filing of a bill, which we agreed to. McDowell & Jefferson advised the employment of D. A. Scott, of Friarpoint, Miss., to assist in the cases. We accordingly employed Scott in the cases, and paid him \$500; Jefferson stating that Col. Gantt was his regular attorney, and would assist in the cases. Jefferson at first suggested and desired the bills filed in our name, but, after a full discussion of the matter with Scott, it was determined to file the bills in the name of Jefferson; but it was well understood by Jefferson, and so declared by him, that the suit was instituted principally for our benefit; and we paid all the expenses, amounting to over \$1,200." W. W. McDowell testified to an interview with J. T. Jefferson and E. L. McGowan that led to the filing of the bill in Jefferson's name in Mississippi. The suggestion was first made to file the bill in the name of the two firms,—Toof, McGowan & Co. and Brooks, Neely & Co.,—but it was finally concluded to file it in Jefferson's name. "We were not employed by Jefferson, or paid any fee by him. * * * S. H. Brooks and H. M. Neely are members of the firm of Brooks, Neely & Co. I went to see them at the request of Jefferson, who had, I believe, talked to them about going on the bond, as J. C. Neely, as he claimed, had agreed to make the bond, but was out of the city. When I called on them, I told them that it was important to make the bond speedily, so as to prevent the sales of the land, and that Jefferson said he had arranged with J. C. Neely to make the bonds, or something to that effect, but that he was absent. I explained the probable risks they would incur. They said but little, but said they would consult about the matter and decide, and did sign the bond, but I don't remember to have seen him further on the subject; and, while I went there at the request of Jefferson, I felt that I was representing my client in my efforts to secure bond, and in that sense I was representing Toof, McGowan & Co., although I would not have gone if Jefferson had not requested me. McGowan may have been present when Jefferson made the request, and I think he knew that I was going." D. A. Scott, witness for defendants, testified "that in the litigation he did not represent Brooks, Neely & Co. Witness was employed by Jefferson many months before his services were engaged by Toof, McGowan & Co., but always considered himself as Jefferson's attorney, incidentally representing Toof, McGowan & Co."

The foregoing is substantially all the evidence. Thereupon, on motion of

the defendants, the court gave a peremptory instruction to the jury, instructing them to find for the defendants,—the court holding that the notes and trust deeds under which the plaintiff claimed title to the lands in controversy were a New York contract, and absolutely void, under the laws of that state; to the giving of which instruction the plaintiff at the time excepted. The instruction of the court to find for the defendants is assigned as error.

T. M. Miller, J. H. Watson, and G. T. Fitzhugh, for plaintiff in error.
D. A. Scott and H. D. McKellar, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the facts, delivered the opinion of the court.

Both parties to the suit deraign title from J. T. Jefferson. The title of the plaintiff in error is deraigned from a deed of trust executed prior to the dates of the deeds of trust from which the defendants in error derive their title. The title of the former therefore must prevail, unless it is shown to be defective and inoperative. The argument of the case was devoted in part to the question as to what law, on the subject of usury, governed the contracts between Jefferson, the mortgagor and maker of the notes, and the trustee and the payee of the notes; that is, by what law were the notes and mortgage to be construed? The Mississippi law authorized the charge of interest at the rate of 10 per cent. per annum; the Tennessee law, only 6 per cent.; the New York statutes, only 6 per cent.; and the statutes of the latter state made void, for usury, any securities bearing a higher rate of interest. The view we take of the case presented by the record makes it unnecessary, in our opinion, to decide that question. If it be conceded that the deed of trust executed by Jefferson to Wheeler in 1886 was subject to the defense of usury, either under the laws of New York or Tennessee, does it follow that the infirmity in the mortgage will be fatal to the deed made on foreclosure? An injunction suit had been brought by Jefferson, or in Jefferson's name, against F. W. Dunton and B. J. Martin, the substituted trustee, to avoid the mortgage, for usury. The chancery court of Coahoma county, Miss., in which the bill was filed, had decided that \$4,909.06 was due on the mortgage, after reducing the interest to conform to the laws of Tennessee. The court dissolved the injunction, so as to permit a foreclosure for the sum found to be due. An appeal was taken to the supreme court of Mississippi, which affirmed the decree of the chancery court. The trustee then sold the real estate, in conformity to the power contained in the deed of trust. His action had the judicial sanction of the court of last resort in the state where the land to be sold was situated. At the sale the plaintiff in error, George S. Edgell, became the purchaser, at \$5,000, paid the purchase money, and received a conveyance from the trustee. The mortgage has performed its function. By the sale the sum adjudged due on the notes is paid. The original contract has been executed. This is not a suit to collect the mortgage or notes. Both are paid. This case is ejectment, and involves only the right of possession, which is here dependent on the legal title to the land. A party who was a stranger to the original transaction has intervened. The purchaser at the sale, who has paid

the purchase money, thereby discharging the mortgage, is before the court, and his rights are to be considered.

We are confronted with this question: After the adjudication in the Mississippi courts, under the circumstances shown in the record, and the foreclosure of the mortgage, the purchase of the property, and payment of the purchase money, and the conveyance by the trustee, can the question of usury in the mortgage be raised in the action of ejectment to defeat the legal title of the purchaser?

Foreclosure under the power of sale given in a mortgage or deed of trust cuts off the equity of redemption as fully as foreclosure by decree of court. *Mortgage Co. v. Sewell*, 92 Ala. 168, 9 South. 143.

The case of *Jackson v. Henry*, 10 Johns. 185, was an action of ejectment. The defendant claimed as purchaser at a mortgage sale made under a power given in the mortgage to the mortgagee. The plaintiff proved that the mortgage was given for a loan on which usurious interest had been reserved. After citing several English cases, Kent, C. J., who delivered the opinion of the court, said:

"The principles of public policy, and the security of titles, are deeply concerned in the protection of such a purchaser. If the purchase was to be defeated by the usury in the original contract, it would be difficult to set bounds to the mischief of the precedent, or to say in what sequel of transactions, or through what course of successive alienations, and for what time short of that in the statute of limitations, the antecedent defect was to be decreed cured or overlooked, so as to give quiet to the title of the bona fide purchaser. The inconvenience to title would be alarming and enormous. The law has always had a regard to derivative title, when fairly procured; and though it may be true, as an abstract principle, that a derivative title cannot be better than that from which it was derived, yet there are many necessary exceptions to the operation of this principle."

When this decision was rendered the New York statute against usury declared the usurious security "utterly void," but the court refused to apply the statute to defeat the purchaser at the mortgage sale, who was sued in ejectment.

In *Mumford v. Trust Co.*, 4 N. Y. 463, an effort was made, in chancery, to invalidate a mortgage, for usury, which had been foreclosed. The court said:

"The mortgage is satisfied. It has performed its office. There is the end of it. New rights have been acquired by these proceedings, and a new relation created between these parties, which neither is at liberty to depart from without the consent of the other."

The court held that the parties, after foreclosure, were estopped from setting up usury.

In *Elliott v. Wood*, 53 Barb. 306, *Jackson v. Henry*, *supra*, is quoted approvingly, and the principle applied to mortgaged "property situated out of the state" of New York. The court held that:

"If the mortgagor allows the property to be sold under a foreclosure, without taking the necessary steps to avoid the mortgage, an innocent purchaser cannot be affected by the alleged usury."

In *Tyler v. Insurance Co.*, 108 Ill. 58, the court said:

"If the maker of a deed of trust, and his subsequent incumbrancer, permit a sale of the premises to be made by the trustee for the principal, and usury included, they will be estopped from afterwards insisting on usury to defeat the sale. By permitting the sale they will be regarded as assenting to it, and the payment of the usury."

In the case of *De Wolf v. Johnson*, 10 Wheat. 368, the question of usury was considered. "It was not contended that in the immediate contract on which the bill was founded there was any usurious taint belonging to that transaction itself. The ground taken was usury in a transaction, anterior by two years, out of which the mortgage in question drew its origin, and from which the usurious taint was supposed to be transplanted. * * *" In considering this question, and in holding that usury could not be set up, the court said:

"Again, it is perfectly established that the plea of usury, at least so far as landed security is concerned, is personal and peculiar; and however a third person, having interest in land, may be affected incidentally by a usurious contract, he cannot take advantage of the usury."

The following cases, in principle, sustain the same view,—that the foreclosure cuts off the consideration of the question of usury: *Perkins v. Conant*, 29 Ill. 184; *Carter v. Moses*, 39 Ill. 539; *Bell v. Fergus* (Ark.) 18 S. W. 931.

Mr. Jones, in his work on Mortgages, quotes Chief Justice Kent's opinion in *Jackson v. Henry*, *supra*, approvingly. "Under usury laws which make void securities affected with usury, the question arises, what limit is there to the effect of the statute? Does a foreclosure of the mortgage, and a sale of the mortgaged property to a third person, terminate the right of the mortgagor to avail himself of the usury, or do the consequences still attend the property, so that the purchaser's title may be rendered void?" Having asked these questions, the learned author adopts Lord Kenyon's and Chief Justice Kent's answers to them,—that the infirmity of usury cannot be raised against the purchaser after foreclosure. 1 Jones, *Mortg.* (5th Ed.) § 646, citing *Cuthbert v. Haley*, 8 Term R. 390; *Jackson v. Henry*, 10 Johns. 185.

If a mortgage may be attacked for usury after foreclosure, when would the right to make such attack be barred? It would produce too much uncertainty of title to say that the attack could be made at any time within the statute of limitations applicable to real actions. If the attack be permitted at all after foreclosure, it would logically have no other limit. Such a rule would encourage unjust litigation, promote perjury, and lessen the salable value of real estate where a mortgage foreclosure was noted on its abstract of title. To avoid these consequences, it must be held, on principle and authority, that when a mortgage on real estate, not usurious on its face by the *lex loci rei sitæ*, is foreclosed by decree of court or by a power of sale, the conveyance to the purchaser cannot be subject to attack for usury in the mortgage.

It is immaterial whether the deed of trust, and the notes secured by it, are to be treated as Mississippi, New York, or Tennessee contracts. In any event, on the record before us, usury, if it existed in the original transaction, would not affect the title of the plaintiff in error.

The circuit court erred in instructing the jury to find for the defendants. On the case made in the record, the peremptory instruction might well have been given in favor of the plaintiff. The judgment is reversed, and the cause remanded for a new trial.

L. BUCKI & SON LUMBER CO. v. ATLANTIC LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. April 25, 1899.)

No. 783.

1. CROSS APPEAL—DISMISSAL.

Where cross appeals are taken, or where each party reserves a bill of exceptions and sues out a writ of error, both appeals or both writs should be heard at the same time; and if cross appellant or plaintiff in error suing out the second writ is not ready, without fault, when the first appeal or writ is called, on showing of proper diligence a reasonable postponement will be had, so that the assignments can be heard at the same time.

2. SAME.

Where one suing out a cross appeal on the hearing of the first appeal does not ask for a postponement, or show diligence, so that it can be heard with the other appeal, as one case, as provided by Cir. Ct. App. Rule 25 (31 C. C. A. clxvi.; 90 Fed. clxvi.), it will be dismissed.

In Error to the Circuit Court of the United States for the Southern District of Florida.

H. Bisbee, for plaintiff in error.

R. H. Liggitt and J. F. Glen, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This was an attachment suit brought by the Atlantic Lumber Company against the L. Bucki & Son Lumber Company, and resulted in a verdict and judgment in favor of the former and against the latter for \$8,988.37. The Atlantic Lumber Company first sued out a writ of error, and in this court the judgment was affirmed; the opinion of the court being filed January 3, 1899. The L. Bucki & Son Lumber Company also reserved a bill of exceptions on the trial, and sued out a cross writ of error; and the case on that writ was argued March 13, 1899, and is before the court for consideration. After the delivery of the opinion affirming the judgment on the first trial in this court, both parties made applications for a rehearing, and it was pending these applications that the case was argued on the second writ of error. The records and assignments of error have been carefully examined, and we are of opinion that no error has been committed prejudicial to either party, and that justice will be awarded either by an affirmance of the judgment on the cross writ of error, or by its dismissal.

An appeal or writ of error will be dismissed by the court, on its own motion, where it is not prosecuted with the diligence required by law or the rules of the court. *Grigsby v. Purcell*, 99 U. S. 505. This is especially applicable to cross appeals. *Clift v. Kuhn*, 52 U. S. App. 178, 26 C. C. A. 130, and 80 Fed. 740; *The S. S. Osborne*, 105 U. S. 447. The verdict and judgment were entered on the 7th of May, 1898; but a motion for a new trial was made, and not disposed of by the court until June 30, 1898. The bill of exceptions taken by the plaintiff in error herein was signed November 7, 1898. The writ of error issued November 10, 1898. The transcript was certified by the clerk of the circuit court November 26, 1898, and filed in this

court November 28, 1898, after the beginning of the present term of this court. The printed record was filed January 7, 1899, after the opinion on the first trial in this court (92 Fed. 864) had been delivered. Where cross appeals are taken, or where each party to a suit reserves a bill of exceptions and sues out a writ of error, an orderly administration of the law requires that both appeals or both writs be heard at the same time. A cross appellant or a plaintiff in error suing out a second writ should be required to prosecute his appeal or writ with such diligence as to enable the court to hear the entire case at once. If, without fault on his part, he was not ready when the first appeal or writ was called, on proper application, showing diligence, a reasonable postponement might be had, so that the assignments of error of both sides could be heard at once. The rules of appellate courts usually provide for but one hearing of both appeals. Cir. Ct. App. Rule 25 (31 C. C. A. clxvi.; 90 Fed. clxvi.); Sup. Ct. Rule 22. And in many jurisdictions, either by statute or by rule of court, on cross appeals or cross writs of error both parties are permitted to assign errors on the same record. Rev. St. U. S. § 1013. This court has no rule to that effect, but rule 25 expressly provides that "cross appeals shall be argued together as one case." Such is the usual practice. 2 Fost. Fed. Prac. (2d Ed.) p. 1017, § 491. A practice permitting two hearings of such cases would cause much inconvenience and delay in the administration of the law. A party who appears only as appellee or defendant in error can only appear to defend the decree or judgment assailed by his adversary. *The Slavers*, 2 Wall. 398; *The Stephen Morgan*, 94 U. S. 599; *Loudon v. Taxing Dist.*, 104 U. S. 771. If the judgment should be reversed, the party would probably not need to prosecute his cross appeal or writ, if the reversal secured a new trial. If it was affirmed, as in this case, he has succeeded in his contention as appellee, and should abide the result. Under proper rules of procedure, one cannot be permitted to hold his own exceptions in reserve, and prosecute them to a decision, or not, as may be to his interest, after the decision on his adversary's assignments of error. The twenty-fifth rule of practice in this court will be so applied as to prevent this result.

In cases of cross appeals or cross writs of error, both must be heard as one case. Where, during the trial, both parties reserve exceptions, the one suing out the second writ of error should prosecute it with such diligence as to have it heard with the first. If he should not be ready when the first is called, on timely application, showing no want of diligence, a postponement would be had, so that the rule could be complied with by hearing both appeals or writs as one case. The writ of error is dismissed.

In re ABRAHAM.

BERNHEIMER v. BRYAN, Marshal.

(Circuit Court of Appeals, Fifth Circuit. April 25, 1899.)

No. 797.

1. BANKRUPTCY—APPEAL AND REVIEW—APPEALABLE ORDERS.

An order or decree of the district court in bankruptcy, on summary proceedings to try the title to property in the possession of a purchaser from the bankrupt's voluntary assignee, and claimed by creditors as belonging to the estate, is not appealable, under section 25 of the bankrupt act; but the remedy of the party aggrieved is by petition for the exercise by the circuit court of appeals of its jurisdiction to "superintend and revise, in matter of law, the proceedings of the inferior courts of bankruptcy," under section 24b.

2. SAME.

Where an appeal from an order of the district court in bankruptcy was allowed by the judge thereof, and all parties concerned had due and actual notice, and the record brought up presents all the facts in issue and the action of the court thereon, but the order in question was not appealable, the circuit court of appeals may permit the appellant, in lieu of his appeal, to file a petition for revision of the proceedings in the district court, and, on due notice thereof to parties entitled, proceed in the exercise of its revisory jurisdiction, or may, under special circumstances, consider the case on its merits in like manner as if a formal petition had been presented and due notice thereof given.

3. SAME—PETITION FOR REVISION.

In analogy to the rules governing the allowance of appeals and writs of error, a petition for revision by the circuit court of appeals of proceedings in the district court in bankruptcy may be presented to, and allowed by, the judge of the district court or any one of the judges of the circuit court of appeals. It should show, with reasonable clearness, the action of the court below which the petitioner seeks to have revised, and reasonable notice thereof should be given to the adverse party.

4. SAME—JURISDICTION OF COURTS OF BANKRUPTCY—SUMMARY PROCEEDINGS.

Pending the hearing on a petition in involuntary bankruptcy against a debtor who had made a general assignment for the benefit of his creditors, petitioning creditors applied for an injunction forbidding the assignee to sell the property in his possession, but the writ was refused, without prejudice, for the reason that the petition therefor was not verified and no bond was given; whereupon the assignee, before the adjudication in bankruptcy, but without leave of the bankruptcy court, sold the property at public auction to appellant. After adjudication, on petition of creditors, the district court ordered the marshal to seize the property in the hands of appellant, and ruled the latter to appear within 10 days and propound his claim to the property in question, and, on his appearance and answer, adjudged that he had no title to the property, and ordered him to pay over the proceeds of portions thereof which he had sold at retail. *Held*, that the court of bankruptcy had no jurisdiction to try the title to the property in question on summary proceedings of this character.

5. SAME.

Where an insolvent debtor makes a general assignment for the benefit of creditors, and is afterwards adjudged bankrupt on that ground, it seems that the trustee in bankruptcy cannot recover from the assignee the property assigned, or its proceeds, on summary petition in the court of bankruptcy, but must proceed by plenary action, at law or in equity, in the proper state or federal circuit court.

Per Pardee and McCormick, Circuit Judges. Parlange, District Judge, dissenting.

6. SAME—UNLAWFUL SEIZURE OF PROPERTY—DAMAGES TO CLAIMANT.

Where petitioning creditors in a case of involuntary bankruptcy, after the adjudication, procured from the district court an order under which the marshal seized property in the hands of a third person, who had purchased the same from the assignee in a voluntary general assignment previously made by the bankrupt, and the circuit court of appeals, on appeal by such purchaser, adjudged that the issuance of such order was unwarranted, and the seizure thereunder unlawful, and that possession of the goods must be restored to the claimant, *held*, that he should be allowed costs, counsel fees, and damages occasioned by the seizure and detention of the property, to be fixed by the district court and paid by the petitioning creditors, and secured by a lien in his favor on the distributive share of the bankrupt's estate to which such creditors should be entitled.

Parlange, District Judge, dissenting.

Appeal from the District Court of the United States for the Middle District of Alabama.

On December 12, 1898, the following petition was presented to the district court of the United States for the Middle district of Alabama, in bankruptcy:

"Your petitioners, the undersigned creditors of D. Abraham, the bankrupt in this cause, respectfully show unto your honor that heretofore, to wit, on the 12th day of December, 1898 (same day), upon a petition heretofore filed by them in this cause, the said D. Abraham was by this court adjudicated a bankrupt, within the true intent and meaning of the act of congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States.' That on, to wit, the 29th day of October, 1898, and prior to said adjudication, the said D. Abraham executed and delivered unto H. C. Davidson a deed of assignment by which he executed unto said Davidson all of his property and effects, for the equal benefit of his creditors. That, upon the delivery of said deed of assignment to him, the said H. C. Davidson entered upon the execution of said trust. That afterwards, as required by the laws of the state of Alabama, the said Davidson filed an inventory of all of the property coming into his possession as assignee in the office of the register in chancery of Montgomery, Ala., by which inventory it is shown that the estate of the said D. Abraham consisted mainly of a stock of goods, wares, merchandise, and book accounts located in a storehouse, No. 106 Dexter avenue. That appraisers were appointed by the said register in chancery to appraise said property, and, in accordance with said appointment, they accordingly appraised all the effects of the said D. Abraham and made a return thereof to said chancery court. That the appraisement of said property, as fixed by said appraisement, is the sum of, to wit, \$7,900. That on, to wit, the 7th day of November, 1898, your petitioners filed in this court their original petition, praying that said Abraham be adjudicated a bankrupt, upon the ground that he executed and delivered said deed of assignment; and, upon the filing of said petition in this court, your petitioners are advised by counsel, and therefore aver, that this court obtained jurisdiction over said estate of said Abraham, and it was the duty of the said H. C. Davidson, as assignee of said Abraham, to hold all of the property and effects of the said Abraham in his possession, subject to the orders and decrees of this court; but the said Davidson, disregarding the authority and jurisdiction of this court, proceeded to sell and dispose of said property, and did dispose of the same, for a sum greatly less than the appraisement as made by said appraisers. That the purchasers of said property have been in possession of the said stock of goods, wares, and merchandise for several days, selling and disposing of the same at retail trade, and at such prices as said purchasers claim to be bankrupt prices. Your petitioners are informed and believe, and upon information aver and state, that said property was sold for greatly less than its value, and that, unless this court makes an order requiring that the said property be taken immediate possession of, your petitioners and all other creditors of the said Abraham will be greatly damaged thereby, and the pro rata share to

which they are entitled out of the effects of the said D. Abraham will be greatly lessened. Your petitioners therefore pray that your honor make an order requiring L. J. Bryan, the marshal of the Middle district of Alabama, to take charge of all the property and effects belonging to the said D. Abraham, at the time of the making of his deed of assignment to the said H. C. Davidson, wherever the same may or can be found; and further requiring the said H. C. Davidson to deliver to the said L. J. Bryan, as marshal, the books of accounts, papers, choses in action, and any other property or effects which may be in his possession belonging to the said D. Abraham; and further authorizing the said L. J. Bryan, as marshal, to take possession of all of the property sold by the said H. C. Davidson, as assignee, to L. Bernheimer, or to any one else, and which is particularly located in said storehouse known as 'No. 106 Dexter Avenue,' in the city of Montgomery, Ala.; and that the said L. J. Bryan, as marshal, be required to hold all of said property so coming into his possession until the further orders of this court."

On the foregoing petition, and on the same day it was presented, the court made the following order:

"The petition of A. C. Barler Manufacturing Co. et al., wherein they pray for an order in said cause requiring L. J. Bryan, the marshal of the Middle district of Alabama, to take possession of the property of the bankrupt in this case, coming on this day to be considered by the court; and it appearing from said petition that, after the filing of the original petition in this cause praying that said Abraham be adjudicated a bankrupt, H. C. Davidson, to whom the said D. Abraham had before the filing of the original petition made a deed of assignment for the benefit of all of the said Abraham's creditors, did sell and dispose of certain property and effects of said D. Abraham for a sum greatly less than its value, and without any authority or direction from this court, and that said property is now in possession of the purchasers and being disposed of by them; and it further appearing to the court from said petition that the creditors of the said D. Abraham will be greatly damaged unless said property is taken possession of by this court; and it further appearing from said petition that it is necessary to the interest of the creditors of the said D. Abraham that this court take possession of all the property and effects of the said D. Abraham: Now, therefore, it is the opinion of the court that said petition should be granted; and it is accordingly ordered, adjudged, and decreed that L. J. Bryan, the marshal for the Middle district of Alabama, take immediate possession of all the property and effects owned by the said D. Abraham at the time of the making of said deed of assignment, wherever the same may or can be found; and, further, that he demand and receive from H. C. Davidson, as assignee, the books of accounts, papers, or any other effects of said Abraham which may be in the possession of the said Davidson as assignee; and, further, that he demand, receive, and take possession of all the property sold by the said Davidson as assignee to L. Bernheimer, or any one else, and which may now be particularly located in that certain storehouse on Dexter avenue, in the city of Montgomery, known as 'No. 106,' and that the said L. J. Bryan, as such marshal, hold all of such property, so coming into his possession, until the further orders of this court."

Under this order, and on the same day, the marshal seized the stock of goods then in the possession of Louis Bernheimer, the purchaser at the assignee's sale; and on the marshal's report of the seizure, and his petition for instructions in reference to his disposition of the goods, the court, on the next day, December 13, 1898, made the following order:

"This cause coming on to be heard on the petition of the marshal for instructions in reference to goods seized by him under a former order of this court, and the same being considered by the court, it is ordered that Louis Bernheimer be notified to appear before this court within 10 days from the date hereof, and propound any claim he has to the goods so seized, or to any part thereof, or, failing therein, that he will be decreed to have no claim or

right thereto. The marshal is directed to retain possession of all said goods until further orders of this court. The clerk of this court will issue, and cause to be served on said Bernheimer, a copy of this order."

On December 17, 1898, the petitioning creditors submitted to the bankruptcy court the following:

"Your petitioners, the undersigned creditors of D. Abraham, respectfully show unto your honor that on, to wit, the 29th day of October, 1898, the said D. Abraham did make and deliver a deed of assignment to H. C. Davidson, who is a resident citizen of Montgomery city and county, and state of Alabama and district aforesaid; that thereafter, on, to wit, the 7th day of November, 1898, your petitioners did file in this honorable court a petition alleging that the said D. Abraham had committed an act of bankruptcy in executing said deed of assignment, and asked that the said D. Abraham be declared and adjudged a bankrupt under the act of congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States'; that thereafter, to wit, on the 12th day of December, 1898, said petition coming on to be heard, after a consideration of the evidence, the said D. Abraham was by this court duly adjudged a bankrupt, within the meaning of said act aforesaid. Your petitioners further show that, after the filing of their said petition in bankruptcy against the said D. Abraham, and in disregard of the proceedings therein pending, the said H. C. Davidson did, as your petitioners are informed and believe, on or about, to wit, the 17th day of November, 1898, turn over to and deliver to one L. Bernheimer all of the stock of goods which belonged to the estate of the said D. Abraham, and which were located in storehouse No. 106 Dexter avenue, in the city of Montgomery, Ala., said district aforesaid; that thereafter the said L. Bernheimer, who is a resident citizen of the city and county of Montgomery, state of Alabama, and said district aforesaid, did, in disregard of the proceedings pending in this court, proceed to sell, transfer, and deliver, largely for cash, said stock of goods as aforesaid. Your petitioners are informed, and upon such information show, that the said stock of goods, at the time the said Bernheimer took possession thereof, was worth, to wit, the sum of about \$10,000. Your petitioners are informed and believe, and upon such information show, that the said L. Bernheimer sold large quantities of said goods while the same were in his possession, to wit, from November 17, 1898, up to and during December 12, 1898, when the balance of said stock was taken, by an order of this court, into the hands of the marshal of this court. Your petitioners are informed and believe that the said L. Bernheimer received from said sales and transfers of goods which belonged to the estate of said D. Abraham large sums of money. Your petitioners are informed and believe, and upon such information show, that the said L. Bernheimer, at the time he took possession of said stock of goods, had knowledge of the proceedings in bankruptcy in this honorable court against the said D. Abraham. Your petitioners are advised by counsel, and upon such advice and information show, that the said L. Bernheimer, as against these petitioners in bankruptcy, did not and could not acquire title to the property of the said D. Abraham, and that said moneys so received by the said L. Bernheimer from sales and transfers of said property and goods belong to the estate of the said D. Abraham, bankrupt. The premises considered, your petitioners pray that an order may be issued by this honorable court directed to said L. Bernheimer, calling on him to file with the referee in bankruptcy, on a day named, a sworn statement of all moneys which the said L. Bernheimer has received from the sale or transfer of said goods of D. Abraham owned by him at the time of making his said deed of assignment, as well as such evidences of indebtedness as he may have received from any one for such sales, and that the said referee hold a reference to ascertain and report the correctness of such statement, and await the further orders of this court."

The record sent up to us does not expressly show what order was made by the bankruptcy court on this last application of the petitioning creditors. It, however, sufficiently appears, from the further action taken, that an order was granted in conformity with the prayer.

On December 22, 1898, Bernheimer submitted to the court the following:

"And now comes Louis Bernheimer, and in obedience to the command of said court issued on the 13th day of December, 1898, and served on said Bernheimer on said date, commanding him to appear before said court and propound his claim to the goods seized by the marshal of said court under a former order of said court in the said bankruptcy proceedings, and propounds his claim thereto, as follows: That on, to wit, the 29th day of October, 1898, the said David Abraham made a general assignment of all of his property, including said goods seized by said marshal while in the possession of claimant, for the benefit of his creditors; that one H. C. Davidson was named as assignee under said assignment, and was by the terms thereof relieved of giving any bond as such; that on the 7th day of November, 1898, certain creditors of the said Abraham filed their petition in this court asking that said Abraham be adjudged a bankrupt; that after said day and date the same creditors filed their petition in this court praying that said H. C. Davidson, as such assignee, be required to appear before said court, and show cause why he should not be restrained from selling the said goods so assigned to him; that, in obedience to the order issued by said court, said Davidson did appear before the said court, and, showing cause satisfactory to the court, said rule was discharged, and said court declined to make the order prayed for restraining him from selling said goods, on the ground that said petition was not sworn to and no bond given, and said petition was dismissed without prejudice; that thereupon said Davidson, as such assignee, proceeded to sell said goods at public auction for cash, in the city of Montgomery; that this claimant being advised by counsel learned in the law, and who were perfectly conversant with all the facts in the case, bought the said goods from the said Davidson at and for the price of three thousand five hundred dollars, which was a fair, just, and reasonable price therefor; that claimant paid the said Davidson, as such assignee, the full sum of three thousand five hundred dollars in cash for said goods, and went into immediate possession thereof, and has been in the possession of the same until he was deprived thereof by the said marshal under the orders of this court; that claimant never intended to interfere in any way with the process of this court, or with any property of said bankrupt, but was advised that he was at liberty to purchase said property under the sale made by said Davidson. Claimant represents to this honorable court that if he is deprived of these goods, and if the said Davidson is allowed to keep the money paid him by claimant as the purchase price of said goods, claimant's position in the premises will be one of great hardship and loss to him; that, under the terms of said assignment, said Davidson will be compelled to pay the money paid by claimant to him for such goods to the creditors of the said Abraham, including the said creditors who petitioned to have said Abraham declared a bankrupt, and the consequences will be that both the goods which the claimant purchased in perfect good faith and by advice of counsel will be held and sold again for the benefit of said creditors, and the money which claimant paid for said goods will also be used and paid out for their benefit. Claimant respectfully submits to the court his claim in this behalf. He asks the court's protection in the premises, and that it will issue such rules and orders in the premises as may be necessary to such protection. He further asks that the creditors of said bankrupt estate be remitted to the fund derived by said Davidson from claimant for the purchase price of said goods. Claimant prays, also, that in default of such order, or if he is mistaken in the relief prayed for, that your honorable court will issue a rule that the said Davidson be ordered to pay into this court the full amount derived by him from claimant as purchase money of said goods, and that same be paid over to claimant, who thereupon offers to rescind said purchase and to waive all further claim to said goods."

On December 24, 1898, Bernheimer made further showing to the bankruptcy court, as follows:

"Answer of L. Bernheimer, claimant, to petition requiring him to account for and turn over to the marshal proceeds of sale of certain goods, etc.: The

claimant, Louis Bernheimer, respectfully represents to the court that, as purchaser of the stock of goods formerly belonging to said bankrupt, under a sale thereof made by H. C. Davidson, to whom said bankrupt had assigned said goods, he entered into the possession thereof. That while in such possession, and in the regular course of trade, and before the marshal of this court, in obedience to its order heretofore issued, seized said goods, claimant sold a portion thereof, and received the proceeds of such sales. That the daily sales made by him of such goods were as follows: * * *, amounting in the aggregate to two thousand seven hundred sixty eight and $\frac{40}{100}$ dollars. That, at the time of the purchase by claimant from said Davidson, he also bought the exemptions allowed by law to said bankrupt under the laws of the state of Alabama and under the act of congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898. The amount of said exemption is one thousand dollars, which claimant, as such purchaser from said bankrupt, claims as exempt from any process for the payment of the debts of said bankrupt. Claimant claims all of said goods as his own under said purchase, as stated in his claim filed under the order of this court on the 22d day of December, 1898, but which was decided against him by this court on said date. And this answer is made without any prejudice to his claim to said goods, but as a part of the proceedings on his said propounded claim. That he has paid out of said sales, for expenses of clerks, insurance, and other necessary expenses, the sum of three hundred and ten and $\frac{10}{100}$ dollars, and returned twelve and $\frac{50}{100}$ dollars to purchasers, leaving a net balance of \$1,434.80."

To the showings or answers thus made by Bernheimer the petitioning creditors demurred on the same day each was respectively filed, on the following grounds:

(1 and 7) Because he shows no title to the property which would be good against their rights; (2) because at the time of his alleged purchase the court of bankruptcy had acquired jurisdiction of the property; (3) because at the time of the sale by the assignee both the assignee and the purchaser had actual knowledge of the filing of the original petition of these petitioners and of the proceedings thereon pending; (4, 5, and 6) because the making of the deed of assignment was an act of bankruptcy, void as to these petitioning creditors; (8) because this court has no jurisdiction to try and determine questions between the assignee and the purchaser at the assignee's sale.

On December 24, 1898, the court of bankruptcy entered its decree as follows:

"The matter of the claim of Louis Bernheimer to certain goods in the possession of the marshal of this court, and to the proceeds of the sales of other goods made by said Bernheimer belonging to the estate of said bankrupt, coming on this day to be heard on the said claims and on the demurrers thereto filed by the petitioning creditors in said bankrupt proceedings, it is considered by the court that the said demurrers be, and the same are hereby, sustained; and the said Bernheimer declining to amend or plead further, and facts being made to appear to the satisfaction of the court, it is ordered, adjudged, and decreed that the said Louis Bernheimer acquired no title to the said goods, or to the proceeds of the sales thereof, made by him under the purchase of said goods from H. C. Davidson, as assignee of said bankrupt, superior to the title of the creditors of said bankrupt's estate. It is further ordered that the said Louis Bernheimer pay over to the marshal of this court, to await the further orders of this court, all the proceeds of the sales (as may be ascertained by the referee and approved by the court, as stated hereinafter) made by him of any of the goods purchased by him of said H. C. Davidson, as assignee of said bankrupt, D. Abraham; and that it be, and is hereby, referred to H. Booth, Esq., referee, to hold a reference, giving all parties due notice, and ascertain and report to this court the amount of such proceeds."

On the application and prayer of the purchaser, Bernheimer, for an appeal to the circuit court of appeals, and for the allowance of a supersedeas, the district court made the following order:

"And now, on December 24, 1898, it is ordered that the appeal and supersedeas be allowed as prayed for."

On the same day the judge approved the bond for appeal and supersedeas. The assignment of errors was filed on January 14, 1899.

Gordon Macdonald, for appellant.

G. F. Mertins, John D. Rouse, and Wm. Grant, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The assignment of errors is to the effect that the court erred in its rulings on the demurrers, and presents this question: Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizing the goods, and requiring Louis Bernheimer, the purchaser at the assignee's sale, by a rule entered against him to appear before that court within 10 days, and propound any claim he had to the goods, or any part thereof, or, failing therein, that he be decreed to have no claim or right thereto? The appellee moves to dismiss this appeal: (1) Because the decree sought thereby to be reviewed is not such a judgment as may be appealed from under the provision of the bankrupt act; (2) that the order or decree sought to be reviewed is a summary order, and not appealable to this court; (3) that the order or decree is not a final decree, and, for that reason, is not appealable.

By the first section of the bankrupt act of 1867 the district courts were constituted courts of bankruptcy, and were given original jurisdiction in all matters and proceedings in bankruptcy, which jurisdiction they were authorized to exercise as well in vacation as in term time, and it was made to extend to all cases and controversies arising between the bankrupt and any creditor or creditors who claimed any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; to the marshaling and disposition of the different funds and assets so as to secure the rights of all parties, and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. To which was added, by the act of 22d of June, 1874, that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed \$500, be collected in the courts of the state where such bankrupt resides having jurisdiction of claims of such nature and amount. By the second section the several circuit courts of the United States were given a general superintendence and jurisdiction of all cases and questions arising under the act, and were authorized upon bill, petition, or other proper process of any party aggrieved to hear and

determine the case as a court of equity, except when special provision is otherwise made in the act. This power and jurisdiction was to be exercised either by the court or by any justice thereof, in term time or vacation. The circuit courts were also given concurrent jurisdiction with the district courts of all suits at law or in equity brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against the assignee touching any property or rights of property of the bankrupt, transferable or vested in such assignee. This last provision, as amended by the act of June 22, 1874, now appears as section 4979 in the Revised Statutes. By section 8 it was provided that appeals may be taken to the circuit courts in all cases in equity, and writs of error may be allowed from the circuit courts to the district courts in cases at law, under the jurisdiction created by the bankrupt act, when the debt or damage claimed amounted to more than \$500; and any supposed creditor whose claim was wholly or in part rejected, or an assignee who was dissatisfied with the allowance of a claim, could appeal from the decision of the district court to the circuit court on certain terms, conditions, and limitations, not necessary to notice here. By section 9 it was provided that in cases arising under the act no appeal or writ of error shall be allowed in any case from the circuit courts to the supreme court of the United States, unless the matter in dispute in such case shall exceed \$2,000. Amended by act of February 6, 1875, so as to read \$5,000. At the time of the passage of this act the conditions in this country were unprecedented. The immense proportions of the Civil War, the suspension of specie payments, the volume of paper currency issued by the national treasury and national banks, the large disbursements by government, the destruction by abolition of property in slaves in the 15 states which had theretofore recognized such property in so many millions of colored people, the throes of reconstruction, and the morbid activity which the liberated energy of more than a million veteran soldiers, with faculties quickened and strung to the highest key by the intensity of the protracted civil strife, had stimulated, and for a time sustained, had brought our commercial interests to that agonizing crisis of almost universal bankruptcy which raised a clamor for speedy liquidation. To meet these transcendent conditions, the provisions of the act of 1867 went beyond the terms of any previous law. When the courts of bankruptcy were opened, the office of circuit judge had not been re-established. The dockets of the supreme court were large, and growing, and severely taxed the time and strength of the circuit justices. Their residence at the national capital then rendered them more remote from, and more difficult to be reached by, parties to bankruptcy proceedings than it would now. They could visit each district, at the most, once only in every two years, for such brief period and labors as their service on the supreme bench then permitted. On the 10th day of April, 1869, the office of circuit judge in each of the nine circuits was re-established, and in due time filled by appointment. Thereafter the general superintendence of the circuit court became more efficient, and the jurisdiction of those courts on appeal or writ of error acquired more practical value, and was more invoked. Immediately upon the tak-

ing effect of the act, the dockets of the courts of bankruptcy became crowded. The most able and careful judges of the district court, pressed by urgent conditions and argument, with little call or time to doubt, began to extend summary process and proceedings so as to meet all individual cases presented. The growing weight of precedent thus nourished by their own practically unreviewable or actually unreviewed decisions carried their jurisdiction to that point where a few years later it became burdensome and dangerous to all persons engaged in agricultural, manufacturing, or commercial pursuits, and dealing to any considerable extent on credit. By the aid of the court of bankruptcy, or without its aid, the efforts of individuals to better their position in trade and other industries caused a strong reaction to set in, and the conditions which had excused and rendered tolerable the exercise of exorbitant jurisdiction by the courts of bankruptcy began to disappear. Commercial transactions acquired a more healthy tone. With some variableness of symptoms, and occasional relapses, more or less severe, the country was steadily recovering, and approaching specie payment, and a sound normal basis of dealing and credit. The summary processes and proceedings in bankruptcy were no longer so much needed or used for the relief of honest debtors, or the protection of creditors against the fraudulent dealings of dishonest insolvents, but came to be used rather for the too rigorous enforcement of collections against honest and substantially solvent, but temporarily embarrassed, dealers. Provision had been made for the resumption of specie payments to take effect on January 1, 1879. On the 7th day of June, 1878, congress passed the act which repealed the bankrupt law, to take effect on September 1, 1878. Thereupon varying insolvent laws, embracing more or less bankruptcy features, were restored or established in most of the different states. The force of the bankruptcy features of these laws was, of necessity, limited in its operation to the territory of the respective states, except so far as it could be and was extended by the consent of creditors. It soon became apparent that the country had substantial need of a national act to establish a uniform system of bankruptcy throughout the United States. Strenuous efforts began to be made both in and out of congress to secure such action on its part as would meet this need. Numerous bills were drawn with elaborate care, studiously constructed on the lines of the previous law and the decisions under it. It was attempted to frame a bill that would be permanent in its beneficial operation, adjust itself to the varying conditions of trade, and be free from all oppressive features or needless rigor. This effort was maintained in congress from session to session, but the recollection of the effect of summary proceedings in bankruptcy under the act of 1867 was so vivid and repugnant that it prevented or delayed for a period of 20 years the action of congress, so much needed, and so urgently sought.

Some cogent reasons combined or coincided to lead the judges of the courts of bankruptcy to take and hold liberal views as to the extent of their jurisdiction in matters of bankruptcy. More than in other matters, this jurisdiction appeared to be the jurisdiction of the judge, as distinguished from that of the court. In these matters there

seemed to be little room, if any, for such distinction. At any point within his district, and at any time,—in term time or vacation,—in open court or in chambers, he was authorized to exercise this jurisdiction to an extent and in a manner well calculated to evolve the unconscious or conscious thought that he was the court of bankruptcy. The judge of the court of bankruptcy not only presided alone in the district court in the exercise of all the other jurisdiction of that court, but he could, and generally did, preside alone in the circuit court, and exercise all the original jurisdiction of that court, except its jurisdiction to take, on due application, a general superintendence of all cases and questions arising in the courts of bankruptcy under the bankrupt act. Thus, where original jurisdiction in bankruptcy proceedings could be conducted in a summary manner, the exercise of such jurisdiction was exclusively his, and in all matters affecting the bankrupt's estate, in which legal proceedings were required to be by plenary suit or action, when the same were pending in the circuit court, he could, and in actual practice generally did, preside alone. His action in these plenary causes in the circuit court could only be reviewed by the supreme court, and by it only in such cases as involved a matter of sufficient amount in value to support an appeal or writ of error. From many of the districts the supreme court was very far away in point of distance, and, whether far or near, the day at which it could reach and decide a case on appeal or writ of error was indefinitely remote. Therefore parties and counsel were reasonably inclined to acquiesce in the views of the judge of the court of bankruptcy, even where they were not (as they more often were than otherwise) interested, and urgent to extend his jurisdiction to meet the exigencies of the case they had or represented. However, after the lapse of some years, cases began to reach the dockets of the supreme court. And, after the substantial final settlement by the subordinate courts of the great bulk of the business that arose under the act, the supreme court began to reach the cases on its dockets which involved the construction of the act, and to announce decisions marking the boundaries of the jurisdiction it conferred, and the manner of procedure in its exercise. These decisions settled that most matters and proceedings in bankruptcy were to be heard and adjudicated in a summary way, but that the general jurisdiction thus to proceed did not extend to controversies by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of the bankrupt transferred to or vested in the assignee; that such controversies, where they could not be settled otherwise than by legal proceedings, could be prosecuted only by plenary suits at law or in equity. *Smith v. Mason* (Dec. Term, 1871) 14 Wall. 419. Of these plenary suits the circuit courts were given concurrent jurisdiction with the district courts of the same district. This language of section 2 necessarily implies, either that the district court had jurisdiction in such matters under the general grant in section 1, or it confers such jurisdiction on that court. It was held in *Goodall v. Tuttle*, 7 N. B. R. 193, Fed. Cas. No. 5,533, that section 2 did not confer it. It seems also to imply that only the circuit courts and the district courts had original juris-

diction in such cases. It doubtless so appeared to the commissioners who prepared the revision of the statutes of the United States, and to the committees of congress which examined the same before it was adopted by an act approved June 22, 1874, for in section 711 of the revision it is declared: "The jurisdiction vested in the courts of the United States in cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: * * * Sixth, of all matters and proceedings in bankruptcy." And in the act of June 22, 1874, amending the act of 1867, it was, as we have seen, deemed necessary to provide that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed \$500, be collected in the courts of the state where such bankrupt resides having jurisdiction of claims of such nature and amount. The reason for this provision doubtless was that the general original jurisdiction of the federal courts was limited to controversies involving matter in value to the amount of \$500 or more. In one case decided at the October term, 1875, it was assumed in the opinion of the court that the state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts which had vested in the assignee in bankruptcy. *Lathrop v. Drake*, 91 U. S. 516. At the same term it was held that the jurisdiction conferred upon the federal courts for the benefit of an assignee in bankruptcy is concurrent with, and does not divest, that of the state courts in suits of which they had full cognizance. *Eyster v. Gaff*, Id. 521. As highly instructive, and pertinent to our inquiry, we quote some of the language of the opinion in the case last cited:

"The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with, and does not divest, that of the state courts."

The same questions were involved in other cases pending in the supreme court, and at the next term (October term, 1876) were elaborately argued by counsel, closely scrutinized by the court, and fully discussed in its opinion, prepared and delivered by the same judge who had been the organ of the court in delivering its opinion in *Lathrop v. Drake*; and the doctrine which was assumed in the opinion in that case, and which was distinctly held in *Eyster v. Gaff*, was adhered to, and the general principle was announced that, where jurisdiction may be conferred on the United States courts, it may be made

exclusive where not so by the constitution itself, but, if exclusive jurisdiction be neither express nor implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. *Claffin v. Houseman*, 93 U. S. 130. By the second section of the act of July 1, 1898, the district courts, as courts of bankruptcy, are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers, and during their respective terms, to "(7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided." It is provided by section 23:

"(a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.

"(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

By section 67e it is provided that all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt, under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same, by legal proceedings or otherwise, for the benefit of the creditors.

It is provided by section 26a:

"The trustee may, pursuant to the directions of the court, submit to arbitration any controversy arising in the settlement of the estate."

Section 27a:

"The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

By clause 3 of section 2, the courts of bankruptcy have authority to "appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified. * * *"

By section 3e it is provided:

"Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or the judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

Section 69a provides:

"A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected, or is neglecting, or is about to so neglect his property, that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained."

Trustees are vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt, with exceptions not necessary to notice. Section 70. Trustees thus vested with title are charged to "collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interest of the parties in interest." Section 47a, cl. 2. And receivers or the marshal may be appointed to discharge the duties of trustees until trustees are appointed.

We have thus grouped together the provisions of the present law which appear to bear on the subject of our inquiry. We have noticed in the opening part of this opinion the extensive and apparently exclusive jurisdiction that was given by the act of 1867 to the national courts over the subject of proceedings in bankruptcy and of cases arising out of such proceedings. Under the present act, if the bankrupt has his principal place of business, resides, or has his domicile in the United States, the adjudication of his bankruptcy and the proceedings therein must be in the district where he has so had his principal place of business, his residence, or his domicile for the preceding six months, or the greater portion thereof. The general rule is that a person can be sued in the United States courts only in the district whereof he is an inhabitant, and no suit can be brought in those courts unless the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. It is therefore apparent that, as a general rule, all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees, as such (or other duly appointed and empowered representatives of the bankrupt's estate), and adverse claimants concerning the property acquired or claimed by the trustees (or other duly appointed and empowered rep-

representatives of the estate), which cannot be, or are not, adjusted by negotiation, arbitration, or compromise, must be abandoned by the trustees or adjudicated in the state courts, unless by consent of the proposed defendant suit can be brought in a United States court. If we concede or assume that the making of a deed of general assignment within four months of the adjudication in bankruptcy, which, by the express terms of the law, is an act of bankruptcy, wholly invalidates the deed, so that no title can pass thereby, as against the grantor's creditors, no matter what may be its terms or the avowed and apparent intent of the parties as shown by the deed (a concession which we are not now prepared to make and do not make, except for the purposes of the argument), the property and assets thereby attempted to be conveyed are precisely such assets and estate as it is made the duty of the trustee to recover and reclaim "by legal proceedings, or otherwise." Whatever the words "or otherwise" may embrace, it can hardly be seriously contended that they embrace such summary proceedings in bankruptcy as the issuance of a special warrant to the marshal to seize the goods, and the service of a rule upon the claimant to come before the court of bankruptcy and render an account, and make restitution for the value of any portion of such goods so attempted to be transferred to him which have been sold or otherwise disposed of by him. Such a construction would render more than nugatory surplusage the language, "by legal proceedings." If, therefore, we were restricted in our view to the terms of section 67e, it would clearly appear therefrom that, "by legal proceedings," must be intended controversies at law and in equity, as distinguished from proceedings in bankruptcy. But our view is not limited to the terms of section 67e. Conceding that the deed of assignment is invalid, and that no title passed to the assignee, or from him to the adverse claimant, as against the grantor's creditors, then such title as the bankrupt had at the time of making the assignment vested fully in the trustee, and might and doubtless often would be surrendered to him on demand. If such demand was refused, the act itself, as we have seen, provides for arbitration or compromise of the controversy. If these fail, and resort must be had to legal proceedings, the adverse claimant is entitled to his day in court, and in that court in which the bankrupt could have brought suit against him for the recovery of the property and assets. The fact that the bankrupt might be estopped and fail of securing a recovery in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him. He would have a right to sue and to show, if he could, that title did not pass by the making and delivery of the deed. That is precisely what the trustee has to show, or, to state it more guardedly, the converse of that is precisely what the adverse claimant has the right to try to show, namely, that title did pass to him under the deed and by the subsequent action of the assignee.

As already intimated, no question as to the validity or invalidity of the title of Bernheimer to the goods which he claims to have acquired from the assignee under the deed of assignment is now before us, or in any manner to be concluded or affected by what we decide, or what we say in deciding the question of law that we are considering and

which we stated at the opening of this opinion to be, did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizure of the goods, and a rule to account entered against the adverse claimant? It seems clear to us that, under the act of 1867, the district courts, as courts of bankruptcy, were not invested with jurisdiction to proceed in that way in such cases as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction.

We are now to consider more directly the question presented by the motion to dismiss. By the act to establish circuit courts of appeals, this court has appellate jurisdiction to review by appeal or by writ of error final decision in the district courts in all cases other than those in which appeals or writs of error may be taken direct to the supreme court, unless otherwise provided by law. Appeals may also be taken to this court in the same cases from certain interlocutory orders or decrees rendered by the district court. By section 25a of the present bankruptcy law, appeals may be taken in equity cases in bankruptcy proceedings from the courts of bankruptcy to this court in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of \$500 or over. Such appeal shall be taken within 10 days after the judgment appealed from has been rendered, and may be heard and determined by this court in term time or vacation, as the case may be. The judgment, order, or decree appealed from in this case is not embraced in either of the three classes of cases as just cited from the statute. It was not rendered on an original independent bill in equity, nor in a proceeding ancillary thereto. If considered in reference alone to its terms, its provisions for being put into immediate execution, if not in effect self-executing, give it the elements of a final decree, within the statutes and decisions under which appeals are taken from decrees in ancillary proceedings in an equity suit. We do not, however, consider it necessary in this case to decide whether an appeal can be taken from that judgment as from a final decree in equity.

Section 24b provides:

"The several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The second section of the act of 1867 provided that the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under the act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. By section 8 of that

act, it was provided that appeals may be taken from the district court to the circuit court in four classes of cases named, but that no appeal shall be allowed unless it is claimed and notice given thereof within 10 days after the entry of the decree or decision appealed from. In a case presented to the circuit court in which Chief Justice Chase was at the time presiding, it appeared that certain judgments or orders were rendered by the district court on the 16th of March, 1869; that the petitioners, as soon as these orders came to their knowledge, prayed an appeal in the name and with the approval of the assignees, and immediately gave notice of their appeal. The time for filing the bond on appeal was extended by the order of the district judge until the 18th of April, and on the 14th an order was passed showing that the assignees had filed their bond in the penalty of \$10,000. On the 6th of May, the assignees informed the counsel for the petitioners that they would not allow the use of their names in the prosecution of this appeal. "The petitioners therefore ask [the date of presenting their petition does not appear in the opinion] in consideration of the surprise occasioned to them by this information, and also upon the ground that no appeal from the order of the district judge in such a case as that before him is allowed by the act, that the court will give them leave to file their petition now presented, and grant them appropriate relief." The chief justice reviewed the provisions of the statute, and held that the order mentioned in the petition was one from which no appeal could be taken, and drew the inevitable conclusion "that it is one which may be reviewed in the exercise of the power of general superintendence, or that it cannot be reviewed at all." He then proceeds to discuss the power of general superintendence conferred on the circuit courts, and concludes his review thereof thus:

"The exercise of this general jurisdiction is not placed by the act under specific regulations and restriction like the proceeding by appeal or writ of error. It was doubtless thought most advisable to leave its regulation to the discretion of the court and to the rules to be prescribed by the supreme court. As yet the supreme court has prescribed no rule concerning it, nor has this court."

Leave was granted to file the petition. In re Alexander, 3 N. B. R. 6, Fed. Cas. No. 160.

The general orders in bankruptcy adopted and established by the supreme court, "under the powers conferred by the constitution and laws on the supreme court of the United States, and particularly by the act of congress approved July 1, 1898, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,'" prescribe no rules or forms to guide or govern the exercise of this jurisdiction by the circuit court of appeals. If we may, or should, establish some rule or rules to regulate the same, we have not done so. In this connection we again quote the language of Chief Justice Chase in the case last cited:

"In the case before us, its exercise must depend on the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed; nor, on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated."

In the exercise of this discretion, we must, of course, keep in view the terms of the statute. It declares that the jurisdiction is in equity;

that it is either interlocutory or final, and to be exercised only in matter of law. It prescribes no mode other than that it shall be on due notice and petition of any party aggrieved. In the general orders in bankruptcy, above referred to, there are both rules and forms for the framing of petitions, but they relate to petitions as defined in section 1, cl. 20, which reads:

"'Petition' shall mean a paper filed in a court of bankruptcy with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named."

The words "due notice" do not prescribe the time or manner of giving the notice, or the parties to whom it is to be given. All the courts which are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings are authorized to exercise their jurisdiction in term time or vacation, as the case may be. By rule 36 of general orders in bankruptcy it is provided that:

"Appeals from a court of bankruptcy to a circuit court of appeals * * * shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."

The right of appeal, as given by the statute, can neither be enlarged nor restricted by the district court or by this court. The regulation of appeals is a regulation of jurisdiction. It was not without purpose, therefore, that the exercise of the superintending jurisdiction of this court is not placed by the act under specific regulations and restrictions, like the proceeding by appeal or writ of error. It seems clear to us, from a consideration of the various provisions of the act, and particularly of the clause conferring superintending and revising jurisdiction on this court, that it was the intent of congress that the exercise of such jurisdiction could be easily invoked by any party aggrieved, and should be freely exerted by the circuit courts of appeals, without the hindrance of technical trammels. In analogy to the rule prescribed for allowing appeals, and to the practice in allowing writs of error in cases at law, the petition for revision may be presented to and allowed by a judge of the court of bankruptcy, or any one of the judges of this court. It should, with reasonable clearness, show the action of the court which it seeks to have revised in matter of law, and reasonable notice thereof should be given to the adverse party. The appeal prayed for, allowed, and perfected in this case, bringing up, as it does, the record of the pleadings, which present all the facts, either verified by the petitioning creditors, whom the appellee represents, and cannot be allowed to dispute, or averred by Bernheimer, and admitted by the demurrer, showing all of the action of the judge thereon, including the last order from which the appeal was taken, may embrace more than it was necessary to put into a petition for revision; but it clearly does embrace a sufficient statement of the facts and action of the court thereon sought to be revised in matter of law. No question has been raised, or can be raised, as to the sufficiency of the notice. It is apparent from the proceedings that the appeal was prayed for and allowed in open court, in the presence of all the parties or their attorneys, at the very instant that the judgment sought to be revised was announced. They thus had, or must be charged with, due

notice. We conclude that the motion to dismiss the proceedings in this court should not be granted.

We could, did we deem it necessary, permit the party aggrieved now to file his petition for the revision he seeks, and, upon due or reasonable notice thereof being given to all parties entitled thereto, proceed thereon, in the exercise of our jurisdiction. We have not deemed it necessary or meet in this case to have resort to that course, but have proceeded to consider the case on its merits, in like manner as if a formal petition had been presented, and due notice thereof given. We may not feel justified in exercising our discretion to the same extent in all cases which may be brought to us in the future. The proceedings in this case in the district court were had before the general orders in bankruptcy took effect, or had been widely published, and become generally known to parties or counsel, or the judges of the inferior courts. The provisions of the act with reference to appeals to this court and to obtaining the superintendence and revision it may exercise are, in a measure, new; and precedents under the former law, if they were uniform (which they are not), could not be safely followed. It appears from the record that the deed of assignment to Davidson was executed and delivered on October 29, 1898; that the assignee at once entered upon the execution of the trust, and, as required by the laws of the state of Alabama, filed in the proper state court an inventory of the property, which consisted mainly of the stock of goods in controversy in this proceeding, and appraisers were duly appointed, who appraised all the effects covered by the assignment, and made return thereof to the state court; that on November 7th certain creditors of Abraham filed their petition in the court of bankruptcy praying that Abraham be adjudged a bankrupt; that thereafter the same creditors filed another petition in that court, praying that Davidson be required to appear before the court, and show cause why he should not be restrained from selling the goods so assigned to him; that, in obedience to this order, he did appear and show cause satisfactory to the court; that the rule against him was discharged, and, the court declining to grant the restraining order, on the ground that the petition therefor was not sworn to, nor any bond given, dismissed the petition without prejudice; that thereupon Davidson, as assignee, proceeded to sell the goods for cash in the city of Montgomery; that Bernheimer bought the same for the price of \$3,500, which he paid in cash, and went into immediate possession of the goods on November 17th; that, claiming to be the purchaser and owner of the goods, Bernheimer proceeded from day to day to sell portions of the same, in the regular course of business, from November 17th up to and during December 12th; that on December 12th the marshal seized, under the special warrant on that day issued out of the court of bankruptcy, that portion of the goods still remaining in Bernheimer's possession; that during the time Bernheimer was in the possession of the stock of goods he made sales thereof to the gross amount in value received therefor of \$2,768.40; that at the time of his purchase from Davidson, Bernheimer bought from Abraham the exemptions allowed by the law of Alabama, the state of the bankrupt's domicile, amounting to the sum of \$1,000; that during the time Bern-

heimer was making sale of the goods purchased from Davidson he paid out for clerks, insurance, and other necessary expenses the sum of \$310.10, and returned to purchasers the sum of \$12.50; that these three sums—\$1,000 paid the bankrupt for his exemptions, the \$310.10, and the \$12.50, aggregating \$1,322.60—leave a net balance of cash received by him from the sale of the goods purchased and received from Davidson of \$1,445.80; that the goods seized are now in the custody of the marshal (the appellee), held for the benefit of creditors. The application of the petitioning creditors for the special warrant obtained in this case having been made on the same day, but after Abraham was adjudged a bankrupt, does not bring them within the letter of section 3e, nor of section 69a, the provisions whereof do not, therefore, literally denounce against them the penalty therein prescribed for wrongfully obtaining thereunder the seizure of the property of an alleged bankrupt; but, in the light of the construction which should be placed, and which we have placed, on the provisions of the bankrupt law, their application for the writ to seize, and the seizure thereunder of the goods in controversy, was a flagrant violation of the spirit of those provisions. Therefore, upon adjudging, as we do, that their application and the issuance of the writ thereon was wholly unwarranted, the seizure and holding of the goods unlawful, and that the possession thereof must be restored to the adverse claimant, it is our opinion that he should be allowed all costs, counsel fees, and damages occasioned by such seizure, taking, and detention of the property so adversely claimed and held by him; the counsel fees, costs, expenses, and damages to be fixed and allowed by the court of bankruptcy, and to be paid by the petitioning creditors; to secure the payment whereof Bernheimer should be allowed a lien on whatever distributive share they may be entitled to receive out of the bankrupt's estate. It is our duty to prevent the springing up of a practice that will extend summary process and proceedings in bankruptcy to controversies between trustees or other parties to the bankruptcy proceedings and adverse claimants. Under the act of 1867 such a practice was prevalent in many quarters at one time, but it rested on opinions taking a view of the provisions of that act against which, as we have seen, the supreme court steadily set its face. As we construe the provisions of the present law, they not only do not admit of such a view, or authorize such a practice, but carefully guard against it, and forbid it.

It is ordered and decreed that the order, judgment, and decree appealed from, rendered on December 24, 1898, be, and the same is hereby, reversed, and the cause is remanded to the district court sitting in bankruptcy, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant, Louis Bernheimer, on the 17th day of December, 1898, to vacate all orders made thereon, and to restore to the said Louis Bernheimer the goods taken from his possession, and thereafter proceed in accordance with the views expressed in this opinion, and as equity may require.

PARLANGE, District Judge (dissenting). The matter which the record in this case presents for decision is whether the creditors of the

bankrupt could proceed summarily in the court of bankruptcy to compel the purchaser at the sale of the bankrupt's property by the assignee to deliver the property or its proceeds to the court of bankruptcy. Incidentally, the right of the purchaser to appeal to this court is contested. I concur fully in the conclusion reached by this court on the matters just stated, and which are, in my opinion, the only matters before this court for decision. The able and exhaustive opinion of the court shows that the court of bankruptcy was devoid of jurisdiction when proceeding against the purchaser as it did, and that the state court is the proper forum to settle the dispute between the purchaser at the assignee's sale and the bankrupt's creditors. The opinion of this court also shows that the purchaser, in coming to this court, mistook his remedy. It is clear that he should have proceeded by petition, and not by appeal. I agree fully that the indulgence of this court in treating, of its own motion, the appeal as a petition, is just and proper for the reasons stated in the court's opinion. But I am constrained to dissent as to the intimation that the court of bankruptcy could not have taken possession of the bankrupt's estate prior to the sale, and while it was in the hands of the assignee; and I must further dissent from the direction to the court of bankruptcy to proceed to decree damages, counsel fees, and costs against the creditors. The question whether a court of bankruptcy has power to take the bankrupt's property from his assignee is not before this court. The circuit courts of appeals for the Second and Eighth circuits have, without a dissent, held that the court of bankruptcy may take the property from the assignee,¹ and both courts referred, in their own able opinions, to the equally able opinion of Judge Brown, in *Re Gutwillig*, 90 Fed. 475. The will of congress, in matters of bankruptcy, is paramount. On such a subject a state statute could not prevail, and it is difficult to comprehend how an individual may defeat, or even impede, the will of congress. The assignee is the bankrupt's agent. I do not see how the court of bankruptcy is deprived of power over the bankrupt's property, because it is found in the hands of the bankrupt's agent. But, be this as it may, it seems to me that the case before the court does not call in any manner for an opinion on the point, and that it would be wiser to defer a determination concerning it until it should come up as a contested issue.

It also seems to me that the court of bankruptcy should not be directed to proceed to impose damages, counsel fees, and costs on the creditors. There is no such demand before us, either in the pleadings or in the briefs. Litigants are usually careful to ask for all that they believe themselves to be entitled to, or that there is any probability of their recovering. They often ask too much, and very seldom, if ever, ask too little. While I agree fully, as has been already stated, that a proper indulgence has been shown the appellant in view of the inevitable uncertainty attendant upon the putting into operation of a new and complex law, I believe that some indulgence should also be shown the creditors, or, at least, this court should not be so rigorous towards them as to impose upon them damages, etc., which have not been asked for.

¹ In *re Gutwillig*, 92 Fed. 337; *Davis v. Bohle*, Id. 325.

I do not understand this court to hold that the creditors cannot recover the bankrupt's property or its proceeds from the purchaser. This court holds that such recovery cannot be had by summary proceeding in the court of bankruptcy. It is evident that this court would not undertake to say what the state court should decide if a suit is brought there to recover the property or its proceeds from the purchaser. It may be that the state court will take the view that the sale is voidable.

Section 69 and section 3e, referred to in the opinion of the court, both relate to bonds given to secure an alleged bankrupt against damages which may result to him from the seizure of his property. Neither section is intended to secure a person situated as is the purchaser in this case. No bond was given under either section. The bankrupt is not complaining of damages to his property. If bonds had been given under either of the sections just mentioned, he alone could have availed himself of them.

Furthermore, I am far from being certain that the court of bankruptcy has jurisdiction to try the question of damages. As the court of bankruptcy has no jurisdiction to entertain the proceeding of the creditors, it is difficult to see how that court has jurisdiction to inflict damages in that same matter. The supreme court has said that a court which has no jurisdiction of a case cannot even award costs, or order execution for them to issue. *Mayor v. Cooper*, 6 Wall. 247; *Smith v. Whitney*, 116 U. S. 175, 6 Sup. Ct. 570; *Elk v. Wilkins*, 112 U. S. 98, 5 Sup. Ct. 41. Under the very views so ably expressed by this court as to the restricted powers of the court of bankruptcy, I have grave doubts, to say the least, with regard to the power of the court of bankruptcy to cause to be framed and to determine an issue between the creditors and the purchaser as to the damages.

In re RUDNICK et al.

(District Court, D. Massachusetts. May 1, 1899.)

No. 191.

1. **BANKRUPTCY—COMPOSITION—SETTING ASIDE.**

Bankruptcy Act 1898, § 13, providing that the judge of the court of bankruptcy may set aside a composition duly confirmed "if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition," defines exclusively the ground upon which a composition may be vacated, and operates as a limitation upon the general grant of authority in section 2, cl. 9, which gives to the courts of bankruptcy jurisdiction to "set aside compositions and reinstate the cases."

2. **SAME.**

A composition in bankruptcy, duly confirmed by the court, will not be set aside, on the petition of a creditor not charging fraud, merely because such creditor's address was erroneously stated in the bankrupt's schedule, and consequently the creditor had no notice of the proceedings in bankruptcy, and did not prove his debt, and the same was not included in the composition.

In Bankruptcy.

Josiah Bon, for bankrupts.
Clarence P. Weston, for petitioning creditor.

LOWELL, District Judge. This is a petition to set aside a composition. The address of the petitioning creditor was erroneously stated by mistake in the bankrupt's schedule, and hence the petitioner received no notice of the bankruptcy proceedings. He did not prove his debt, and the bankrupt's deposit did not cover any dividend thereon. It is contended by the bankrupt that the composition cannot be set aside except in pursuance of the provisions of section 13 of the bankruptcy act; that is to say, unless fraud was practiced in the procuring of the composition, which is not charged in this case. The petitioner contends, on the other hand, that the court of bankruptcy has the right to vacate its own decrees when the same have been improperly made.

Section 2 (9) of the bankruptcy act gives the courts of bankruptcy "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, to confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases." Section 13 provides that "the judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside, and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition." Is the authority given by section 2 limited by section 13? I think it is, and that, as the court has no power to confirm or reject a composition except pursuant to section 12, so it has no power to set one aside except pursuant to section 13. Were this not the case, section 13 would seem to be meaningless and useless. It has been suggested, indeed, that some effect may be given to the section by construing it as limiting to six months the time within which a composition may be set aside on the ground of fraud; but this construction severely strains the language. If it were the true construction, then the judge might, because certain formalities had not been complied with, set aside a composition at any time, though, on the ground of fraud, he might not set it aside after six months had passed; and so the section would be construed to make formal error weightier consideration than fraud for setting aside a composition. Again, if the construction suggested by the petitioner were correct, though the judge might not, after six months, set aside a composition upon the ground of fraud, if knowledge of the fraud had come to the petitioners since the confirmation of the composition, yet, if the knowledge of the fraud had come to the petitioners before the confirmation, he might, if he saw fit, set the composition aside after any interval of time, however long. Upon the whole, it seems clear that section 2 (9) is intended to give the court of bankruptcy jurisdiction concerning compositions, but not in any way to determine when compositions shall be confirmed and when set aside; that section 38 (4) lim-

its the jurisdiction to the judge, and takes it away from the referee; that section 12 defines exclusively the mode by which, and the terms upon which, a composition may be confirmed; and that section 13 defines exclusively the grounds upon which it may be set aside. Similarly, section 2 (12) gives the court of bankruptcy jurisdiction concerning discharge; section 38 (4) limits this jurisdiction to the judge; section 14 defines exclusively the conditions under which a discharge may be granted; and section 15 defines exclusively the conditions under which it may be revoked. The strongest case in support of the petitioners' contention which I have been able to find is *In re Dupee*, 2 Low. 18, Fed. Cas. No. 4,183, but that case was decided under the act of 1867, which, in this respect, differed totally from that of 1898. Perhaps a case may be imagined, not within the terms of section 13 of the latter act, where this court would have jurisdiction to vacate its decree of confirmation improvidently rendered; but, plainly, congress did not contemplate that a composition should be set aside on the ground that a creditor had failed to get notice of the proceedings because his address was misstated in the bankrupt's schedule by mistake. Petition dismissed.

In re STEVENSON et al.

(District Court, E. D. North Carolina. April 22, 1899.)

1. BANKRUPTCY—EXEMPTIONS—FOLLOWING STATE DECISIONS.

On the question of the right of the individual members of a bankrupt firm to have set apart to them, out of the partnership assets, the exemptions allowed by the law of the state, the federal courts, sitting in bankruptcy, will follow the rule established by the decisions of the highest court of the state.

2. SAME—PARTNERSHIP ASSETS.

In North Carolina, in case of the bankruptcy of a partnership, where there are firm assets but no individual estate, each partner is entitled to receive, out of the partnership assets, the exemption allowed by the law of the state, provided the other partner consents thereto; and the fact that the petition in bankruptcy is signed by both partners is conclusive evidence of such consent mutually given.

In Bankruptcy. In the voluntary bankruptcy of the firm of Stevenson & King, each of the partners claimed to have set apart to him, out of the partnership assets (there being no individual assets), the personal property exemption allowed by Const. N. C. art. 10, § 1. The referee in bankruptcy, on a hearing, decided in favor of the claim of the bankrupts, and, on exceptions by certain creditors, this decision was certified to the court for review.

J. H. Pou, for bankrupts.

R. C. Strong, for creditors.

PURNELL, District Judge. The bankrupts were partners and had no personal property, except a stock of goods owned by the partnership firm. The only question contested and argued, was whether both partners are entitled to the personal property exemptions out of the

firm assets. The act of congress of July 1, 1898, entitled an "Act to establish a uniform system of bankruptcy" (section 6), provides:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

In addition to the general rule that federal courts will follow the decisions of the highest court of the state in construing their own statutes, this section makes it obligatory on the court of bankruptcy to follow such decisions in regard to exemptions. It contemplates that the bankruptcy law shall not affect the exemptions as allowed under the state law and construed by the courts of the state. Hence the state decisions are paramount in cases like the one at bar. The constitution of North Carolina (section 1, art. 10) provides:

"The personal property of any resident of this state, to the value of five hundred dollars, to be selected by such resident, shall be, and is hereby exempted from sale under execution, or other final process of any court, issued for the collection of any debt."

This section of the constitution has been frequently before the supreme court of the state, and it seems to be the settled law of the state that partners having no other property than the firm assets each is entitled to the personal property exemptions out of such property, provided the other partner or partners consent. *State v. Kenan*, 94 N. C. 296; *Burns v. Harris*, 67 N. C. 140. In the first case cited it was urged upon the court to reverse this ruling, as in variance with the decisions of many other states; but the court, after discussing the decisions of other states, adhered to the former ruling, and it seems to be the settled law in North Carolina.

The petition in bankruptcy, signed by both the partners, is written evidence under oath of a consent previously given, if it is not a consent *per se*, that each partner shall have the personal property exemptions allowed by the constitution and laws of North Carolina, as construed by the supreme court. A denial of the personal property exemptions, where there is even doubt about the consent, is upon the ground that each has the right to have his separate estate exonerated from debt as far as possible by the partnership assets, not because of any lien or legal right inherent in a creditor. In bankruptcy, the discharge exonerates the estates of each partner, if the petition is joint and several. Whether the consent, therefore, would be of as much importance in bankruptcy as in a proceeding in a state court, may be doubted; but the law as decided by the supreme court is as stated above, and the bankruptcy court must abide thereby, not because it should be, but because it is, so. The decisions cited to the contrary do not apply, for one at least makes an exception where the forfeiture is by bankruptcy, and the law of 1898 expressly provides that the exemption shall not be affected. I must therefore hold that this is conclusive evidence of a consent, and that both partners are entitled to the personal property exemptions out of the firm assets. The decision of the referee herein is affirmed.

In re SMITH.

(District Court, W. D. Texas, El Paso Division. April 25, 1899.)

No. 7.

1. **BANKRUPTCY—REVIEW OF DECISION OF REFEREE.**

Under General Order No. 27 (18 Sup. Ct. viii.), in bankruptcy, the decision of the referee on a contest between the bankrupt and one of his creditors cannot be certified to the judge for review when the referee's finding is not followed by any order made by him, and the exceptant does not file a petition setting forth the error alleged to have been committed by the referee.

2. **SAME—CONTEST AS TO EXEMPTIONS.**

The question of the status of a particular chattel claimed by the bankrupt as exempt, and by a creditor as assets of the estate, cannot properly come before the court for determination until a trustee has been appointed, and has made his report of the articles set apart by him as exempt. Exceptions to the trustee's action may then be heard by the referee, and certified by him to the judge for final determination.

3. **SAME—APPOINTMENT OF TRUSTEE—AFTER-DISCOVERED ASSETS.**

In a case of voluntary bankruptcy, where no trustee was appointed, for the reason that the schedule showed no assets, and no creditors attended the first meeting, if the referee afterwards learns that property of the bankrupt has been found, which creditors claim as assets of the estate, a trustee should then be appointed, according to General Order No. 15 (18 Sup. Ct. vi.).

In Bankruptcy. On review of finding of referee.

Frank E. Hunter, for bankrupt.

Z. B. Clardy, for contesting creditor.

MAXEY, District Judge. Richard F. Burges, Esq., one of the referees in bankruptcy, has submitted the following certificate for the consideration of the judge:

"I, Richard F. Burges, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings: Is a diamond, of the value of two or three hundred dollars, which is set as a shirt stud, and is habitually worn as such, exempt to a bankrupt under the statute of Texas, which exempts 'all wearing apparel'? Art. 2397, Rev. Stat. Tex. 1895. An agreed statement of all the evidence pertinent to this issue which was adduced upon the hearing thereof is hereto attached, and marked 'Exhibit A,' and made a part hereof. And the referee, after hearing all the evidence, and the authorities submitted, and argument made by counsel for both parties, to wit, the Edgewood Distilling Co., contestant, and Phillip Smith, bankrupt, held that such diamond was not exempt. Whereupon Phillip Smith, bankrupt, by his counsel, excepted to said ruling of the referee. And the said question is certified to the judge for his opinion thereon."

After a careful examination of the proceedings in this case, the court feels constrained to return the record to the referee, with instructions for further proceedings. Bankruptcy Act, § 2, cl. 10. If the referee predicated his certificate upon rule 27 (18 Sup. Ct. viii.), it does not appear that in the proceeding before him any order was made upon his finding; nor does the record contain a petition filed by the bankrupt, setting out any error committed by the referee. If it was the purpose of the Edgewood Distilling Company, whose claim was proved

up against the bankrupt subsequent to the first meeting of creditors, to secure a ruling of the judge upon its exceptions to the application of the bankrupt for his discharge, the certificate of the referee was evidently not prepared to meet that phase of the case. See order of this court "as to procedure on petitions for discharge." It was doubtless the purpose of the parties to secure a ruling by the judge upon the question as to whether the bankrupt could retain the diamond "shirt stud" as exempt property. The court is of the opinion that the question is not properly presented, and that correct procedure requires the return of the record. Under the provisions of section 70 of the act of congress, the title to the diamond passed to the trustee, unless it was exempt; and it is made the duty of the trustee, by section 47, cl. 11, of the act, "to set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court as soon as practicable after their appointment." Rule 17 of the supreme court (18 Sup. Ct. vi.) prescribes the procedure to be pursued by the trustee in setting apart exempt property, and the time and manner in which exceptions may be taken to his report. It is there provided:

"The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party."

The record discloses that the referee, in view of the absence of all creditors at the first meeting, and of the fact that the schedule disclosed no assets, quite properly, in the exercise of the discretion conferred by rule 15 (18 Sup. Ct. vi.), directed that no trustee should be appointed until the further order of the court. When, however, it came to the knowledge of the referee, during the further progress of the case, that property of the bankrupt had been found which the creditors claimed as assets of the estate, a trustee should have been appointed, as the necessity for such action had arisen as contemplated by rule 15. When the trustee shall make his report to the referee, the dissatisfied party may except thereto in the manner prescribed by rule 17, and at the request of either party it is made the duty of the referee to certify the exceptions for the final determination of the judge. No trustee having been appointed, the record and findings certified by the referee will be returned, with instructions to take the proper steps to secure the appointment of a trustee, who shall, upon his appointment and qualification, proceed in the discharge of his duties as required by the act of congress and the rules of court. For the reasons given, the court, for the present, declines to answer the question certified by the referee. Returned, with instructions.

STEVENS v. STATE OF OHIO.

(Circuit Court, N. D. Ohio, E. D. May 5, 1899.)

No. 5,893.

INTERSTATE COMMERCE—INTOXICATING LIQUORS—EFFECT OF WILSON ACT.

An agent of a West Virginia brewing company took an order for a keg of beer, to be delivered at the residence of the purchaser in Ohio, at which place the order was taken. The beer was shipped to a near-by railroad station, the keg having a card attached, on which was written the name of the purchaser, though it did not appear to whom it was billed. It was received, however, by another agent of the company, who conveyed it to the residence of the purchaser, and there delivered it, the selling agent afterwards collecting the price. *Held*, that the transaction was a sale in Ohio, having no relation to interstate commerce; that, on the arrival of the beer at the station, and its delivery to the agent of the brewing company, the interstate shipment terminated, and the beer had "arrived within the state," within the meaning of the Wilson act (26 Stat. 313, c. 728), and was thereafter subject to the operation of the state laws regulating its sale; that, so far as any question of interstate commerce was concerned, it was immaterial whether the sale was made before or after such arrival.

On Application by Emil Stevens for a Writ of Habeas Corpus.

J. B. Handlan, for plaintiff.

Addison C. Lewis, for the State of Ohio.

RICKS, District Judge. The following is the agreed statement of facts:

"In the matter of the indictment of said defendant in said court for unlawfully selling intoxicating liquor as a beverage to one Richard Roe, in the township of Mt. Pleasant, a prohibition township, in the county of Jefferson, and state of Ohio, and without the limits of a municipal corporation, on the 17th day of December, 1898, counsel for the state, as well as the defendant and his counsel, admit and agree that the following statement shall constitute, and actually are, the material facts in this case: That said Emil Stevens, at the time and place so charged in the indictment, was a citizen of the United States, and a resident of the state of Ohio, and was the agent of a brewing company, which company was engaged in the manufacture of beer from the raw material, and the sale thereof, and whose manufactory and office were situate in the city of Wheeling, county of Ohio, and state of West Virginia. That under his authority as such agent said defendant, on the ——— day of December, 1898, in said township, and without the limits of a municipal corporation, entered into an oral contract with one Richard Roe, by the conditions of which contract the said brewing company, in consideration of the sum of \$1.10, was to deliver to said Roe, at his residence in said township, in the state of Ohio, and without the limits of a municipal corporation, free of charge, certain intoxicating liquor, viz. one wooden keg, containing beer, and being one-eighth of a barrel, and holding four gallons of said beer, the product of said brewery, said consideration to be paid to said agent as such in said township after the delivery of said beer as aforesaid, and the keg, when emptied, to be returned at the residence of said Roe to another agent of said brewing company, as the property of said company, said other agent being then and there in the employment of said company for hauling and delivering its beer from the railroad station in said township to the residences therein of the various purchasers, and for collecting the empty kegs and shipping them back to said company at Wheeling, West Virginia. That in pursuance of said contract the said defendant, Emil Stevens, as said agent of said brewing company, filled in an order blank in writing (used by him for reporting such contracts to his said principal) for said one-eighth of a barrel of beer, to be de-

livered to said Richard Roe, as aforesaid, and sent said order blank so filled in to his (the said defendant's) principal, at Wheeling, in the state of West Virginia. That upon the receipt of the said order blank so filled in the said brewing company, at its manufactory, consigned one-eighth of a barrel of beer to said Richard Roe, with the name of said Richard Roe on said barrel upon a card tacked on said one-eighth barrel; and said one-eighth barrel was, on or about the 17th day of December, 1898, shipped by said company from its brewery in Wheeling, in the state of West Virginia, via the Wheeling & Lake Erie Railroad, a common carrier, to a station on said railroad, and within said township, in the state of Ohio, and from said station was thence taken by said brewing company by its said other employé, and delivered to said Roe at his said residence in said township, and without the limits of any municipal corporation; and thereafter (but not at the time of said delivery of said beer), in said township, said Roe paid to said Stevens, as agent of said company, the purchase price, viz. \$1.10, and said other agent of said company called for the empty keg at said Roe's said residence, and returned it to said railroad station for shipment back to said company at Wheeling, West Virginia. That said defendant, Stevens, thereafter accounted to his principal as its agent for said purchase money received by him as aforesaid, to wit, \$1.10, and paid the same accordingly to the said brewing company at Wheeling, West Virginia; that in consideration of the defendant's services rendered to his principal in this and similar transactions, as aforesaid, the defendant received from the said brewing company the sum of \$15.00 per week, and that defendant received no compensation other than his said weekly salary. That said company paid the freight, and delivered said keg of beer in the manner aforesaid without charge, except the purchase price paid as aforesaid. That said keg of beer was delivered as aforesaid without change in its original form as it left the brewery. That at the time said keg of beer was sold to said Richard Roe, as aforesaid, and for more than thirty days prior to the making of said contract therefor, said township of Mt. Pleasant was a local option or prohibition township in which the sale of intoxicating liquors, other than cider, or wine manufactured from the pure juice of the grape, cultivated in this state, was forbidden and unlawful under the laws of the said state of Ohio. That said defendant then and there was not a legally registered druggist, and that said beer was sold to said Richard Roe, as aforesaid, to be used as a beverage, and not for exclusively known medicinal, art, scientific, mechanical, or sacramental purposes. It is further agreed by the defendant and his counsel and counsel for the state that this action shall be tried to and by said court without the intervention of a jury upon the foregoing statement of facts, and that said court shall determine the question of defendant's guilt or innocence of said charge, and pass judgment accordingly."

Upon this agreement a jury was waived, and the alleged offense was tried before the court of common pleas of Jefferson county, Ohio, for a violation of what is known as the "Local Option Law" of Ohio. The defendant was found guilty, and was adjudged to be imprisoned in the Stark county workhouse for a period of 20 days from and including March 6, 1899, and to pay a fine of \$500, and stand committed until the fine and costs should be paid. The question to be decided is whether, in view of the act of congress of August 8, 1890 (26 Stat. 313, c. 728), known as the "Wilson Law," the prohibition laws of the state of Ohio apply so as to give effect to the prohibitory or local option laws of the state, or whether the local option law is in conflict with subdivision 3, § 8, art. 1, of the federal constitution. The local option law of Ohio (85 Ohio Laws, p. 55) reads as follows:

"An act to further provide against the evils resulting from the traffic in intoxicating liquors, by local option in any township in the state of Ohio, passed March 3, 1888.

"Section 1. Be it enacted," etc., "that whenever one-fourth of the qualified electors of any township, residing outside of any municipal incorporation,

shall petition the trustees therefor for the privilege to determine by ballot whether the sale, of intoxicating liquors as a beverage shall be prohibited within the limits of such township, and without the limits of any such municipal incorporation, such trustees shall order a special election for the purpose, to be held at the usual place or places for holding township elections; and notice shall be given and the election conducted in all respects as provided by law for the election of township trustees; and only those electors shall be entitled to vote at such election who reside within the township and without the limits of such municipal incorporation. A record of the result of such election shall be kept by the township clerk in the record of proceedings of township trustees; and in all trials for violation of this act, the original entry of said record, or a copy thereof certified by the township clerk, provided that it shows or states that a majority was against the sale, shall be prima facie evidence that the selling, furnishing, giving away or keeping a place, if it took place from and after thirty days from the day of the holding of said election, was then and there prohibited and unlawful.

"Sec. 2. Persons voting at any election held under the provisions of this act, who are opposed to the sale of intoxicating liquors as a beverage, shall have written or printed on their ballots, 'Against the sale;' and those who favor the sale of such liquors shall have written or printed on their ballots, 'For the sale;' and if a majority of the votes cast at such election shall be 'Against the sale,' then from and after thirty days from the day of the holding of said election, it shall be unlawful for any person within the limits of such township and without the limits of such municipal corporation to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished; and whoever sells, furnishes or gives away any intoxicating liquors as a beverage, or keeps a place where such liquors are kept for sale, given away or furnished, shall be fined not more than five hundred dollars, nor less than fifty dollars, and be imprisoned in the county jail not exceeding six months; but nothing in this section shall be construed so as to prevent the manufacture and sale of cider, or sale of wine manufactured from the pure juice of the grape, cultivated in this state, nor to prevent a legally registered druggist from selling or furnishing pure wines or liquors for exclusively known medicinal, art, scientific, mechanical, or sacramental purposes; but this provision shall not be construed to authorize the keeping of a place where wine, cider or other intoxicating liquors are sold, kept for sale, furnished or given away as a beverage.

"Sec. 3. In indictments for violations of this act, it shall not be necessary to set forth the facts showing that the township has availed itself of the provisions of this act, but it shall be sufficient to plead simply that said selling, furnishing, giving away or keeping a place was then and there prohibited and unlawful."

The Wilson act reads as follows:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

A full consideration of the questions presented in this case leads to the conclusion that the court should be governed by the decision in *Re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, in which it was held:

"The act of August 8, 1890 (26 Stat. 313, c. 728), enacting 'that all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not

be exempt therefrom by reason of being introduced therein in original packages or otherwise,' is a valid and constitutional exercise of the legislative power conferred upon congress; and, after that act took effect, such liquors or liquids, introduced into a state or territory from another state, whether in original packages or otherwise, became subject to the operation of such of its then existing laws as had been properly enacted in the exercise of its police powers; among which was the statute in question as applied to the petitioner's offense."

It is claimed that this decision is modified by the case of *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, in which it was held that section 1553 of the Code of Iowa, prohibiting express companies, railway companies, or other persons from transporting or conveying intoxicating liquors from one place to another within the state, cannot be held to apply to a box of spirituous liquors shipped by rail from a point in Illinois to a citizen of Iowa, at his residence in that state, while in transit from its point of shipment to its delivery to the consignee, without causing the Iowa law to be repugnant to the constitution of the United States. In other words, the Wilson act was not intended to and did not cause the power of the state to attach to an interstate commerce shipment while the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery to the consignee. The decision in the *Rhodes* Case was wholly a question of transportation and of interstate shipment; in which the meaning of the phrase, "upon arrival in such state or territory," was construed, and not for determining whether, the Wilson law being applied, it would give to the statutes of Iowa extraterritorial operation, and so prevent the sale by a citizen of one state to a citizen of another. In the *Rahrer* Case, Maynard, Hopkins & Co., of Missouri, shipped to their agent, Rahrer, at Topeka, Kan., a car load of liquor in original packages, which was taken charge of by Rahrer as the agent of the shipper, and by him offered for sale and sold in the original packages; and the court held that such liquors became subject to the operation of such of the then existing laws of Kansas as had been properly enacted in the exercise of its police powers. What, if anything, distinguishes the facts in the *Rahrer* Case from those in this case? In both cases the sale was made by the agent of the foreign merchant within the territory in which such sales were prohibited. In the *Rahrer* Case the liquor was shipped into the state before the sales were made, and at once became subject to the laws of Kansas. In the case under consideration the brewing company set up an establishment within the prohibition territory. It had there a local agent for selling the liquor, and another agent, with horse and wagon, to deliver the goods to customers residing within the township. Orders from customers were first taken, and the supply was procured from the brewery afterwards. In the *Rahrer* Case the beer was distributed from a storage room, and in this case it was distributed from the railway station. By the terms of the sale in this case the goods were to be actually delivered at the residence of the purchaser before there was a transfer of property or title. The brewing company paid all the freight, and undertook to deliver at the residence, and these facts, together with the circumstances of the transaction, clearly show that the place

of sale was within the prohibition township, and not in Virginia. In short, the company did business just as a resident of the township might do, who simply secured orders from local customers, and thereafter ordered his supply from the brewers to fill such orders. It is claimed, however, that this view of the case would forbid the sale by the brewing company in Wheeling to a customer in Ohio; but we must take the actual transaction, together with all the facts and circumstances, into consideration. While the agreed statement of facts shows that the brewing company, "at its manufactory, consigned one-eighth of a barrel of beer to said Richard Roe, with the name of said Richard Roe on said barrel upon a card tacked on said barrel," the fact is, as shown, that it was shipped to "a station in Mount Pleasant township," and there received and taken in charge, not by Richard Roe, but by the local distributing agent of the brewing company; and it was in the possession and under the control of the seller from the time of its arrival at the station until it was delivered at the residence of the purchaser. These latter facts, it seems to me, take away the elements of interstate commerce from the transaction, and that the putting of the label on the keg, and the shipment from the brewery, was a device to evade the state law. It does not appear from the statement that the card contained the name of the station, so that the package would be sent to the right place if intended for Roe, or whether this keg, with others like it, was included in a way-bill covering the lot. While the keg was nominally consigned to Roe, it was in fact consigned to the brewers and their agents at the railway station. On its arrival at the station, and in the possession of the agent, it had "arrived" within the state of Ohio, and within the prohibition territory, and the prohibition laws of Ohio thereupon attached and operated upon it by virtue of the Wilson act. Surely, a shipment from the company at Wheeling, W. Va., to its agent at the station in Mt. Pleasant township, in Ohio, was in no sense an interstate transaction, within the contemplation of the law; but, up to that point, it was a transaction in which only the seller was concerned,—a shipment from the brewing company to the brewing company,—by which continuous possession and ownership was retained in the company until the time of its "arrival" at the station in Ohio, when the local option law applied. It follows that the petitioner is not entitled to be discharged, and his petition is dismissed.

UNITED STATES v. CHU CHEE et al.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1899.)

No. 455.

1. CHINESE EXCLUSION ACT — PROCEEDINGS FOR DEPORTATION — EVIDENCE OF RIGHT TO REMAIN IN UNITED STATES.

A Chinese person, who obtains entry into the United States without the certificate from the Chinese government showing him to be a member of the class privileged to enter, which is required by the acts of congress, cannot establish his right to remain, when arrested under the act of May 5, 1892, as a Chinese laborer within the United States without the certi-

cate of residence required by law, by proof that since his entry he has not been a laborer, but has followed the occupation of a member of the privileged class.

2. SAME—EVIDENCE OF RIGHT TO ENTER.

A certificate of a consul of the United States in China, not indorsed on one from the Chinese government, is not evidence tending to establish the right of a Chinese person to entry into the United States.

3. SAME—CHINESE LABORERS AS A CLASS—STATUS OF MINOR CHILDREN.

The purpose of the Chinese exclusion acts is to prohibit the entry into the United States of Chinese laborers as a class, and the status of minor children of a laborer is that of their father.

In Error to the District Court of the United States for the District of Oregon.

This was a proceeding for the deportation of the defendants, two Chinese boys, aged, respectively, 13 and 15 years, born in the empire of China, and brought to this country in May, 1896, landing at Port Townsend, in the district of Washington, as students, upon the presentation of the following certificates:

"Consulate of the United States, Hong Kong, April 9, 1896.

"I, Wm. E. Hunt, consul of the United States of America for the colony of Hong Kong and its dependencies, hereby certify that two Chinese youths, namely, Chu How and Chu Chee, appeared before me this day, and presented a letter, addressed to me by Messrs. Kinsey and Markley, hereto appended, and requested for a certificate of identity, as they are going to the United States, in response to a call, as alleged, of their father, a resident of Eugene, Oregon, for the purpose of acquiring an English education.

"And for the better identification of these boys, their photographic likenesses are hereto appended, and their descriptions are as the following:

Chu How, arrived May 11, 1896, on board Br. Str. Tacoma, from Hong Kong, China.

WALTER BOWEN,
Special Agent.

Name: Chu How. Height: 4 feet 5½ inches. Age: 11 years. Physical peculiarities: A scar on forehead; a mole front of right ear. Native of Sun Hui, Kwongtung.

(Photograph.)
U. S. Consulate,
Hong Kong,
China.
Chu How.

Chu Chee, arrived May 11, 1896, on board Br. Str. Tacoma, from Hong Kong, China.

WALTER BOWEN,
Special Agent.

Name: Chu Chee. Height: 4 feet, 7½ inches. Age: 13 years. Physical peculiarities: A mole on inner end of l. eyebrow; a scar on outer end of r. eyebrow.

(Photograph.)
U. S. Consulate,
Hong Kong,
China.
Chu Chee.

"Given under my hand and seal of office, at Hong Kong, the day and year aforesaid.
W. E. Hunt, U. S. Consul."

"Eugene, Oregon, December 23, 189—.

"United States Consul, Hong Kong, China—Dear Sir: There are two boys coming from the country into Hong Kong to take the steamer to Portland, Oregon, U. S. A. The father of these boys is living at Eugene, Oregon, and has been living there for three years last past. The object of the father of these boys, in bringing them to the U. S., is for the purpose of educating them in the schools of this state. The younger one is named Chu How, and is eleven years of age. The other, Chu Chee; age, thirteen. We inclose with photographs of the two boys.

"Yours, respectfully,

Kinsey and Markley."

The defendants did not present, or appear to possess, any other certificates entitling them to land. On April 20, 1898, nearly two years after the defendants were permitted to land, the United States attorney for the district of Oregon filed an information against them, charging that they were Chinese laborers, without the certificate of residence required by law, and therefore unlawfully within the United States. It was shown upon the trial of the case that the defendants were then, and had been since their arrival in this country, students in the English schools of Eugene City, Or., having no other vo-

cation; that the father of the defendants came to this country a number of years before the arrival of the boys, and had been engaged in the labor of a laundryman in said city. The court held that the occupation of the father could not be imputed to the children against the status of students which they had acquired in this country. The application to remand was accordingly denied, and the defendants ordered discharged. From this judgment the United States appeals.

John H. Hall, U. S. Dist. Atty.

A. L. Worley, W. W. Thayer, and Henry St. Rayner, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The defendants were arrested under the provisions of the act of congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892 (27 Stat. 25, c. 60), as amended by the act of November 3, 1893 (28 Stat. 7, c. 14). Section 1 of the first-named act provides:

"That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act."

Section 3 provides:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

The laws in force on the 5th day of May, 1892, upon the subject of Chinese exclusion, had their origin in the treaty between the United States and the empire of China, dated November 17, 1880. Articles 1 and 2 of this treaty provide as follows:

"Article 1. Whenever in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"Art. 2. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

Pursuant to this treaty congress passed the act entitled "An act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882 (22 Stat. 58, c. 126). This was the first of the exclusion acts passed by congress. It provides, in section 1, that from and

after the expiration of 90 days after the passage of the act, and until the expiration of 10 years next succeeding its passage, the coming of Chinese laborers to the United States should be suspended, and during such suspension it should not be lawful for any Chinese laborer to come, or, having so come, after the expiration of said 90 days to remain within the United States. The fourth section declares that, for the purpose of identifying the Chinese laborers who were here on the 17th day of November, 1880, or who should come within the 90 days mentioned, and to furnish them with the proper evidence of their right to go and come to the United States, the—

"Collector of customs of the district from which any such Chinese laborer shall depart from the United States, shall in person or by deputy, go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry books to be kept for that purpose, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom house."

And each Chinese laborer thus departing was entitled to receive from the collector or his deputy a certificate containing such particulars, corresponding with the registry, as would identify him. This certificate of identification entitled the Chinese laborer to whom it was issued to return and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer should seek to re-enter. The sixth section of the act provides that, for the faithful execution of the treaty of November 17, 1880, every Chinese person, other than a laborer, who may be entitled by the treaty and by the act to come within the United States, and who is about to come,

"Shall be identified as so entitled by the Chinese government in each case, such identity to be evidenced by certificate issued under the authority of said government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the certificate is issued, and that such person is entitled conformably to the treaty in this act mentioned to come within the United States. Such certificate shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs, or his deputy, of the port in the district in the United States at which the person named therein shall arrive."

From this provision diplomatic and other officers of the Chinese government, traveling upon the business of that government, are exempted; their credentials being taken as equivalent to the certificate.

It is a matter of history that this act proved ineffective to prevent the coming of Chinese laborers into the United States. The immigration of Chinese persons claiming to belong to the privileged classes increased rapidly, and, among others, Chinese laborers who had no return certificates, but who claimed the right to return on the ground that they were in the country at the date of the treaty, and had departed before the passage of the act of congress providing for return certificates. The subject being brought to the attention of congress,

the act of 1882 was amended for the purpose of prohibiting the landing of any Chinese laborers in the United States who could not produce return certificates. The amendatory act is the act of July 5, 1884 (23 Stat. 115, c. 220). Among other amendments, section 4 of the act of 1882 was amended by adding to the provision relating to the return certificate:

"And said certificate shall be the only evidence permissible to establish his right of re-entry."

And section 6 was amended, with respect to the certificate to be produced by Chinese persons other than laborers, so that the section should read as follows:

"Every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by certificate issued by such government, which certificate shall * * * before such person goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States, * * * and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue, it shall be his duty to refuse to indorse the same. Such certificate viséd as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities."

The purpose of congress in these amendments was to provide that no Chinese laborer, or Chinese person other than a laborer (except diplomatic and other officers of the Chinese government, traveling upon the business of the government), should be permitted to land or come into the United States, unless he could produce the appropriate certificate as required by the act of 1882; but the amendments failed of their purpose, particularly the one relating to the certificate for returning Chinese laborers,—the supreme court holding, in the case of *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255, that the fourth section of the act of 1882, as amended by the act of 1884, prescribing the certificate which should be produced by a Chinese laborer as the only evidence permissible to establish his right of re-entry into the United States, was not applicable to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884. The effect of this decision was that the return certificate for Chinese laborers was the only evidence permissible on the part of the person producing it, but for those who could not produce such evidence, by reason of departure from the country before the act of 1882 went into effect, other competent testimony was admissible. The court says, among other things:

"What injustice could be more marked than, by legislative enactment to recognize the existence of a right by treaty to come within the limits of the United States, and at the same time to prescribe, as the only evidence permissible to establish it, the possession of a collector's certificate that could not possibly have been obtained by the person to whom the right belongs? Or to prevent the re-entry of a person into the United States upon the ground that he did not, upon his arrival from a foreign port, produce a certain certificate, under the hand and seal of a collector, and upon forms prescribed by the secretary of the treasury, which neither that nor any other officer was authorized or permitted to give prior to the departure of such person from this country? Or what incongruity is more evident than to impose upon a collector the duty of going on board of a vessel about to sail from his district for a foreign port, and making and recording a list of its passengers of a particular race, showing their individual, family, and tribal names in full, their age, occupation, last place of residence, and physical marks and peculiarities, when such vessel had sailed long before the law passed which imposed that duty on the collector? These questions suggest the consequences that must result if it is held that congress intended to abrogate the treaty with China by imposing conditions upon the enjoyment of rights secured by it which are impossible of performance."

The failure of the act of 1884 to cure the defects in the act of 1882 resulted in both the legislative and executive departments of the government taking up the subject, with the view of providing an effective measure of exclusion against the continual influx of Chinese immigrants. A new treaty was negotiated by the state department, and congress immediately passed the act of September 13, 1888 (25 Stat. 476), to carry the treaty into effect. The treaty was, however, finally rejected by the Chinese government, and as a consequence that portion of the act dependent upon the ratification of the treaty failed to become a law. Thereupon congress very promptly passed an act to supplement the act of 1882. It was approved October 1, 1888 (25 Stat. 504, c. 1064), and provided that it should be unlawful for any Chinese laborer who had at any time before been, or who was then or might thereafter be, a resident of the United States, and who had departed or should thereafter depart therefrom, and had not returned before the passage of the act, to return to or remain in the United States, and that no certificate of identity provided for in the fourth and fifth sections of the act of 1882 should thereafter be issued, and every certificate theretofore issued in pursuance of said section was declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof should not be permitted to enter the United States. This act closed the door effectually against Chinese laborers coming into the United States upon any claim of prior residence, whether supported by return certificates or proof of residence in the United States between November 17, 1880, and August 5, 1882.

In the case of *Chae Chan Ping v. U. S.*, 130 U. S. 581, 9 Sup. Ct. 623, the validity of this act was assailed as being in effect an expulsion from the country of Chinese laborers in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of congress. Judge Field, speaking for the supreme court, reviews the history of Chinese immigration into the United States, and the treaties and legislation upon the subject, and holds that the act of October 1, 1888, revoking all return certificates, and excluding Chinese laborers from the United States, was a constitutional exercise of legislative power,

and, so far as it conflicted with existing treaties between the United States and China, it operated to that extent to abrogate them as part of the municipal law of the United States.

In the case of *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. 729, the petitioner, in an application for a writ of habeas corpus, alleged that he was restrained of his liberty on board the steamship *Arabic* in the port of San Francisco; the master of the vessel claiming that the petitioner was not entitled to land under the provisions of the act of congress of May 6, 1882, and the act amendatory thereof. The petitioner alleged that he was a resident of the United States on the 17th of November, 1880, and departed therefrom prior to the 6th day of June, 1882, and that at all the times mentioned he was a merchant doing business in San Francisco, having only temporarily left the United States on April 19, 1882. His claim was that he belonged to the privileged class. The supreme court affirmed a judgment of the circuit court remanding the petitioner, holding that his right to land rested upon his establishing the fact that he was not a laborer within the provisions of the act of October 1, 1888, and that could only have been shown by a certificate of identity issued under the authority of the Chinese government. The court upon this point said:

"The result of the legislation respecting the Chinese would seem to be this: that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein, and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese government, or of such other foreign government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be viséd by a representative of the government of the United States."

The effect of these decisions was to determine that the privilege of Chinese laborers to come to or remain in the United States was a subject within legislative control, to be regulated, suspended, or entirely abrogated, as congress should declare, and that the law of the *Chew Heong Case*, *supra*, was no longer authority in construing the exclusion acts.

We come, now, to the consideration of the statute under which the defendants were arrested as being unlawfully in the United States. The title and terms of exclusion of the act approved May 5, 1892, indicate that the scope and purpose of the act are to permit only such persons to enter or remain in the United States who are expressly designated as being entitled to the privilege. The title of the act is, "An act to prohibit the coming of Chinese persons into the United States." The first section, in extending the laws then in force for a period of 10 years, prohibits and regulates the coming into this country of "Chinese persons and persons of Chinese descent"; and the third section provides that any "Chinese person or person of Chinese descent" arrested under the provisions of the act shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of the parties, judge, or commissioner, his lawful right to remain in

the United States. Section 6 provides that it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of the act, and who were entitled to remain in the United States, to apply to the collectors of internal revenue of the respective districts for a certificate of residence. The charge in the information of the United States attorney upon which the defendants were arrested is that they are Chinese laborers found within the United States without a certificate of residence, as provided by the act of congress to which reference has just been made.

The right of the defendants to enter the United States appears to have been determined by the collector of customs at Port Townsend upon a certificate issued by the United States consul at Hong Kong as to their identity, and upon the statement contained in the certificate that:

"They are going to the United States in response to a call, as alleged, of their father, a resident of Eugene, Oregon, for the purpose of acquiring an English education."

The right of the defendants to remain in the United States is based upon oral testimony that:

"Immediately upon being landed said defendants proceeded at once to the city of Eugene, the home of their father, and that ever since said time they have been attending public and private schools in that city, and have acquired the English language, and made rapid progress in their studies."

The purpose of the consular certificate, as evidence before the court in this case, was apparently as tending to establish the fact that defendants were students, and belonged to the privileged class, and were entitled to come into the United States by the act of May 6, 1882, as amended by the act of July 5, 1884; but it is clear that the certificate is not in conformity with that section, and does not tend to establish the fact in question. It does not contain the permission of the Chinese government, nor are the defendants identified by that government as being entitled to come to the United States. It is wholly a document issued by the United States consul at Hong Kong, without authority of law, and without any value as evidence of the right of the defendants to come into or remain within the United States; and, being landed upon such insufficient evidence, they were unlawfully within the United States. *U. S. v. Moc Chew*, 7 U. S. App. 534, 4 C. C. A. 482, and 54 Fed. 490; *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. 729.

But it is contended on the part of the defendants that the status of Chinese aliens domiciled in the United States must be determined according to their status at the time of arrest, and not at the time of entry, and that, upon being arrested, it was competent for them to show by affirmative proof that they were students engaged in acquiring an education in our schools, and, being so engaged, they were not members of the prohibited class, and not subject to deportation. When, however, that domicile has been acquired contrary to and in violation of the laws of the United States, and when, as here, it is only through an unlawful entry into the United States that the Chinese persons secure a residence in this country, they cannot purge themselves of their offense by assuming the occupation of

members of the privileged class, and establish their right to remain by proof of that character. The right of the defendants to land in this country on the claim of being students was dependent upon their producing to the collector of customs, at the port of their arrival, the certificate required by section 6 of the act of 1882, as amended; and to entitle them to remain here they must thereafter produce the same to the proper authorities whenever lawfully demanded.

But not only do the defendants fail to show that their entry into and residence in the United States was lawful, and under a certificate showing that they belonged to a privileged class, but it appears affirmatively that they were at that time the minor children of a Chinese laborer, and that they are still minors. The status of the defendants, under the laws, was that of the father. The policy of the exclusion acts is to prohibit the entry into the United States of the entire class of Chinese laborers as a class. In *re Ah Quan*, 10 Sawy. 222, 21 Fed. 182; In *re Ah Moy*, 10 Sawy. 345, 21 Fed. 785; In *re Li Foon*, 80 Fed. 881. The defendants belonged to that class upon their arrival in this country, and they so continued up to the time of their arrest; and, not having the certificate as required by section 6 of the act of May 5, 1892, as amended by the act of November 3, 1893, they were not entitled to remain in the United States, and should have been deported. Judgment reversed.

CORSER v. BRATTLEBORO OVERALL CO.

(Circuit Court, D. Vermont. April 1, 1899.)

1. PATENTS—INVENTION.

Overalls with an upward extension or bib in front being old, there is no invention in making a similar upward extension of about the same height at the back, for the purpose of excluding dust and cinders, and permitting the use of short suspenders, which require no crosspiece to prevent them from slipping from the shoulders.

2. SAME—OVERALLS.

The Corser patent, No. 366,621, for an improvement in overalls, is void as to claim 3, for want of invention.

This was a suit in equity by Brackett G. Corser against the Brattleboro Overall Company for alleged infringement of a patent for an improvement in overalls.

James L. Martin, for plaintiff.

Kittredge Haskins and William E. Simonds, for defendant.

WHEELER, District Judge. This suit is brought upon letters patent No. 366,621 applied for November 12, 1886, dated July 12, 1887, and granted to the plaintiff for an improvement in overalls. The patent covers several different features by various claims. All of it that relates to the one in question is in the specification:

"At Figs. 3 and 9 I have represented a portion of the rear of a pair of overalls; the customary style being indicated in dotted lines, and an improvement in full lines. The back is extended upwardly about as high as the

usual height of a bib. This excludes cinders and dust. The suspenders are shorter, and no crosspiece is required to prevent them from slipping from the shoulders."

And among the claims is:

"(3) A pair of overalls, provided with a back piece extending substantially above the waistband, with suspenders fastened to said back piece, substantially as specified, whereby the customary strap connecting the suspenders is dispensed with, and a means of protecting the back immediately below the shoulder blades, and excluding cinders, is afforded."

The figures referred to show the extension upward, with suspenders from the corners to go over each shoulder without crossing, or having any crosspiece. Overalls with such an extension upward in front, to which the suspenders were buttoned or buckled, were old, within common knowledge; and this extension was recognized in the patent as a bib. That what were called "railroad overalls," having something of such an extension upward, had been made before the plaintiff's invention, well appears from the evidence, and appears to be recognized by the plaintiff in his rebutting testimony. In his answer to direct interrogatory 19, he appears to have said, in describing how the then existing style was cut:

"The overall would then be marked out, and the back, like the 12 overall that they were then making, would not come up so high as the fold of the cloth came; and the difference which I made between this and that is that the back does come up as high as the front. Because the back did not come up as high, they got the straps out of the web. By adding on some four or five inches onto the height of the back, * * * adding it onto the 12, * * * I could make the straps four or five inches shorter, and get the straps out between the legs."

On cross-examination as to this he appears to have testified:

"(135) And was not that a high-back railroad overall? It was not as high back as Exhibit 2 or Exhibit Q. (136) Was it not called a 'high-back overall'? I never heard it called so. (137) Was it not cut with a high back? My remembrance is, it was cut like one of these exhibits here. (138) Was it not an overall having a back extending above the ordinary waistband? It was one like Exhibit 12."

The back of the alleged infringement extends upward about four inches from the waistband, and has wide suspenders, which fill the upper side of the extension, cross, and are fastened together at about the height of the bib, and go over the shoulders, without any crosspiece, making a tight back up to about the shoulder blades, where the suspenders cross, and above, to where they separate, and of the width of one suspender where they cross, of both where they separate, and of both where they are attached to the upward extension of the back. Suspenders, wide, as well as otherwise, crossed to keep them on the shoulders, and fastened together where they cross, were old and well known. Thus, this supposed infringement appears to be like the prior railroad overalls, with crossed wide suspenders attached to the upper side of the back extension. The suspenders do not leave the back extension at the corners to go over the shoulders separately, unless the whole is considered as back extension all the way up to where the suspenders separate. As overalls, and overall backs and fronts, and suspenders, wide and otherwise, were all old, the plaintiff could have

a valid patent only for his specific improvements upon them in these respects. *Railway Co. v. Sayles*, 97 U. S. 554. In that case Mr. Justice Bradley said:

"If one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs."

The plaintiff's improvement here consisted in making the back higher. The alleged infringement consists in using wide, crossed suspenders. If his improvement could be said to cover extending the back of the overalls upward as high as the bib for the protection of the back of the wearer, the extension would be like the bib at the front, and would be merely putting that device to the same use, in a new place, in the same garment, for the same purpose. Such putting to a new use does not constitute patentable invention. The cases to this effect in the supreme court of the United States are too numerous for citation in detail, and this principle of patent law is too well settled to justify it. In *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, several of these cases were examined, and Mr. Justice Brown said:

"As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use, but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty."

As soon as the want of a high back, as well as a high front, should be felt, the exercise of mechanical skill, without inventive genius, would provide it. The plaintiff appears to have exercised good judgment and high skill about this, but not inventive genius or faculty in construction or discovery. And, with high backs to any fair extent, the making them higher would be merely carrying forward the same idea, although to a result more perfect, and would not seem to be patentable. *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1.

These considerations make the examination of other questions urged unnecessary. Bill dismissed.

CORSER v. BRATTLEBORO OVERALL CO.

(Circuit Court, D. Vermont. April 1, 1899.)

1. PATENTS—VALIDITY—SUGGESTION OF INVENTION BY OTHERS.

A merely oral and casual suggestion by another to the patentee of a part of the improvement covered by the patent is not sufficient to make the same invalid.

2. SAME—METALLIC BUCKLE AND BUTTON HOLDER.

The Corser patent, No. 372,062, for a combined metallic buckle and button holder or hole, discloses patentable invention, and is valid.

This was a suit in equity by Brackett G. Corser against the Brattleboro Overall Company for alleged infringement of a patent.

James L. Martin, for plaintiff.

Kittredge Haskins and William E. Simonds, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 372,062, dated October 25, 1887, and granted to the plaintiff for a combined metallic buckle and button holder or hole. The principal improvement is a shoulder in each side of the loop that goes over the button, formed by bends in the metal, to rest upon the button, and prevent unbuttoning, when loose. The evidence shows that he had conversation with others about this device while making it, and they testify to suggesting this improvement, but not to doing anything about it. The principal questions are whether it amounts to a patentable invention, and whether the suggestion defeats his right to the patent. This shoulder had to be contrived for preventing unbuttoning in this way: To have told a skilled workman to fix the prior flat loop so it would not unbutton when loose would not have produced this device, unless he had, in addition to his mechanical skill, sufficient ingenuity which he should exercise to contrive it. Invention was necessary to make it; when made, it seems to have been very useful, and also to have been patentable.

A patent is *prima facie* evidence of the invention of the thing patented by the patentee. This is elementary. Among the defenses allowed by statute to meet this presumption is that the supposed inventor "had surreptitiously or unjustly obtained the patent for that which was in fact invented by another who was using reasonable diligence in adapting and perfecting the same." Rev. St. § 4920, par. 2. The one who made the suggestion in respect to this improvement does not appear to have used any diligence at all in adapting or perfecting it, or to have understood that he was inventing anything like it, but rather to the contrary; for he appears to have afterwards made an application for an improvement upon these articles without including it. Such a suggestion is mere information, the receiving and acting upon which are not surreptitious or unjust. People are continually acquiring information. And Chief Justice Taney said, with reference to an inventor, in *O'Reilly v. Morse*, 15 How. 62, at page 111, "It can make no difference, in this respect, whether he derives his information from books or from conversation with men skilled in the science. If it were otherwise, no patent in which a combination of elements is used could ever be obtained. For no man ever made such an invention without having first obtained this information, unless it was discovered by some fortunate accident." In *Agawam Co. v. Jordan*, 7 Wall. 583, a claimed suggestion of an important part of the patented invention was held not to constitute the person making it and the patentee joint inventors, nor to afford any defense for infringement. This merely oral and casual suggestion, if made as claimed, would not appear to be sufficient to defeat this patent. Besides this, such a defense is affirmative, and must be made out beyond reasonable doubt. The plaintiff admits conversation on the subject, but denies such suggestion. In view of all the circumstances, a doubt that it was so made as to give full information of the invention remains and seems reasonable. Decree for plaintiff.

CORSER v. BRATTLEBORO OVERALL CO.

(Circuit Court, D. Vermont. April 1, 1899.)

1. PATENTS—INVENTION—IMPROVEMENTS IN COATS.

It having been customary, in putting on the collars of coats, to sew the underside to the coat, and then sew the upper side down over the seam, there was no invention in making the outside of the collar a "seam" larger than the inside, and seam both to the coat at the same time, and then turn the wide part under and seam it. This is simply a change in the form and arrangement of the constituent parts, and not patentable.

2. SAME.

In cutting coats, there can be no invention in laying on the patterns in a particular way, for the purpose of economizing material. This is merely a matter of judgment, producing good workmanship, and not a matter of invention.

3. SAME.

The Corser patent, No. 364,219, for improvements in coats and the methods of making them, *held* valid and infringed as to claim 3, and void as to the remaining claims for want of invention.

4. SAME—APPORTIONMENT OF COSTS.

Where three patent cases were heard upon the same testimony, and in one case the decree was for plaintiff, in another for defendant, and in the third for plaintiff on one claim, and for defendant on the three others, *held*, that in each case costs would be allowed to the recovering party for all but the evidence, and the costs for the evidence would be disallowed in all of the cases.

This was a suit in equity by Brackett G. Corser against the Brattleboro Overall Company for alleged infringement of a patent for improvements in coats and the methods of making them.

James L. Martin, for plaintiff.

Kittredge Haskins and William E. Simonds, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 364,219, dated June 7, 1887, and granted to the plaintiff for an alleged improvement in coats and method of making them. The improvement in coats relates to the putting on of the collars, and is thus described in the specification:

"It has been customary to sew the underside to the coat, and then sew the upper side down over this seam, which latter is a difficult operation, and usually leaves the collar awry or twisted and deformed by plaits. I make the outside of the collar a 'seam' larger than the inside, and seam both to the coat at the same time, after which the wide part is turned under and seamed."

There are four claims for this alleged improvement,—two for a coat provided with a collar composed of these parts, and connected to the coat in this way; and two for "the improvement in the art of attaching collars to coats, which consists in providing" these parts and sewing them to the neck of the coat in this way. A part of the method of making is a sleeve pattern, with longitudinal lines where the seam under the arm would come, or notches where the ends of the lines would be, either whole, or divided there with the lines along the edges of the parts, for conveniently varying that seam, and the sizes of the parts, and allowing economy in material, by placing the seam along lines at equal distances each way from the middle, and so preserving the size

of the sleeve by adding as much to one part as should be taken from the other. The corresponding claim is:

"(3) The pattern in one or more parts for the entire sleeve, provided with longitudinal lines, or equivalents, as described, for locating the under-arm seam, whereby it is adapted for use in cutting sleeves of a given size, but which may be made of parts having various relative widths, substantially as set forth."

The other forms of the method are economical ways of laying the various patterns on the cloth, the smaller among the larger, for cutting out the parts of the coats.

The improvement in the coat is like that in the shoe in question in *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. 394, where the court said:

"Their shoe performed no new function. In the construction of it the vamp, the quarters and the expansible gore flap were cut somewhat differently, it is true, from the like parts of the shoes constructed under the earlier patents referred to, but they subserved the same purposes. It is well settled that not every improvement in an article is patentable. The test is that the improvement must be the product of an original conception."

And, after citing and commenting upon cases, the court further said that it was "simply a change in form and arrangement of the constituent parts of the shoe, or an improvement in degree only."

So, here, coats are and have long been universally worn and known, having many and various styles of collars and modes of sewing them on. Whether the prior structures are covered by patents, or ever have been, or not, makes no difference as to the character of the improvement upon them. The collars of the coats of this improvement perform no new function. Turning under an edge to sew down is no new thing. Neither is cutting the part to be turned under enough larger for that purpose any new thing. It is, as in the case of the shoe, "simply a change in the form and arrangement of the constituent parts," and not patentable. Whether such an art as that of providing parts of collars of different sizes and sewing them on together, and then turning under the edge of one, is patentable, has been doubted. *Walk. Pat.* (3d Ed.) §§ 3, 3a. If it is, the ingredient of invention would be as necessary as in that of the product, and as much wanting in this process. The same consideration will apply to the claims for laying on of patterns for cutting coats. Tailors and cutters have been laying on patterns for economy of cloth for many years, if not from time immemorial. By the first claim, this improvement "consists in cutting a front and front facing from one side of the web, the upper part of the sleeve from the opposite side adjacent, the entire back from the body of the web, the under parts of two sleeves from the sides adjacent, and the parts of the collar and pocket piece from closely adjacent or intermediate parts of the web." By the second, it consists in substantially the same method, including the use of the longitudinally marked pattern for obtaining the relative width of the parts of the sleeve. If this order of placing the patterns is not new, it is merely a good way; if it is new, it is merely a better way. It is a matter of judgment, producing good workmanship, and not a matter of invention, producing a distinctively new method. It is by the principles of the cases mentioned, and many others, outside of patentable invention. The inclusion of the use of a new style of pattern in the

method does not make the method itself patentable, although the pattern should be patentable.

The lines upon the pattern are not shown to have been known and used before. The notches shown, although used for the same purpose, are not the same things. The lines are new things on the pattern for accomplishing the same purpose with the pattern, and the pattern, with lines upon it, was a new manufacture. To contrive them and place them there for the purpose would seem to involve constructive ingenuity, which amounted to an original conception of this device as an addition to the former pattern. No adequate reason is made to appear why the third claim is not valid for the pattern with these lines upon it. The use of such patterns by the defendant does not appear to be disputed. The notch for sleeve buttons on the patterns used is an addition not affecting the use of the lines. If it is an improvement, the patented invention has been taken to put the improvement upon, and the taking of it is none the less an infringement. So, the plaintiff appears to be entitled to a decree upon this claim only.

This and two other cases between the same parties have been heard upon the same testimony, in one of which the plaintiff is to have a decree, and in the other the defendant. Obviously, the cost of the testimony is to be somehow apportioned. Perhaps the most equitable and practicable way would be to allow costs in each case to the recovering party for all but the evidence, and to disallow costs for that in all the cases. Decree for plaintiff as to third claim only.

TANNAGE PATENT CO. v. DONALLAN.

(Circuit Court, D. Massachusetts. April 7, 1899.)

No. 716.

1. PATENTS—INVENTION—PRESUMPTIONS.

The fact that a certain process of dyeing animal fibers, skins, etc., which is claimed to anticipate a patented process of chrome tanning, was publicly known for more than 30 years, during a time when inventors and scientists were vainly endeavoring to discover a successful method of chrome tanning, raises a strong presumption that such dyeing process did not fully disclose a practical tanning method.

2. SAME—ANALOGOUS USE—DYEING AND TANNING.

The two arts of dyeing and tanning are radically distinct, so that it would require invention of a high order to discover that an old dyeing process would produce merchantable chrome-tanned leather.

3. SAME—ANTICIPATION—ACCIDENTAL RESULTS.

An accidental result of a process, not contemplated and not recognized as important by the inventor, cannot anticipate a later patent.

4. SAME—CHROME—TANNING PROCESS.

The Schultz patents, Nos. 291,784 and 291,785, for a process of tanning by the green oxide of chromium, known as "chrome tanning," were not anticipated either by the Heinzerling patent of 1881, for a process of chrome tanning, which was never a commercial success, or by the Francillon French and English patents of 1853, for a process of dyeing animal fibers, skins, etc.

This was a suit in equity by the Tannage Patent Company against John E. Donallan for alleged infringement of certain patents for a process of chrome tanning. On final hearing.

Fish, Richardson & Storrow, for complainant.

George L. Roberts and W. Orison Underwood, for defendant.

COLT, Circuit Judge. This suit relates to two patents issued to Augustus Schultz, January 8, 1884, for "a process of tawing hides and skins." Patent No. 291,785 is for the general process. Patent No. 291,784 contains a more specific description of the solution which composes the second bath of the process. For present purposes they may be regarded as one patent.

The Schultz patent is for a process of mineral tanning, as distinguished from the old methods of bark tanning. Specifically, it is for a process of tanning by the green oxide of chromium, and is known as "chrome tanning." As a practical and commercial method for making morocco leather it has proved very successful, and may be said to have revolutionized this branch of the tanning art. It is estimated that 80 per cent. of the morocco leather at present produced in this country is made by this process. Not only does it largely reduce the time of tanning by the old methods, but the leather itself is of a superior quality. In the consideration of a patent of this character, and in harmony with what we believe to be the spirit and purpose of the patent laws of the United States, the court is naturally inclined to sustain it, unless it clearly appears to be invalid under the law. Nor does it detract from the merit of such an invention that prior inventors had nearly solved the problem, or had reached a successful experimental stage in its solution. When the prior art is brought to bear upon any important invention, this is often found to be the situation. The Schultz process for chrome tanning is to first subject the skin to a bath of bichromate of potash, and then to a second bath which consists of sulphite of soda dissolved in water, to which hydrochloric acid is added to set free the sulphurous acid, whereby the chromic acid throughout the skin is reduced to the green oxide of chromium; in other words, it is the reduction of chromic acid to chromic oxide through sulphurous acid. The prior tanning art does not disclose this process. For 30 or 40 years before the date of the Schultz patent, persons skilled in the art had striven to discover a practical method of chrome tanning, but, with one exception, these efforts were failures. This record presents an exhaustive review of these old methods. It is sufficient to refer to the most important. The earliest method is described in the Warrington British patent of 1846. Warrington uses for tanning "green vegetable matter," such as rhubarb, potatoes, or chemical deoxidizing agents, such as gum, starch, or certain compounds of sulphur mixed with tanning material, such as bark; and he uses either bichromate of potash or diluted sulphuric acid to prevent putrefaction. He employs one-eighth to one-half a pound of bichromate of potash in 100 gallons of water; and in the case of sulphuric acid a quarter of a pound to a pound of the acid to 10 gallons of water. Nobody contends that the Warrington process

was ever practically employed in tanning, and on its face it is very remote from the Schultz process.

We come next to the Swedish patent, to Cavalin (Cavallius), of May 1, 1850. He first describes a dyeing process which may be either a mineral one, as, "for instance, of one part of sulphate of protoxide of iron and six to twenty-four parts of water," or a vegetable one, with "leaves, sprigs, and the bark of a majority of the perennial plants." He then places the skins in a solution of chromate for tanning. In the second bath of Cavalin there is no suggestion of the sulphurous acid reducing bath of Schultz. Of this process, Heinzerling, in the *Elements of Leather Making* (1882), says, at page 144:

"We can regard Cavalin's process as a combination of iron, alumina and chrome tanning. The leather, however, showed an easily removable or deteriorating result in water, and was brittle, which made its practical application impossible."

Morfit on the *Art of Tanning* (1852) says (page 401) of Cavalin and other similar processes:

"It is doubtful whether leather made by any of the preceding processes will preserve its durability for any length of time, as from its very nature it would be reasonable to expect it to crack, unless it be kept constantly greased."

Davis on the *Manufacture of Leather* (1885) says, on page 629:

"Cavalin's method may be considered as a combination of tanning with ferric, aluminum, and chromic oxides. But a practical application of the process is not possible, since the leather loses its tannin easily when immersed in water, and its grain is brittle. * * * All the above-mentioned methods of tanning have been abandoned on account of the defective quality of the product prepared by them."

Professor H. R. Proctor says, in a lecture given October 9, 1893, when speaking of the Cavalin leather:

"The resulting leather was a combined iron and chrome tannage, which is not a practical success, though it is not impossible that some modification of it might be put to useful purpose."

The authorities on the subject of tanning, as well as an inspection of the Cavalin patent, demonstrate that it is not an anticipation of the Schultz process.

In 1858, Dr. Frederick Knapp published an article on the nature of leather. This article is translated in *Dingler's Polytechnical Journal*, vol. 149, p. 305, and in *Wagner's Jahresbericht* (1858) p. 521. Speaking generally, the Knapp method relates to tanning with salts of the oxide of iron or of the oxide of chrome. It is a "single-bath process." The Schultz process depends, primarily, "upon the reduction throughout the skin of a compound of chromic acid." No compound of chromic acid is employed by Knapp, and no reduction of chromic acid takes place when the skins are tanned. The Knapp method of treatment with iron and chromium salts has been unsuccessful. The literature of the art shows that the Knapp process never went into commercial use.

Heinzerling on the *Elements of Leather Making* (1882) p. 144, says:

"The application of iron and chrome alum in tanning has already been formally proposed, and also been practically carried out. The use of these substances was soon, however, given up again, since the leather so prepared

showed no advantage over the leather tanned with alum and other aluminum salts."

Davis on the Manufacture of Leather (1885) p. 629, says:

"The use of iron alum and chrome alum was at one time proposed and actually introduced in practice, but the use of these substances was soon abandoned, as the leather prepared in this manner had no advantage over that tanned with alum and alumina salts."

Wagner's Chemical Technology (1892) p. 889, says, under the heading "Knapp's Leather":

"The hides do not become really tanned by being immersed in solutions of such metallic salts as those of the ferrous and ferric oxides and zinc and chromium oxides. * * * Though a certain combination of the oxide and fibers takes place, no real leather is formed, because the substance when finished is not fitted for contact with water; for then the so-called 'tannin' is washed out. * * * Although the exterior color of good, sound leather may be imitated, the real qualities of leather are wanting. Knapp's process is not in use, or is so entirely modified by substituting alum for metallic oxides that the skins are tawed by a combination of the preceding tawing process and the oil tawing process now to be described."

Proctor, in his text-book on Tanning (1885) p. 219, says of leather made by the use of basic ferric salts:

"The leather, however, has by no means the same resistance to wet and decay as bark-tanned leather, and invariably has a tendency to crack when sharply bent. The process has been most carefully worked out by Professor Knapp, and was patented and worked commercially for a short time in Brunswick, but apparently without financial success."

It is manifest that Knapp does not describe the Schultz process.

We have next the Swan British patent of 1866. Swan states that his invention may be applied to tanning. His method is to immerse the skins in a solution containing 1 per cent. of chrome alum, or in a solution of chromate or bichromate of potash, and then to decompose the chromate or bichromate in the skin "by means of oxalic or other similar acid," so as to reduce the bichromate and produce "the required compound of chromic oxide." It is established by this record that oxalic acid reduces bichromate more slowly than sulphurous acid, and that it must be used with great care to prevent injurious action on the raw hide. The Swan process has not proved to be a practical method for tanning. It is not the Schultz process.

The Heinzerling English patent of 1880 and American patent of 1881 describe the only chrome-tanning process before Schultz which may be said to have gone into commercial use. Heinzerling first left the hides in the "chrome or aluminous solution" from one to twenty days. It is unnecessary to refer to the other operations of this complicated process, except to add that the hides were finally "exposed to the light for from twenty-five days to sixty." Heinzerling soaked his skins in a solution of chromic acid or of a chromate and bichromate, but he never reached the Schultz process of reduction through sulphurous acid. In chrome tanning there is no complete reduction until the hide turns green. In the Heinzerling process it seems that the gradual effect of exposure to the light had to be relied upon to reduce the chromate. Davis on the Manufacture of Leather (1885) p. 634, says:

"The cut surface of leather prepared according to the described [Heinzerling] process is at first yellow, but becomes gradually lighter, especially when exposed to the light, and turns finally to a nearly whitish green."

Concerning the Heinzerling process, Prof. Proctor, in his textbook on Tanning (1885) p. 221, says:

"A process which has been worked on a larger scale is that of Dr. Heinzerling, introduced about 1878, with the usual promise of 'complete revolution' in the leather trade, but which, in spite of the most determined and persevering efforts of the Eglinton Chemical Company, who own the English patent, has failed to take any very prominent position in commerce."

In a lecture delivered October 9, 1893, after speaking of the Cavalin process, Prof. Proctor said:

"Much later and much better known, if not more successful, was the Heinzerling process as carried out by the Eglinton Chemical Company and the Yorkshire Tanning Company. This could hardly be called a true chrome-tanning process, since alum and salt were the principal tanning agents, and the bichromate, which was used with them, was never systematically reduced to the green tanning form, though in course of time it gradually became partially changed at the expense of the skin."

Wagner's Chemical Technology (1892) p. 889, says: "Heinzerling's chrome tanning is, in the opinion of the author, perfectly worthless."

Upon examination of the present record, it appears—First, that, in the art of chrome tanning, no prior patent or publication describes the Schultz process; second, that no prior patent or publication disclosed a practical or commercial process for chrome tanning, with the single exception of Heinzerling, which was only successful to a limited degree, and which cannot be said to have solved the problem of practical chrome tanning worked out by Schultz; and, further, that the Heinzerling process is not an anticipation of Schultz because the two methods are distinctly different. Although chrome tanning may be effected experimentally by several of these old processes, as seems to appear from the evidence of the defendant's experts and the samples produced, we do not think this class of testimony detracts from the merit of the Schultz process, or from its position in the art. On the contrary, previous efforts and previous failures add to the importance of Schultz's discovery. A process carefully conducted by a skilled expert may be adequate to tan skins, and yet be commercially perfectly worthless. Such experimental success should have little or no weight in determining the question of the validity or scope of the Schultz patent. In the case of Patent Co. v. Zahn, 17 C. C. A. 552, 70 Fed. 1003, the circuit court of appeals for the Third circuit, on final hearing, sustained the validity of the Schultz patents. In five other suits brought by this complainant against various defendants preliminary injunctions have been granted, and in three of these cases the order was affirmed by the circuit court of appeals. Patent Co. v. Donallan, 75 Fed. 287; Same v. Adams, 77 Fed. 191; Adams v. Patent Co., 26 C. C. A. 326, 81 Fed. 178; Clerk v. Same, 28 C. C. A. 501, 84 Fed. 643; Ford Morocco Co. v. Tannage Patent Co., 28 C. C. A. 503, 84 Fed. 644. The substantial defense in the present case is anticipation of the Schultz process based upon the Francillon French and English patents of 1853. The Francillon patent was introduced in the prior injunction case against Adams, and carefully considered

by Judge Acheson in his opinion in the circuit court, and by Judge Dallas, speaking for the court, in the circuit court of appeals. It was also before this court on motion for a preliminary injunction. It is true, however, that the Francillon patent has not been heretofore considered by any court on final hearing, that this defense is now for the first time thoroughly and exhaustively presented, and that the defendant is entitled to have this question of anticipation investigated and passed upon in this case. It further appears that, in connection with the introduction of the Francillon patent, the whole prior art has been more fully presented in this case than in any prior litigation. After the most diligent search, however, in this and foreign countries, as we have seen, no process such as is described by Schultz has been found in the prior tanning art. We have only left then to determine the one important question whether in view of Francillon there was any patentable novelty in the Schultz method. Schultz describes a process of "tawing hides and skins" with minerals. Francillon's patent is for a process of "dyeing and printing silk, wool, and other animal fibers," including "skins." The Schultz patent is for a tanning process. The Francillon patent is for a dyeing process. This is the fundamental distinction between the two. The Francillon patent was taken out in 1853. It was commented on in trade publications, and was well known. It nowhere purports to disclose a tanning process. It was used for dyeing silks and wools. It does not appear that skins were ever dyed by this method. It was never used practically to tan a skin. It was not until after the discovery and great success of the Schultz process, and as a defense to the charge of infringement, that the expert witnesses for the defendant have found out by experiment that the Francillon dyeing process will in fact tan. And in this connection, and as going to show that the court should not be wholly guided by the experimental success of the most eminent experts, it may be observed that Prof. Carmichael also obtained good merchantable chrome-tanned skins from the Knapp, Cavalin, Swan, and Heinzerling processes, although, with the exception of Heinzerling, and then only to a limited extent, these old methods had proved practical failures.

With the history of the development of the chrome-tanning art before us, showing for many years repeated effort and repeated failure until the Schultz patents, and with these patents repeatedly sustained by the courts in other cases, the proof of an alleged anticipation in the form of a well-known foreign patent issued 30 years before, should be clear, convincing, and free from doubt. Before reaching the conclusion that the Francillon process is an anticipation of Schultz, we should be satisfied—first, that the art of tanning and the art of dyeing are so nearly analogous that there was no invention in the application of an old dyeing process to tanning; and, second, that the Francillon patent for dyeing sets out in full, clear, and exact terms the Schultz method of tanning, so that any one skilled in the art would be able to practice the Schultz process by following the directions of the Francillon specification. If either of these propositions is doubtful, the defendant's attack upon the Schultz patent must fail. As a matter of common knowledge, as well as scientific classification, tanning and

dyeing are distinct arts. The art of tanning is to change a raw skin into leather. The art of dyeing is to fix color. The Century Dictionary defines tanning as "the art or process of converting hides and skins into leather," and dyeing as "the operation or practice of fixing colors in solution in texible and other porous substances." The Encyclopædia Britannica (1894) defines leather as follows:

"Leather consists of the hides and skins of certain animals, prepared by chemical and mechanical means in such a manner as to resist influences to which in their natural condition they are subject, and also to give them certain entirely new properties and qualities. Skins in an unprepared, moist condition are readily disintegrated and destroyed by putrefaction, and if they are dried raw they become hard, horny, and intractable. The art of the leather manufacturer is principally directed to overcoming the tendency to putrefaction, to securing suppleness in the material, to rendering it impervious to and unalterable by water, and to increasing the strength of the skin, and its power to resist tear and wear."

It defines dyeing as follows:

"Dyeing is the art of coloring in a permanent manner porous or absorbent substances by impregnating them with coloring bodies. Most vegetable and animal bodies are porous or absorbent, and can be dyed; some minerals also, such as marble, can absorb liquid coloring matters; but the term 'dyeing' is usually confined to the coloring of textile fibrous materials by penetration. The superficial application of pigments to tissues by means of adhesive vehicles, such as oil or albumen, as in painting or in some kinds of calico printing, is not considered as a case of dyeing, because the coloring bodies so applied do not penetrate the fiber, and are not intimately incorporated with it. The mere saturation of textile fiber with a solution of some colored body and subsequent drying do not constitute a case of dyeing, unless the color becomes in so far permanently attached to the fiber that it cannot be washed out again by the solvent employed or by common water."

Dyeing, technically speaking, and as contrasted with painting, means a saturation or impregnation of the fiber in order to secure fixation of color. As applied to some animal fibers, such as silk or wool, it means a thorough saturation; as applied to skins, it may signify a thorough or a partial saturation; in other words, skins may be dyed on the surface, or a portion of the way through, or all the way through. The dyeing of skins is effected either by plunging or dipping in the dyeing solution, or by spreading the dyeing material on the surface by brushing over it. Francillon was a French dyer. His patent discloses a process for the fixation of a permanent green color on animal fibers. As practiced commercially, this method seems to have been limited to dyeing silk and woolen fabrics. Wagner's *Jahresbericht* (1858), in review of the Francillon process, says:

"Francillon described the following process for dyeing woollens and silk fabrics a permanent green by means of oxide of chromium."

He then sets out the steps of the process substantially as found in the Francillon patents. The Francillon French and English patents are substantially the same. With respect to these patents, Mr. Little, complainant's expert, says:

"The Francillon patents relate directly and solely to a process of dyeing. They are directed to dyers, and are to be read from the dyers' point of view. They are, moreover, primarily directed to the dyeing of silk and wool."

In the specification of his English patent, Francillon says:

"My invention of improvements in dyeing and printing silk, wool, and other animal fibers relates to a method of fixing upon silk, wool, and other animal fibers, such as hair, feathers, or skins, the green oxide of chrome, called by French chemists sesqui-oxide of chrome, or the chromic oxide of Berzelius. This oxide may either be applied and fixed alone, or in order to produce various shades and colors the oxide may also be employed in combination with various substances, such as certain acids or oxides, or with coloring or astringent matters. This object of the invention may be effected either by the oxidation of chromous oxide, which may be effected upon the substances either in the fibrous state or after having been manufactured into the fabrics to be dyed or printed, or the same effect may be produced by the reduction of chromic acid and its conversion into chromic oxide. The fixing operation is carried on in the following manner: A cold saturated solution of bichromate of potash is laid evenly either upon the whole fabric or upon any part which it is desired to have colored, dyed, or stained; and I would here observe that there are some kinds of fibers which are better impregnated with impure chromic acid, or even with bichromate of chloride (salt of peligot), than with a perfectly pure salt. This operation is performed at the ordinary temperature, or at a temperature of thirty degrees, forty degrees, or fifty degrees of the centigrade thermometer, or even a higher temperature may be employed, according to the nature of the fiber to be operated upon. The fiber thus impregnated with chromate or chromic acid is left in repose for some hours protected from the solar rays. The operation of reducing the chromic acid is then proceeded with, in order to deprive the acid of a moiety of its oxygen, and to convert it into chromic oxide. It is well known that many agents are capable of effecting the reduction of chromic acid either in a free state or in the form of chromate, and of converting it into green oxide. Amongst these may be particularly mentioned chloride of tin, the hydro acids, phosphorous acid, several oxy acids of sulphur, either free or in the form of a salt, but more especially sulphurous acid. This latter has been preferred, inasmuch as, besides presenting the advantage of economy, it possesses, furthermore that of only requiring for its action the apparatus and processes employed for bleaching woolen and silken fabrics by means of sulphur. When the fibers or fabrics to be dyed have been impregnated with chromic acid, they are to be exposed in a damp state to the action of sulphurous acid, either in gaseous form or in solution. The sulphurous acid instantly effects the reduction of the chromic acid, and the fibers pass from a brownish yellow color to either a grayish green or a decided green, according to whether the chromate has been employed alone or with the addition of arsenious or arsenic acid. The fabric or material now only requires to be washed, and the color is fixed. The tint obtained by means of the red chromate is upon wool a gray green, and a sea green upon silk, but much less intense. By adding to the chromate arsenical preparations, a great variety of shades of green may be produced. As the chromic acid acts as a mordant as energetically as alumina and oxide of iron, yarns or fabrics upon which the chromic acid has been previously fixed may be dyed in baths of madder, cochineal, and other matters, and by this means several fancy shades may be produced; but, in the same manner as when mordants of alumina and iron are employed together in order to produce complex shades, so the chromic oxide, mixed with the preceding mordants, serves to produce still more varying tints, which cannot easily be imitated by other processes. The coloring or astringent matter may, when they allow of it, be deposited and fixed at the same time as the chromate, and the sulphurous acid be allowed to act afterwards. In conclusion, I desire it to be understood that I claim the application to the dyeing and printing of fibers, yarns, threads, silken and woolen fabrics, and other animal fibers or tissues (such as hair, feathers, or skins) of the color produced by the fixing thereon of the green oxide of chrome (the sesqui-oxide of chrome of the French chemists and the chromic oxide of Berzelius). This oxide I either apply and fix alone, or in order to produce various tints I combine it (either at the time of applying it to the material or afterwards) either with certain acids, such as phosphoric, phosphorous, arsenic, or arsenious acid, or with certain oxides, such as those of iron, lead, copper, or other metal, or with coloring matters which require

the assistance of an oxide in order to combine with the fiber, and which find in the chromic oxide a mordant, and, lastly, with that no less numerous class of astringent matters by means of which so many fast colors are produced. I do not, therefore, intend to confine myself to the process above described; but what I consider to be new, and desire to claim as of my invention in the above-described process, is dyeing and printing animal fibers, such as wool, silk, hair, feathers, or skins, by means of chromic acid or its combinations, which may be reduced and converted into a chromic oxide, and fixed by any convenient chemical means, as above described."

Schultz, in his patent No. 291,785, says:

"Be it known that I, Augustus Schultz, a citizen of the United States, * * * have invented new and useful improvements in tawing hides and skins, of which the following is a specification: This invention relates to a new process for treating hides or skins, said process consisting in subjecting said hides or skins to the action of a bath prepared from a metallic salt, such as bichromate of potash, and of then treating the same with a bath containing sulphurous acid. In carrying out my process, I unhair the raw hides and prepare them in the same manner in which they are made ready for tanning. If the hides have not been pickled, I subject them to the action of a bath of bichromate of potash in an acid, such as hydrochloric acid, or, if the hides have been pickled, they may be treated in a solution of bichromate of potash in water without the addition of an acid. In this solution the hides are left for a longer or shorter time, according to their thickness and to the strength of the solution employed. A skiver or the face of a sheepskin can be done in a strong solution, as above described, in about fifteen minutes, while a full skin "roan," would require in the same solution about one hour. I call the solution weak if it contains five per cent. or less of the weight of the skins of bichromate of potash, and I call the solution strong if it contains more than five per cent. of bichromate of potash. The skins are done if small pieces cut from the thickest part thereof show that the solutions have entirely penetrated. The skins are then ready to be taken out of the solution, and, after the adhering liquor has run off, the skins are introduced into the second bath, which consists, by preference, of sulphite of soda dissolved in water, to which an acid—such as hydrochloric acid—should be added, in order to set free the sulphurous acid. The hydrochloric acid or its substitute may be added to the bath in a free state or through the medium of skins previously pickled, such skins being impregnated with the proper acid. The solution may be strong or weak of sulphite, and the quantity of acid used at first may be less than requisite to exhaust the bath of the sulphite, and more acid may be added if the skins show that more is required, which is indicated by the color of the skins. When the skins are done, they show a whitish, blueish, or greenish color, according to the time they are kept in the sulphite bath. A skiver which first has been exposed to the action of the bichromate bath for fifteen minutes will be ready by remaining in the sulphite bath about twenty minutes. For thicker skins a proportionately longer time is required. For some skins—such as calf or steers' skins—it is desirable that the same, after having been withdrawn from the second or sulphite bath, shall be returned to the bichromate bath, which imparts to them a brownish color, and leaves them in a favorable condition to be colored black. The leather coming from the sulphite bath is especially adapted for light and also for dark colors, and by proper dyeing methods better and brighter colors can be produced than on leather done by tannin. After the leather is done in the manner above described, it may be colored, soaped, and greased in the usual way. Leather can also be made by reversing the operation and first soaking the hides in a sulphite bath, and then exposing them to the action of the bichromate bath. By using the baths described at a heat of about 80° Fahrenheit, the process will be done in a shorter time than if the baths are used cold. Tawed leather made by my process is very strong, soft, and elastic, and my process is applicable to hides or skins of every description. Instead of using sulphite of soda, I can use other sulphites or bisulphites in presence of an acid or an aqueous solution of sulphurous acid. What I claim as new, and desire to secure by letters patent, is the within-described process for tawing hides and skins, said process consisting in subjecting the hides or skins to the action of a bath prepared from a metallic salt, such as bichromate

of potash, and then to the action of a bath capable of evolving sulphurous acid, such as a solution of sulphite of soda, in presence of another acid, such as hydrochloric acid, substantially as described."

We have italicized some parts of the above quotations from the patents in order to draw special attention to them.

The same chemicals are used in the Francillon dyeing process as in the Schultz tanning process, but the mode of treatment is not identical. The description in the Francillon patent is such as a dyer would find necessary to follow to successfully dye wool, silk, or the surface of a skin. The description in the Schultz patent is such as a tanner would find necessary to follow to successfully tan a skin. The literal following of the Francillon specification will not, in our opinion, tan a skin except by accident. It does not clearly or accurately describe or disclose a tanning process. The Francillon patent says nothing about two baths. As to the first operation it says: "A cold saturated solution of bichromate of potash is laid evenly upon the whole fabric or upon any part which it is desired to have colored, dyed, or stained;" or, in the language of the French patent, the bichromate is to be deposited "uniformly or locally on the textile fiber." To a skin dyer this would probably mean that the solution was to be applied to the surface with a brush, which was one customary mode in dyeing skins. By the Schultz process, the hides are first prepared for tanning, and then they are subjected to the action of a solution of bichromate of potash. In this solution the hides are left for a shorter or longer time, according to their thickness and to the strength of the solution employed. As to the second operation, Francillon says: "The sulphurous acid instantly effects the reduction of the chromic acid;" or, as the French patent says, "The latter reduces instantly the chromic acid." This exposure to the action of sulphurous acid and the instantaneous reduction of the chromic acid is a sufficient description to the skilled dyer to enable him to dye wool, silk, or the surface of a skin, because the reduction of the chromic acid and the change of color are instantaneous; but to effect the reduction throughout the skin, which is necessary in tanning, it is required to remain in the second bath from 20 minutes to several hours. Schultz says as to the second operation:

"A skiver which first has been exposed to the action of the bichromate bath for fifteen minutes will be ready by remaining in the sulphite bath about twenty minutes. For thicker skins a proportionately longer time is required."

A comparison of the Francillon and Schultz specifications demonstrates, we think, that the processes described are not identical, just as the results to be accomplished are different. To dye silk, wool, or the surface of a skin, it is only necessary to follow the instructions of Francillon, and to expose the material, after the first operation, for a few moments to the action of sulphurous acid to obtain what is sought,—green color; but this is not the tanning process described and carried out by Schultz, and which the defendant uses with an immaterial modification. With the Schultz process before him, it may be possible for a skilled expert to tan a skin by following what he believes to be a liberal construction of the Francillon specification. But that is not the question. Francillon is not to be interpreted

in the light of and with the knowledge of the Schultz process. The question is, assuming the Schultz process did not exist, does Francillon disclose a tanning process, and by following literally his instructions have you solved the problem of a practical and commercial method of chrome tanning? We think this question must be answered in the negative. The fact that the Francillon process was publicly known for more than 30 years before Schultz, and during a time when inventors and scientists were vainly endeavoring to discover a successful method of chrome tanning, raises a strong presumption on its face that Francillon did not fully disclose a practical tanning method. The discovery of a dyeing process for the production of color, by the fixation of chromic oxide upon wool, silk, skins, and other animal fibers, is quite a different thing from the discovery of a tanning process for the production of another substance called "leather." Indeed, if the Francillon patent for chrome dyeing disclosed a method by which chrome tanning might be effected, we think, in view of the history of the two arts contained in this record, and of the fact that they are radically distinct, it would have been invention of a high order to have discovered that an old dyeing process would produce merchantable chrome-tanned leather. And when we add to this what we have found to be the fact, that the Francillon patents do not contain a full, clear, and exact description of the Schultz process, the conclusion follows that the Schultz patents are not anticipated by Francillon.

The main arguments relied upon by the defendant seem to be: First. Francillon's patent was for a process for the fixation of chromic oxide upon animal fibers including, specifically, skins, and it therefore includes both chrome dyeing and chrome tanning. The answer to this is that repeatedly in both the French and English patents Francillon limits his invention, and only claims as new the dyeing, or the dyeing and printing, of animal fibers. Second. This is a case of double use, because Schultz simply applied the old and well-known Francillon dyeing process to tanning. The answer to this is that, in our opinion, this is not a case of double use, because the art of dyeing and the art of tanning are not analogous, since the results or products produced are different, and because the Francillon patent for dyeing animal fibers does not contain a full and clear description of the Schultz method for chrome tanning. It is true that the fixation of chromic oxide upon a skin will tan as well as dye. It is also true that a skin dyed by the Francillon process may be tanned on its surface, which does not make it leather, or accidentally tanned through and through, which would make it leather. But this result is not a sufficient reason for holding that Francillon anticipates Schultz. An accidental result not contemplated by a former inventor cannot anticipate a later patent.

In *Tilghman v. Proctor*, 102 U. S. 707, 711, 712, Mr. Justice Bradley, speaking for the court, said:

"We do not regard the accidental formation of fat acid in Perkins' steam cylinder * * * as of any consequence in this inquiry. What the process was by which it was generated or formed was never fully understood. Those engaged in the art of making candles, or in any other art in which fat acids are desirable, certainly never derived the least hint from this accidental phenomenon in regard to any practical process for manufacturing such acids. The accidental effects produced in Daniell's water barometer and in Wal-

ther's process for purifying fats and oils preparatory to soap making are of the same character. They revealed no process for the manufacture of fat acids. If the acids were accidentally and unwittingly produced, whilst the operators were in pursuit of other and different results, without exciting attention and without its even being known what was done or how it had been done, it would be absurd to say that this was an anticipation of Tilghman's discovery."

In *Clough v. Manufacturing Co.*, 106 U. S. 166, 175, 176, 1 Sup. Ct. 198, the Clough patent was held valid, notwithstanding the prior Barker burner. The court said:

"The testimony * * * amounts really to this only: that if that burner is used now in a way it which it was never designed to be used, and it is not shown to have ever been used before Clough's invention, it may be made to furnish a supplementary supply of gas. * * * Any further raising of the tube was accidental, and not a part of the law of the structure. * * * The structure was not designed for the same purpose as Clough's, no person looking at it or using it would understand that it was to be used in the way Clough's is used, and it is not shown to have been really used and operated in that way."

In *Pittsburgh Reduction Co. v. Cowles Electric Smelting Aluminum Co.*, 55 Fed. 301, 307, the court said:

"Suppose it to be a fact that in De Ville's process alumina was dissolved in the bath from the anode, and that thereupon it was electrolyzed as in the Hall process, it was a mere accident of which De Ville made no note, and which therefore, we may reasonably infer, he did not observe. Accidents of this character cannot be relied on as anticipations of a patented process, when the operator does not recognize the means by which the accidental result is accomplished, and does not thereafter consciously and purposely adopt such means as a process for reaching the result."

Upon careful consideration, we are of opinion that the Francillon patents do not anticipate the Schultz patents, and that the decision of the circuit court of appeals for the Third circuit in the Zahn Case was correct, and should be followed by this court. Decree for complainant.

UNITED STATES PLAYING-CARD CO. v. SPALDING et al.

(Circuit Court, S. D. New York. February 28, 1899.)

PATENTS—SUITS FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

Where the question of the violation by a defendant of an injunction issued in a suit for infringement of a patent depends on whether or not a new article sold by defendant since the granting of the injunction is an infringement of complainant's patent, which is an intricate question, dependent on structure, and requiring a comparison of the article with others, and a consideration of other patents, the court will not undertake to determine it on a motion for an attachment, but, no intentional violation being claimed, will deny the motion, and leave the complainant to his remedy by a new bill.

In Equity. On motion for attachment for violation of injunction.

Arthur v. Briesen, for the motion.

Fred. L. Chappel, opposed.

WHEELER, District Judge. The statement in the opinion heretofore filed (92 Fed. 368) upon the motion for an attachment herein,

that Spalding & Bros. appear to have respected the injunction, was founded upon that of plaintiff's counsel at the argument, which was understood to mean that they had not done anything that was now complained of. Attention has since been called to the answering affidavit of their manager, which states that since the injunction Ihling Bros. & Everard have sold to them "a tray known as the 'New Kalamazoo Tray,' which this deponent is informed and believed was manufactured under a patent antedating the Bisler patent, here in suit, and was therefore obviously not included or contemplated in the decree of the court, or in the above-named injunction, as an infringement." This tray is the one complained of, and a mere denial of the motion would leave the decision to look like an adjudication that it is not an infringement, which would not be correct; for, in the view taken, that would be immaterial, and no conclusion was reached upon it. That prior patent was the Butler patent, and, in view of that statement now noticed in the affidavit, that structure becomes material, and the question arising upon it has been further examined. The Butler patent was for an open tray in the form of a cross, into the arms of which the hands of cards were to be pushed from the interior between guides, and to be held down there by elastic bands around the arms above the cards. This New Kalamazoo tray is open, and in the form of a cross, and in appearance somewhat like the Butler patent; but it has a block in the interior, forming, with the sides, cribs for holding the hands of cards, which are pushed from the exterior under bars which hold them down; and it has the features of the Bisler patent, and of the structure which has been held to be an infringement, except that it is open, and the bars hold the hands down in place, instead of the cover. So, it does not appear to be made according to the Butler patent, and it may be an infringement of the Bisler patent, and its sale a violation of the injunction, in which Spalding & Bros. and Ihling Bros. & Everard had part. But the Bisler patent is for improvements upon the Butler trays and others, and this new tray cannot be definitely determined to be an infringement without comparing it, in the light of evidence, with that and still other patents and structures. This cannot be safely and properly done on this motion, which is in its nature criminal, and in result sought punitive, requiring full proof of a violation that is obvious to the senses, without intricate comparison or study. The position of Spalding & Bros. here, who are acquitted by counsel of the plaintiff of any intentional, although not of actual, violation of the injunction, shows that this question of violation is intricate, and cannot be determined upon merely obvious appearances. As now considered, such an alleged infringement should be left to a new bill.

The conclusion reached is that the motion for an attachment must be denied, as before, except that it should be without prejudice, instead of as an adjudication in respect to infringement by the sale of this now new tray. "Without prejudice" to be added to denial of motion.

THOMPSON v. SECOND AVE. TRACTION CO. et al.

(Circuit Court of Appeals, Third Circuit. May 1, 1899.)

No. 32, March Term.

1. PATENTS—INFRINGEMENT—ROLLER COASTERS.

A patent for a roller-coasting structure, claiming tracks "running parallel with each other, and having the starting and terminal stations at the same elevation," is infringed by a similar structure in which the terminal station is only from six inches to a foot lower than the starting station.

2. SAME—MECHANICAL EQUIVALENTS.

In a roller-coasting structure, having parallel tracks, the use of turntables or pivoted switch tracks, instead of fixed switch tracks, does not avoid infringement, since these devices are well-known equivalents.

3. SAME.

The Thompson patent, No. 310,966, for an improved roller-coasting structure, construed, and *held* valid, and infringed as to claim 1.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity by La Marcus A. Thompson against the Second Avenue Traction Company and James A. Griffiths for alleged infringement of a patent for a roller-coasting structure. The circuit court found that there was no infringement, and entered a decree dismissing the bill (89 Fed. 321), from which decree the complainant has appealed.

Frank S. Busser, for appellant.

Henry E. Everding, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and McPHERSON, District Judge.

ACHESON, Circuit Judge. The bill in this case charges the defendants, the Second Avenue Traction Company and James A. Griffiths, with infringement of letters patent No. 310,966, granted on January 20, 1885, to the complainant, La Marcus A. Thompson. The invention of this patent relates to an improved roller-coasting structure. The specification describes, and the drawings illustrate, a structure in which there are two parallel undulating tracks, extending from an elevated starting station at one end of the structure to a terminal station having the same elevation at the other end of the structure, each end of the structure being provided with a switch track, by means of which the car may be transferred from one track to the other, the object being to have each car make a round trip, "going out on one track and returning on the other." The specification, referring to the attached drawings, states:

"The starting end, D, of the outgoing track, B, is of a gradual decline to b, where the track takes a short rise, which, however, is not steep enough to materially check the momentum gained by the car from the start. From this point the track takes quite a sudden or steep descent to the lowest part, d, and then a gradual and regular rise to the terminal point. The momentum or acceleration acquired on the down grade will carry the car nearly to the top of the ascending end, means being provided to continue the car to the top when its collected force has been expended. The car is then transferred to

the return or companion track, B', by means of the switch track, E, and when it has returned to the starting point it is switched onto the outgoing track by means of the switch, F. The two tracks run parallel, and are duplicates of each other, the structure and grades being the same at opposite ends. * * * This construction and arrangement afford a very enjoyable means for amusement and pleasure, the sensation being similar to that of coasting on the snow, with the difference that the conveyance runs on wheels, and returns the passenger to the starting point without the necessity of having to walk up hill for a second ride."

Infringement of the first claim of the patent is here alleged. That claim reads thus:

"(1) In a coasting structure, the combination, with the tracks, B, B', running parallel with each other and having the starting and terminal stations at the same elevation, of the switch tracks, E, F, whereby the car reaching the terminus on the outgoing track is transferred to the return track and back again to the first track for another trip, substantially as described."

Upon the uncontradicted proofs, it is quite clear that the defendants' roller-coasting structure at Calhoun Park, the subject of complaint here, in form of construction, mode of operation, and purpose, conforms closely to the specification and drawings of the patent in suit. Indeed, to take their structure out of the first claim, the defendants rely exclusively on two alleged differences. They assert—First, that the starting and terminal stations of their structure are not at the same elevation; and, second, that their switching devices are turntables or pivoted switch tracks, whereas the switching devices shown in the patent in suit are fixed switch tracks.

In respect to station elevation, the defendants' allegation is that their starting station is one foot higher than their terminal station. This is the entire alleged difference in the height of the starting and terminal stations in a structure having a length of 450 feet and an altitude at the ends of about 21 feet. The complainant alleges, and his proofs show, that the defendants' starting and terminal stations do not vary in elevation more than five or six inches. Here the weight of the evidence, we think, is with the complainant. Certain it is that no difference in elevation between the starting and terminal stations of the defendants' structure is discernible by the eye, and whatever difference exists is ascertainable only by the nicest measurement. Now, we are not able to read the first claim of this patent as requiring that the starting and terminal stations shall be exactly at the same elevation. Mathematical precision is not necessary and is not prescribed. It suffices if the stations are substantially at the same height. This accomplishes practical success. The claim has the usual conclusion, "substantially as described." Without these qualifying words, however, the claim is to receive a reasonable construction, regard being had to the nature of the described structure and the object to be attained. The defendants' structure has the starting and terminal stations at the same elevation for all practical purposes. This is enough. The slight actual difference in elevation is a matter of no moment.

It is undeniable, under the evidence, that at the date of the complainant's patent both the switch tracks illustrated in his drawings and the defendants' switch tracks were old and familiar devices for transferring cars from one track to another. They were well-known

equivalents. Here they perform the same function. The substitution of one for the other in this combination works no new or different result whatever. The first claim of the patent does not name "fixed" switch tracks. The change in the mere form of the switching device which the defendants have adopted is altogether immaterial. The changed form embodies the invention described and claimed. *Winans v. Denmead*, 15 How. 330, 342. There is substantial identity between these two coasting structures. In this class of cases, we have repeatedly held that such mere formal changes are unavailing to avoid infringement. *Devlin v. Paynter*, 28 U. S. App. 115, 122, 12 C. C. A. 188, and 64 Fed. 398; *Hillborn v. Manufacturing Co.*, 28 U. S. App. 525, 557, 16 C. C. A. 569, and 69 Fed. 958; *McDowell v. Kurtz*, 39 U. S. App. 353, 23 C. C. A. 119, and 77 Fed. 206.

We are not able to concur in the view which prevailed in the court below that, unless the first claim of the patent in suit is construed so narrowly as to exclude the defendants' structure, then the claim must be held to have been anticipated by the patent to John G. Taylor, No. 128,674, and therefore void. A careful study of these two patents has convinced us that they relate to structures which differ substantially in form, method of action, and result. The Taylor patent shows an inclined railway consisting of two combined tracks, which tracks, respectively, start from different levels, and run in reverse directions; the car, in making its trip, starting from a high platform at the beginning of the railway, and finally stopping at a very much lower platform at the end of the railway. When the car starts it proceeds down the first inclined track, and onto an intermediate transfer platform, where, by means of a movable frame, it is moved sidewise, so as to come opposite the second inclined track, and, being again started, passes down that incline, and onto the stopping platform, where the passengers alight at a point remote from the starting platform. The car is then pushed or pulled up a steep incline to another or fourth platform, and then, being moved sidewise, is placed again on the starting platform for another trip. In order to take another ride, the passengers have again to walk up the steps leading from the ground to the most elevated platform. The Taylor structure does not possess the distinguishing features which have brought the Thompson roller-coasting structure into great public favor and extensive use, namely, the capability of securing a round trip,—each car going out on one track and returning on the other track,—and bringing back the passengers to the starting point, without the necessity of their walking uphill or climbing a flight of steps for a second trip. The views we have thus expressed require a reversal of the decree dismissing the bill. The decree of the circuit court is reversed, and the cause is remanded to that court, with directions to enter a decree in favor of the complainant in the bill.

NEW YORK FILTER MFG. CO. v. CHEMICAL BLDG. CO.

(Circuit Court, E. D. Missouri, E. D. April 20, 1899.)

No. 4,200.

1. PATENTS—PRELIMINARY INJUNCTION.

Where infringement prior to the suit clearly appears by the use of an infringing attachment, which may be easily disconnected and as readily connected again to the other parts of the device, the mere fact that a few days before the suit was commenced defendant disconnected such attachment, and informed complainant that he would no longer use it, is not sufficient ground for refusing a preliminary injunction. Under such circumstances complainant is entitled to greater security than the mere statement of defendant that he will not further infringe.

2. SAME—IMPROVEMENT IN WATER FILTERS.

The Hyatt patent, No. 293,740, for an improvement in the art of filtering water, *held* infringed on motion for a preliminary injunction.

This was a suit in equity by the New York Filter Manufacturing Company against the Chemical Building Company for alleged infringement of letters patent No. 293,740, issued to Isaac S. Hyatt for an improvement in the art of filtration of water. The cause was heard on a motion for preliminary injunction.

Paul Reiss and Bond, Adams, Pickard & Jackson, for complainant.
George W. Taussig, for defendant.

ADAMS, District Judge. This is an application for a preliminary injunction. The bill and moving papers show that complainant's patent has been upheld and declared valid by several prior adjudications, all of which are cited in the case of Manufacturing Co. v. Jackson (decided by this court Dec. 27, 1898) 91 Fed. 422. Infringement by defendant prior to the institution of this suit clearly appears. Upon this state of facts the application must be granted, unless the fact, as shown by defendant's affidavits, that defendant, a few days before this suit was instituted, and when the same was imminent, disconnected the infringing attachment, and informed complainant that it would no longer use the same, constitutes sufficient cause for denying the same. The fact appears that the infringing attachment in question can be easily disconnected from defendant's filter, and as readily connected again. The adaptability of the filter to such facile changes affords a constant temptation to defendant, as well as a constant menace to complainant. Under such circumstances it seems to me that the interests of both parties will be subserved by granting the application. Not only so, but complainant is entitled, on the showing made, to greater security against a once existing infringement than the mere statement by defendant that it will not further infringe. This is supported by abundant authority. Walk. Pat. §§ 676, 701; Curt. Pat. § 335; Chemical Works v. Vice, 14 Blatchf. 179, 20 Fed. Cas. 1355; Celluloid Mfg. Co. v. Arlington Mfg. Co., 34 Fed. 324; Gilmore v. Anderson, 38 Fed. 846; White v. Walbridge, 46 Fed. 526; Spindle Co. v. Turner, 55 Fed. 979. As is said in these authorities: "If the defendant intends in good faith to keep its promise,

the injunction will not harm it; otherwise, it will be a security for the complainants that their rights will not again be invaded." The application for a preliminary injunction is granted.

RICHARDSON v. D. M. OSBORNE & CO. et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 55.

1. PATENTS—INFRINGEMENT SUIT—LACHES.

A patent owner who, for about 14 years, witnesses the extensive and increasing manufacture and sale of an alleged infringing machine, without taking any steps to enforce his rights, is guilty of laches precluding him from maintaining an infringement suit.

2. SAME—HARVESTERS.

The right of the owner of the Fowler patent, No. 181,664, for an improvement in machines for bundling grain, to sue for infringement, held to have been lost by laches.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This was a suit in equity by James G. Richardson against D. M. Osborne & Co. and others for alleged infringement of a patent for an improvement in machines for bundling grain. In the circuit court the bill was dismissed because of complainant's laches (82 Fed. 95), and the complainant has appealed.

Horatio C. King and George A. Clement, for appellant.

James J. Storrow and Frederick P. Fish, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Letters patent No. 181,664 were granted on August 29, 1876, to Thaddeus Fowler, as inventor, and to James G. Richardson and his two brothers, Wilbur J. Richardson and Isaac S. Richardson, as assignees of one-half of the patent, for an improvement in machines for bundling grain. A bill in equity, verified on June 8, 1893, which was based upon the alleged infringement of this patent, was brought in the Northern district of New York by James G. Richardson, who became the owner of the entire patent on October 7, 1890, against D. M. Osborne & Co., a corporation, and its officers. The defenses which were relied upon were the unexplained laches of the owners of the patent in attempting to enforce their alleged rights, the prior invention of the patented structure by John F. Appleby, noninfringement, and nonpatentability. The circuit court dismissed the bill by reason of the laches of the owners of the patent. The invention is a part of a harvester, and was a device which will automatically discharge the bundle of grain when a certain predetermined quantity has been gathered, and consisted in a beater, which, having pressed the grain into the holder, was combined with a deliverer, which, when the beater had attained a predetermined pressure upon the bundles, was caused to remove the gathered bundle from the holder, either to the binding machine or to a binding ma-

chine combined with the device, or to the ground, to be otherwise bound. Fowler assigned his interest in the patent to the Richardson brothers on November 21, 1876. The only machine which was ever made under this patent was built by the inventor in Seymour, Conn., in the summer of 1876, and is said to have been "shipped West." Whither it went is not stated by adequate testimony, what became of it is unknown, no license was ever given to build or to use a machine, and the patent continued to be a mere paper patent.

The grain-binding harvester, patented to John F. Appleby on February 18, 1879, by letters patent No. 212,420, began to be introduced to the public in 1878, and speedily went into universal use in the grain-producing portions of the Western states, and is said to contain Fowler's bundling device. The leading manufacturers of harvesting machines bought shop rights at prices which seem excessive, it supplanted all previous binders, is still being manufactured, and its widespread use and its commercial success were known by all dealers in machines of this class. James G. Richardson lived in Lake City, Minn., from 1863 to 1887, was in partnership with one of his brothers in the sale of harvesters, reapers, and binders, and the firm acted as agents for the Johnson Reaper Company, J. Easter & Co., Gammon & Deering, and William Deering & Co., who were manufacturers of this class of machinery. The particular business of the complainant was the introduction of farm machines into active work upon the farm, and he must have been perfectly familiar with the mechanism and the extent of the use of the Appleby binder. He regarded the infringement as a palpable one, and, as the use was universal, he thought that practically all the binders and harvesters made in this country between 1879 and 1893 infringed the Fowler patent. This suit was brought about 2½ months before the expiration of the patent, and after the extensive and expensive manufacture of Appleby machines had progressed at an increasingly active rate, within the complainant's knowledge and observation, for about 14 years.

The defendants say that the owners of the patent were practically silent, permitted this expenditure to go on without interference or any adequate assertion of their alleged rights, and that the suit was barred by their inexcusable laches.

The record shows that nothing was done in the way of litigation, or active attempts to push either the patent or their claims, until May, 1890. No effort was made by either of the owners to make contracts or agreements with manufacturers to use the patent, and no effort was made by legal proceedings to suppress its infringement. The complainant's brothers would not enter into expenses for this purpose, would not consult with his attorneys, and opposed litigation. They were not poor and were not rich, but not only discouraged any litigation, but refused to participate in the expenses of an investigation as to the validity of the patent. Meantime, no efficient or active representations were made to the harvester companies of their infringement. The complainant says that he sent notices to the manufacturers, and, among others, to the defendant corporation, in the latter part of 1883, and met the president in Lake City by appointment in January, 1884. He says: "We had some conversation. He

asked what our claim was. He was told that it was on the combination. We talked together perhaps fifteen minutes, pleasantly." This was the extent of the manifestation to the defendant of the complainant's claim of right to a part of the Appleby machine, which was being made by the thousands. In May, 1890, an action at law was brought against the Minneapolis Harvester Works, which was compromised before trial, in September, 1891, by the payment of money and a release by the complainant. He did not tell how much money was paid, or whether it was in recognition of the validity of the patent. For aught that appears, all that the defendant did was to pay a trifling sum to be freed from a lawsuit. No other proceeding was instituted until the present suit. The only thing which can be, during the entire history of the invention, characterized as an active exercise of ownership, was the Minneapolis suit, and its outcome is so vague and shadowy that it cannot be told whether it was a successful or an abandoned attempt to sustain the patent. The continued refusal or neglect of the joint owners to impart life to it was so manifest that a court cannot look with favor upon the present attempt to gain money from manufacturers who invested in the effort to supply the demand for Appleby machines, under the belief that it infringed no patent,—a belief which the conduct of the owners of the Fowler patent encouraged. All the adjudged cases in regard to laches proceed upon the inequitable conduct of the complainant, and the inequity which would result if the stale claim was permitted to be enforced, and the judgments adverse to the claimant are founded upon the fact that the party to whom laches is imputed has all the time "knowledge of his rights, and an ample opportunity to establish them in the proper forum; that, by reason of his delay, the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them." A further reference to decided cases is unnecessary, as Judge Coxe has cited many of them in his opinion (82 Fed. 95).

Much testimony was also introduced by each party as to the second defense, which was Appleby's priority of invention. The date of the Fowler invention was placed by the complainant and his witnesses in the *prima facie* case in the summer of 1876, which was its actual date, although an attempt was subsequently made to place it in the summer of 1875. Appleby's first machine was made at the factory of the Parker Steam Reaper Works in Beloit in the winter of 1874-75, was tried in the summer of 1875, and was destroyed by order of one of the owners of the factory. A second crude machine was made, which was finished before January 1, 1876, did no work in the field, and was accidentally burned after the commencement of this suit. Four machines were then built for the same owner, the first one of which was finished in April, 1876, and was tried upon green rye in June, 1876. The written specification of the patent was executed on October 19, 1876. It is probable that the machine was the one described in the Appleby patent. As an entirety, it was not a perfect machine; for the knotting mechanism and the manner of attachment

to the harvester were subsequently improved. We think that Fowler's invention was probably in the Appleby machine as and when it was tried in June, 1876; but it is unnecessary to analyze the testimony with the closest care, and to decide the question of the priority of two inventions, the patents upon which have now expired, for the case of the complainant is so defective by reason of the laches of himself and his co-owners that the decree of the circuit court must be affirmed, with costs.

NEALL v. CURRAN et al.

(District Court, D. Massachusetts. April 21, 1899.)

No. 966.

ADMIRALTY PLEADING — DISCRETION OF COURT — MULTIFARIOUSNESS AND MISJOINDER.

There is no rule of admiralty pleading which renders a libel by a vessel owner to recover freight earned subject to exception for multifariousness and misjoinder because it joins the charterer and another, to whom the bill of lading had been transferred, and asks recovery in the alternative against one or the other, alleging that, by reason of certain facts set out, the libelant is unable to say which is liable; and the court has discretion to permit such joinder, where it will conduce to its own convenience in the trial of the claims, and will result in no injustice to the parties.

In Admiralty. On exception to libel.

Carver & Blodgett, for libelant.

Henry M. Rogers, for respondents.

LOWELL, District Judge. The libel in this case was brought by the owner of the barge *Felix* against Curran & Burton and the Delaware Insurance Company. It sets out that the *Felix* was chartered to Curran & Burton to carry a cargo of coal; that she was loaded, and a bill of lading given to her master, in which Curran & Burton were designated as consignees; that she was wrecked while on her voyage, was raised, and a large part of her cargo delivered according to the terms of the charter and the bill of lading; that the insurance company had issued a policy of insurance to Curran & Burton on the cargo, had paid to them a total loss, had received the bill of lading, duly indorsed by Curran & Burton to the insurance company, and had become subrogated to the rights of Curran & Burton, and subject to their liabilities as consignees and shippers; that the cargo was received by Curran & Burton, on behalf of the insurance company, without notice to the libelant; that freight was earned thereon, and was demanded both from Curran & Burton and from the insurance company, and that each of the claimants alleged that the said freight should be paid by the other; "that the said freight as aforesaid is due to your libelant from the said Curran & Burton, as the persons making the contract of charter and the receivers of the same, and is also due from the said Delaware Insurance Company, as the holders of the bill of lading, and persons receiving the property, they afterwards having sold it." The claimants duly excepted upon the

ground of multifariousness and misjoinder, and because the allegations of the libel were contradictory, conflicting, irreconcilable, and incompatible, and because the libelant was bound to elect which of the defendants he would seek to hold liable, and to discontinue as against the other.

As the libelant's case was presented in the libel and at the argument, it is a claim for freight arising out of a given charter party, which claim, he alleges, is valid against both the claimants, or, at the least, against one of them; but, if against only one, then, by reason of a doubt concerning law or fact, he is ignorant which defendant is liable. The libelant, in substance, says: "As the result of a certain transaction, A. and B. are liable to me,—one or both,—I do not know which; and therefore I proceed against both of them in the same suit, seeking to recover against one or both according as my right shall appear." It should be added that the libelant has disclosed the circumstances of his claim as fully as he can, and that the claimants do not contend that he has concealed anything, or that they will be taken by surprise. If this were a declaration at common law, it would be demurrable, and so it would very possibly be if it were a bill in equity. No case has been pointed out in which a plaintiff was permitted to sue A. and B. in one action, alleging that one of the two was liable,—he did not know which. This is a libel in admiralty, and the libelant contends that in admiralty the rule is different. There is no doubt that the rules of pleading in admiralty are more liberal than at law or in equity. Multifariousness and misjoinder are to some extent technical defenses. Their validity as defenses is largely determined by historical considerations and by early precedents in pleading. The substantial reason why two controversies closely related to each other may not, in a given case, be determined in one action, is that from their joinder and from their trial together there would result either inconvenience to the court or injustice to a party. In the case at bar the convenience of the court makes for joinder and a trial of the plaintiff's claims at the same time, and such a trial will do no injustice to either of the claimants. If the facts in this case were to be investigated by a jury, the claimants might well be prejudiced by a joint trial of the claims against them, as the jury might hastily infer that one of the two claimants must be liable, but before a judge no harm will ensue. With rules of pleading so elastic as those in admiralty, much must be left to the discretion of the court; and it may be that, in some cases in admiralty, claims against two parties in the alternative, arising out of the same transaction, cannot properly be joined and tried together. In this case I think justice and convenience unite to make a single action and a single trial advisable. Exceptions overruled.

THE BELLE.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 125.

TUG AND TOW—LIABILITY OF TUG FOR INJURY TO TOW.

Where the presence of a number of vessels, moored alongside of each other in Harlem river, made it necessary for tugs with a tow, in passing down, to keep well to the opposite side of the channel, but they kept within the limits where the water was of sufficient depth, as shown by the government charts, they cannot be held liable for an injury to the tow caused by her striking a sunken rock, which was not shown on the charts or known to navigators.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the district court, Southern district of New York, dismissing the libel. 89 Fed. 879. The suit was brought to recover damages alleged to have been caused by the said tugs in negligently towing the libellant's barge, Joseph H. Rose, upon a rock in the Harlem river, on September 4, 1897.

George B. Adams, for appellant.

Peter Alexander, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The barge was being towed from the entrance of Spuyten Duyvil creek, down the Harlem river, bound for 138th street. She drew $8\frac{1}{2}$ feet, the rock was about $5\frac{1}{2}$ feet under water at low tide, and the ordinary rise and fall of the tide was about 5 feet. The tide had been flood for about an hour and a half in the Hudson river when the tow started. The flood tide flows from the Hudson river down the Harlem. There seems to be no dispute, upon the evidence, that the existence of the rock was not known to navigators. Upon the charts of soundings made by the government, incident to the improvements being made on the Harlem river, its presence was not indicated. These improvements had effected changes in the channel, but the dredging had not been continued quite as far down the river. It stopped about 15 feet short of the rock. As the tow approached Morris' dock, it was found that a number of boats were made fast there, alongside of each other, so as to occupy 150 feet of the channel,—a most reprehensible practice in such a restricted water way. In order to pass it was necessary to keep the tow well over to the westward.

There is a sharp conflict of evidence as to the precise location of the rock. Claimant's witnesses place it nearly opposite Morris' Dock. The libellant's witness, Taylor, a civil engineer of 20 years' experience, and who had been employed for 11 years by the government as engineer in charge of the work on Harlem river, places it a little below the line of the dock, and further to the westward. He located the rock by actual survey with a sextant, using the triangulation stations already fixed as part of the survey work done by the government

engineers. We accept his location as the correct one. It appears, however, from the very charts of soundings of 1896 which he produced, that the rock lay between the 9-foot and the 12-foot contour lines; and, since its presence there was then unknown, we cannot find the tugs negligent for taking the tow where, except for this unknown obstruction, there was sufficient depth of water, even though they were navigating far over towards the westerly side of the 9-foot water way,—a maneuver rendered necessary by the obstruction of half, or more than half, of the channel by the vessels at Morris' dock.

The decree of the district court is affirmed, with costs.

THE QUEEN.

(District Court, N. D. California. April 15, 1899.)

No. 11,802.

1. SEAMEN—EXEMPTION OF WAGES FROM EXECUTION.

Neither the general maritime law, nor Rev. St. § 4536, providing that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court," exempts wages due a seaman from seizure under an execution issued on a valid judgment against him in a state court; and a satisfaction of such execution by the employer, as authorized by the state laws, is a good defense to a subsequent action by the seaman to recover the amount.

2. SAME — CONSTRUCTION OF EXEMPTION STATUTE — APPLICATION TO PRIOR JUDGMENTS.

Act Cal. March 27, 1897, amending Code Civ. Proc. § 690, by exempting absolutely from execution wages of seamen, in an amount not exceeding \$100, cannot be construed to apply to executions based upon judgments rendered in suits on contract prior to the passage of the act. Such a statute, if applied to judgments based on contracts made before its enactment, would conflict with the provision of the constitution which denies to a state the power to pass any law impairing the obligation of contracts.

H. W. Hutton, for libellant.

Geo. W. Towle, Jr., for claimant.

DE HAVEN, District Judge. This is a libel in rem to recover wages earned by the libellant as a seaman, and a further sum for meals provided by himself during his service as such. The case has been submitted to the court for decision upon an agreed statement of facts, from which it appears that on February 2, 1899, the sum of \$25 was due to the libellant for services rendered by him as a seaman on the steamship Queen, and the further sum of \$1.68 on account of meals paid for by himself during the time of such service; and on that day the money so due him was levied upon, in the hands of the agents of the steamer, under an execution regularly issued upon a judgment rendered upon May 10, 1895, in the justice's court for the city and county of San Francisco, in favor of one J. J. Rauer and against the libellant; and thereafter, on February 14, 1899, and prior to the commencement of this action, the agents of the steamer paid the officer holding such execution the sum of \$25.50, the amount then

due on the judgment, including interest and accruing costs. Before making this payment, they were notified by libelant that his wages "could not lawfully be paid or delivered by said agents, and against the objection of libelant then made, to said sheriff in satisfaction of said judgment, or upon, or pursuant to, or in satisfaction of the said execution." The judgment upon which the execution issued was based upon a cause of action arising on contract. The remainder of the sum earned by the libelant, after deducting the amount paid on account of the execution, has been paid; so that the only question to be decided is whether the libelant's wages as a seaman were subject to execution,—for, if they were, the payment made by the agents of the steamer in satisfaction of the execution levied is a defense to this action, under section 716 of the Code of Civil Procedure of this state, which provides:

"After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid."

The claim of the libelant is that the wages of seamen are exempt from execution under the general rule of the maritime law, and also by the express provisions of section 4536 of the Revised Statutes of the United States, and section 690 of the Code of Civil Procedure of this state. It has been held that the maritime law does not recognize any right to attach the wages of a seaman in an action at law instituted by his creditors in a state court. *McCarty v. The City of New Bedford*, 4 Fed. 818; *Ross v. Bourne*, 14 Fed. 858. And the same principle was recognized in *The City of New Bedford*, 20 Fed. 57. That is, it was held in those cases, that the fact that the wages of the mariner were under attachment in a proceeding at law pending in a state court would not suspend or defeat the right of the mariner to proceed in admiralty for the recovery of his wages. In reaching this conclusion, it was said by Judge Nelson in the case of *Ross v. Bourne*, just cited:

"I am aware of no law of congress, or rule or practice in admiralty, which requires this court to hang up its decree in this case until the attachment suit is disposed of. Ordinarily the sailor's only means of subsistence on shore are his wages earned at sea. If these may be stopped by an attachment suit the instant the ship is moored to the wharf, a new hardship is added to a vocation already subject to its full share of the ills of life."

There is, however, a marked difference between an attachment to secure the payment of an asserted, and, it may be, disputed and unfounded, claim, and the levy of an execution which simply seizes upon property of a debtor for the purpose of satisfying a valid judgment; and my attention has not been called to any case in which it has been decided that the wages of a seaman may not be taken on execution issued out of a state court, in the absence of a statute exempting them from such seizure, or in which it has been held that a prior payment of the amount due a seaman for wages, in satisfaction of an execution issued against him, would not constitute a good defense to a subsequent action brought by him in admiralty for the recovery of such wages. In such a case it cannot be said that the seaman has not had the full

benefit of the wages earned by him. Their application, under a lawful execution, to the payment of a debt of his, which is conclusively presumed to be just, and which he is bound, in conscience, to pay, is not oppressive, in a legal sense; and a court of admiralty will not, under such circumstances, decree that what has already been paid for his benefit shall be again paid to him.

In regard to the second contention of libelant, nothing more need be said than that section 4536 of the Revised Statutes, in providing, as it does, that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court," is not broad enough to cover the case of a seizure of a seaman's wages on execution (*Telles v. Lynde*, 47 Fed. 912), and therefore has no application to the present case.

The only question that remains is this: Were the wages of libelant exempt from execution under section 690 of the Code of Civil Procedure of this state? Prior to March 27, 1897, there was nothing in that section relating to the wages of seamen, except the general provision applicable to the earnings of all laborers, to the effect that "the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution of attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this state, supported in whole or in part by his labor," should be exempt from execution. On the day last mentioned, however, this section was amended by adding thereto a special provision in relation to the wages of seamen, exempting such wages from execution absolutely, in an amount not exceeding \$100, and without requiring any affidavit or other proof, upon the part of the seaman, showing that such wages are necessary for the use of his family residing in this state, and supported in whole or in part by his labor. St. Cal. 1897, p. 179. It will be observed that this amendment was enacted long subsequent to the rendition of the judgment upon which the execution above referred to issued, and, of course, subsequent to the making of the contract upon which that judgment was based. The libelant has not brought himself within the general provisions of the statute applicable to laborers having a family to support; so that, unless his wages were exempt from execution under the amended statute relating to the earnings of seamen, he is not entitled to recover in this action. After a careful consideration of the question, I am satisfied that the amendment to section 690 of the Code of Civil Procedure, before referred to, cannot be given the effect claimed for it by the libelant. The general question of the validity of exemption laws, as applied to contracts made prior to their enactment, was thoroughly considered by the supreme court in the case of *Edwards v. Kearzey*, 96 U. S. 595; and the court in that case announced its conclusion as follows:

"The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void."

And in the later case of *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, this conclusion is reaffirmed; the court quoting with approval

the following from the opinion in *Von Hoffman v. City of Quincy*, 4 Wall. 535:

"It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the constitution, and to that extent void."

There can be no doubt that a law absolutely exempting seamen's wages in an amount not exceeding \$100, as applied to previous contracts made with seamen, at a time when no such exemption is allowed, would materially lessen and impair the obligation of such contracts. It is a well-known fact that, as a general rule, seamen have no means of discharging their contract obligations, other than by the application of their earnings for that purpose; and in most instances the exemption of such wages from execution, in the amount named in the statute, would be equal to a withdrawal of the whole or the greater part of the seaman's property from the reach of his creditors, and would seriously impair the obligation of contracts entered into by the seaman at a time when the only exemption allowed him was that given by section 690 of the Code of Civil Procedure of this state, prior to its amendment by the act of March 27, 1897, to wit, his wages for 30 days prior to the levy of the execution, when necessary for the use of his family, residing in this state, and supported in whole or in part by his wages. The libel will be dismissed; the claimant to recover costs.

THE PRUSSIA.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 96.

1. SHIPPING—DAMAGE TO CARGO—CONTRACT LIMITING LIABILITY OF CARRIER.

A carrier by water, who accepts a cargo of frozen meat for transportation across the ocean, impliedly contracts that his vessel is provided with suitable and efficient apparatus to enable him to deliver the cargo in proper condition; but it is competent for the parties, by express contract, to stipulate for the exemption of the carrier from liability for loss or damage to the cargo in consequence of latent defects in such apparatus which are not due to any fault or negligence on his part, or on the part of those for whom he is responsible.

2. SAME—EFFECT OF HARTER ACT.

Such a stipulation in a bill of lading is not in violation of section 2 of the Harter act.

3. SAME—TRANSPORTATION OF FROZEN MEAT.

A steamship company contracted for the carriage of a consignment of fresh meat to a European port, the bill of lading containing a provision expressly exempting the carrier from liability for loss or damage arising from any defect or insufficiency in the refrigerating apparatus of the vessel. The meat became damaged on the voyage in consequence of the failure of the refrigerating machinery to work properly. The apparatus, as well as the vessel, was new, had been constructed by competent makers,

and had been thoroughly tested, and found to work perfectly. Its failure to work properly on this voyage was caused by the presence in a suction pipe of a leather washer, which had been inadvertently left in the interior of the apparatus when it was put together by the makers, and had gradually worked into the pipe. Its presence could not be detected until the machinery was taken apart by an expert at the end of the voyage. Held, that due diligence was exercised by the owner of the vessel to provide suitable and perfect refrigerating machinery, and that the damage arose from a latent defect, for which it was not responsible under the terms of the bill of lading.

Appeal from the District Court of the United States for the Eastern District of New York.

Lawrence Kneeland, for appellant.

Everett P. Wheeler, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree (88 Fed. 531) dismissing a libel filed to recover damages caused by the deterioration of a quantity of dressed beef shipped by the Schwarzschild & Sulzberger Company at New York in July, 1894, on the steamship Prussia, to be transported to Hamburg, and which was insured against loss or damage by the libellant. The beef was shipped under a bill of lading which contained the clause as follows:

"Dressed-Meat Clause.

"It is expressly agreed that the goods named herein are shipped and carried at the sole risk of the shippers or owners thereof, and that the shipowners shall in no case be responsible for any loss or damage thereof, or in any wise relating thereto, whether such loss or damage arise from defect or insufficiency, either before or after shipment, in the hull of the said steamer, or in her machinery, boilers, or refrigerating chambers machinery, or in any part of the refrigerating apparatus, or in any material, or the supply or use thereof, used in the process of refrigeration, and whether such loss or damage, however arising, be caused by the negligence, default, error in judgment, of the pilot, master, officers, engineers, mariners, refrigerating engineers, or other servants of the shipowners, or persons for whom they are responsible, or by negligence in stowage."

The Prussia was engaged in the business of a common carrier, running in a regular line between New York and Hamburg, and was equipped with cold-storage rooms, maintained for the purpose of carrying dressed meat, and with refrigerating apparatus designed to maintain a temperature in the compartments slightly below the freezing point, necessary to preserve the meat from injury. She was a new vessel, built at Belfast, and completed in May, 1894. The refrigerating apparatus was built at Dartford, England, and was what is known as a "duplex machine," consisting of two machines situated side by side, and driven by one engine. This apparatus was thoroughly tested by the makers before it was sent to the ship. After it was put into the vessel it was again tested, under the supervision of the makers, the shipbuilders, and an engineer in the employ of the owner, the Hamburg-American Packet Company; this test continuing from 11:30 a. m. May 29, 1894, to 3:40 p. m. May 30th. The proper temperature of the refrigerating rooms was maintained during this

test, and the apparatus proved thoroughly satisfactory. The next day the steamship sailed from Belfast to Hamburg. The refrigerating apparatus was kept running throughout that voyage, and worked satisfactorily, maintaining the proper temperature to cool the provision rooms; each machine being run on alternate days. From Hamburg the vessel proceeded on a voyage to New York, and the refrigerating apparatus was operated throughout this voyage, and worked satisfactorily. The steamship then proceeded on the voyage to Hamburg, during which the meat in controversy was injured. The meat had been placed in two refrigerating rooms. On July 16th, the second day out, it was found that the refrigerating apparatus was not working satisfactorily. The next day the starboard machine was stopped, and the meat in the upper refrigerating room was transferred to the lower room. In the meantime the temperature of the refrigerating rooms rose above the freezing point, thereby injuring the meat. Thereafter only one machine was used. After the meat was transferred to the lower room, the temperature of that room was gradually reduced to the proper point by the use of one machine.

It is conceded that the cause of the injury to the meat was the failure of the starboard machine to work, owing to the presence of a leather washer in the apparatus. This could not be detected until the apparatus was taken apart after the arrival of the vessel at Hamburg. It was then found in the suction pipe leading from the evaporator, by an engineer sent to Hamburg by the makers of the apparatus for the purpose of investigating the trouble. The proofs denote that the washer must have been left in the apparatus by the inadvertence of the employes of the maker when putting it together. By the operation of the apparatus during the voyages of the vessel, it gradually worked its way through the evaporation coils to the suction pipe, where the smaller diameter caused it to obstruct the efficient working of one of the machines.

We agree with the learned judge who decided the case in the court below that the libellant was not entitled to recover upon the theory that the owners of the Prussia were negligent in providing defective refrigerating apparatus for the purposes of the transportation. The apparatus had been constructed by builders of requisite capacity, and, after it had become a part of the equipment of the steamship, had been tested by competent experts in the most thorough manner, and found to be perfect. It was new, and had not been used long enough to impair its efficiency; but it had been used sufficiently to demonstrate that it was adequate, and apparently in perfect condition.

It is the duty of the carrier by water, when he offers a vessel for freight, to see that she is in suitable condition to transport her cargo in safety; and he impliedly warrants that this duty has been fulfilled. And, when he proposes to transport across the Atlantic a cargo of frozen meat, we agree, as was adjudged in *The Maori King* [1895] 2 Q. B. 550, and *Queensland Nat. Bank v. Peninsula & Oriental Steam-Nav. Co.* [1898] 1 Q. B. 567, that he must be taken to stipulate with the shipper that the vessel is provided with suitable apparatus of requisite efficiency to enable him to deliver it in proper order. But

it is competent for the parties, by express contract, to modify the obligations which would otherwise devolve upon the carrier, including even that of providing a seaworthy vessel; and short of any modification which will exempt him from the consequences of his own misconduct or negligence, or those for whom he is responsible, such contracts, though strictly construed against the carrier, are given full effect. Among them, one of the most common is that exempting carriers from liability for latent defects in the hull or machinery of the vessel. As was said by Mr. Justice Brown in *The Carib Prince*, 170 U. S. 664, 18 Sup. Ct. 757: "To exempt a vessel from the consequences of such a defect is neither unreasonable nor unjust, and most of the modern bills of lading contain a stipulation to that effect."

In the present case the bill of lading contained a clause especially addressed to restricting the liability of the carrier in respect to the transportation of dressed meat, and the parties to the instrument agreed that the carrier should not be responsible for any loss or damage to it arising from defects or insufficiencies in any part of the refrigerating apparatus, whether arising before or after the shipment. While this clause would not extend to exempt the carrier for loss or damage caused by his own negligence, we have no doubt it protects him against such as arises in consequence of a latent defect in the apparatus, existing without his knowledge or negligence. The express contract displaces the warranty which would be implied in its absence.

It is insisted for the appellant that the clause is in violation of section 2 of the Harter act. In our opinion, the provisions of this section only prohibit contracts relaxing the obligation of carriers to exercise due diligence in respect to providing seaworthy vessels, and in respect to the handling and storage of cargoes. The warranty of seaworthiness is that a vessel is competent to resist the ordinary action of the sea during the voyage, without damage or loss of cargo (*Dupont De Nemours v. Vance*, 19 How. 162),—in other words, in such a state, as to repair, equipment, and crew, as to be able to encounter the ordinary perils of the adventure (*Gibson v. Small*, 4 H. L. Cas. 390). The carrier is not an insurer against damage proceeding "from an intrinsic principle of decay, naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship" (*Clark v. Barnwell*, 12 How. 282); and the implied understanding created by the proposal to transport and deliver a commodity, which the shipper and carrier know cannot be practically performed unless the carrier is provided with the proper instrumentalities in customary use for its preservation, is not a warranty of seaworthiness. Section 2 of the Harter act is the complement of section 3, which excuses the shipowner if he has exercised due diligence to make the vessel "in all respects seaworthy, and properly manned, equipped and supplied." The two sections are to be read together, both being intended to enforce the same rule of diligence in respect to the same subject-matter.

We conclude that the damage sued for arose in consequence of a latent defect in the refrigerating machinery, that due diligence was exercised by the owner of the steamship to provide suitable and per-

fect refrigerating machinery, and that by the terms of the Harter act, as well as irrespective of that act, it is lawful for a vessel owner, who has exercised due diligence in that behalf, to stipulate for exemption from liability arising from such a defect. We desire to take this occasion to commend the course adopted, of bringing this suit in the name of the insurer. Heretofore nearly all the causes which we have had to consider, brought against vessels to recover damages to cargo, have been ostensibly prosecuted by the shipper, although really by the insurer; and too many of them have been brought upon the chance that something not known at the time might be developed in the course of the proofs to shift the loss from the insurer upon the vessel. The present case is not open to this criticism in either respect.

The decree is affirmed, with costs.

THE E. LUCKENBACH.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1899.)

No. 299.

1. APPEAL IN ADMIRALTY—REVIEW OF FINDINGS OF FACT.

The decision of a trial court in admiralty upon questions of fact, based on the conflicting testimony of witnesses examined before the judge, will not be reversed on appeal, unless there is a decided preponderance of evidence against it.

2. COLLISION—STEAM AND SAILING VESSELS MEETING—CARE REQUIRED OF STEAM VESSEL.

It is the duty of a steam vessel, and especially of a tug with a tow, when meeting a sailing vessel where there is ample sea room, and the approaching vessel is seen at a distance, to keep at a sufficient distance in passing to avoid all danger, and to make allowance for the uncertainty in the movements of the sail vessel, which is unavoidable; and where she fails to do so, and a collision results, notwithstanding the keeping of her course by the sailing vessel until a moment before, she must be held in fault, and liable therefor, although the immediate cause of the collision may have been an improper movement of the sailing vessel in attempting to extricate herself from the dangerous position in which she was placed.

Appeal from the District Court of the United States for the Eastern District of Virginia.

In Admiralty.

Robert M. Hughes, for appellant.

Floyd Hughes, for appellee.

Thomas H. Willcox, for owner of barge.

Before GOFF, Circuit Judge, and MORRIS, District Judge.

GOFF, Circuit Judge. In the early morning of June 15, 1896, the schooner J. B. Van Dusen, bound from New York to Norfolk, light, and barge No. 2, of the New York, Philadelphia & Norfolk Railroad Company, then in tow of the tug E. Luckenbach, bound from Norfolk to Cape Charles, came into collision between Old Point and Thimble Light. The schooner, shortly after the accident, sunk on Hampton

Bar, and the libel in this case was filed against the tug and barge to recover for the damages occasioned by the collision. The J. B. Van Dusen was a three-masted schooner of about 222 tons burden, with a crew of six men, consisting of the master, mate, the cook, and three seamen, and was making about six miles an hour, with seven of her nine sails set. The wind was from the east, the night was clear, and the tide ebb. Her master was in command, and his watch, consisting of two seamen, one at the wheel and the other on the lookout, were at their respective stations. The lights, properly placed, were burning brightly. The tug E. Luckenbach was 90 feet long by 15 feet beam, with a crew of nine men, four of whom were on duty. The barge, which was 215 feet long by 42 feet beam, was in tow of the tug, and was loaded with freight cars. The tug and its tow were making about seven miles an hour. The libellant claimed that, as the vessels approached, they were showing their port lights to each other, and that when they were about 300 yards apart the tug changed its course so as to cross the schooner's bow, thereby showing for a short time to the navigators of the schooner both lights, and then shutting in its red light; that the schooner held her course until the vessels were about 100 feet apart, when she luffed under a starboard helm, and succeeded in clearing the tug; that the barge, which was 480 feet behind the tug, had not been able to change her course as rapidly as the tug, and was still showing her port light; that it was impossible for the schooner, situated as the vessels then were, to clear the barge by continuing under a starboard helm, and that, therefore, her master, in the hope of avoiding collision, put his vessel under a helm hard a-port, but that almost immediately after passing the tug the bow of the schooner came in contact with the starboard corner of the barge. The master of the tug claims, as does also the master of the barge, that the vessels approached each other green to green; that the schooner was a point and a half on the starboard bow of the tug, moving on a parallel course, with the barge exactly behind the tug; that the vessels would have cleared each other fully 400 feet, and no collision would have occurred, had not the schooner hard ported when about even with the tug, thereby running into the barge. The court below found that the barge was not at fault, and that the tug alone was responsible for the collision, and entered a decree in favor of the libellant for the damages caused thereby. From that decree this appeal is prosecuted.

There is the conflict in the testimony usually found in cases of collision, the contending interests being diametrically opposite in their claims, as well as in the testimony their respective representatives have given relative thereto. Of the tug's crew of nine men, four of whom were on duty at the time of the collision, only two were examined as witnesses. The entire crew of the schooner, as also of the barge, were produced and examined, either by deposition or in open court; the material witnesses on both sides testifying before the judge who decided the case below. Unless we find from the record that the decision is clearly against the evidence, we will not—as the questions of fact are to be ascertained from conflicting testi-

mony—reverse the decree of the judge in whose presence the evidence was given, who observed the witnesses, and noted their appearance and manner, and who was thereby aided in determining as to their credibility. The conduct of the witnesses when being examined, their demeanor under cross-examination, and their personal characteristics are material, and, unfortunately, cannot be carried into the record. Consequently the rule prevails in cases like this that the decree of the trial judge will not be disturbed upon mere questions of fact depending upon the credibility of witnesses who testified before him, unless there is found to be a decided preponderance of the evidence against the same. *The Jersey City*, 2 C. C. A. 365, 51 Fed. 527; *The Warrior*, 4 C. C. A. 498, 54 Fed. 534; *The City of New York*, 4 C. C. A. 268, 54 Fed. 181; *The Alejandro*, 6 C. C. A. 54, 56 Fed. 621; *The S. S. Wilhelm*, 8 C. C. A. 72, 59 Fed. 169; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237.

The conflict in the testimony was of the character not attributable to mistake, and we agree with the judge who heard the case, and conclude that he gave due consideration to, and properly solved, the same, when he found the tug alone was responsible for the collision. The vessels were in plain view of each other for at least two miles, the night was bright, and the sea open. We think it clear that the vessels approached showing their port lights to each other, and that the schooner, as it was her duty, kept her course. The vessels were quite close to each other when passing,—evidently within a hundred feet. The tug should have not only kept out of the way of the schooner, but sufficiently far from it to avoid dangerous proximity, and not interfere with its movements by causing alarm and doubt, keeping in view the contingencies of navigation. With the best of handling, the movements of a sailing vessel are uncertain, and a steamer approaching it will, if properly navigated, make sufficient allowances for such uncertainties and the contingencies flowing therefrom. If it fails to do so, it must suffer the consequences, and pay the damages caused by such carelessness. Even if the sailing vessel should, in an endeavor to escape from the danger so caused, resort to an improper movement, and be clearly guilty of an error in management, still the steamer, as it had the ability to keep away, is liable for the result, because responsible for the original fault of the dangerously near approach. *Spencer, Mar. Collis*, 209–211; *Haney v. Packet Co.*, 23 How. 287; *The Carroll*, 8 Wall. 302, 305; *The Falcon*, 19 Wall. 75.

In this case the tug, according to the testimony of the master, permitted the schooner to approach within 480 feet, upon such close parallel courses as to render passing dangerous, without changing its course; and this, when the master had observed the sail vessel over two miles off, and when he was in a channel free to the westward for over a mile, and to the eastward without limit, with no other vessel near, whereby navigation could be obstructed. The schooner kept her course (at least until danger was imminent), as it was proper for her to have done. She could not make her own selection, because the law had made it for her. The tug could have changed her course either to the eastward or to the westward, and have thereby given

the schooner a safe margin. The fact that the tug had the barge in tow enhanced the danger of passing the sail vessel, and required a degree of caution which was not observed. *Bigelow v. Nickerson*, 17 C. C. A. 1, 70 Fed. 113; *The Maverick*, 75 Fed. 845; *The Marguerite*, 87 Fed. 953.

The tug should have watched the progress and direction of the schooner, should have taken into consideration all the circumstances of the situation, and have so governed herself as to have guarded against peril to either the schooner, the barge, or herself. Other questions are raised by the assignments of error, and were discussed by counsel, but, finding as we do concerning the facts existing at the time of the collision, they become immaterial, and we do not think it necessary to consider them. The decree appealed from is affirmed.

HENDERSON v. CITY OF CLEVELAND.

(District Court, N. D. Ohio, E. D. April 6, 1899.)

No. 2,227.

1. COLLISION—INJURY TO MOORED VESSEL—BURDEN OF PROOF.

Where a sailing vessel, safely moored to a dock, in a proper place, and unable to move, is struck and injured by a steam vessel, the burden rests upon the latter to exonerate itself from the charge of negligence.

2. SAME—CARE REQUIRED OF FIRE TUG.

A fire tug owned by a city, and forming a part of its fire department, is not exempt, by reason of its employment, from the duty of exercising ordinary care to prevent collision with other vessels, though what constitutes ordinary care, as a question of fact, may vary with the exigencies of the service in which it is at the time engaged.

3. SAME—LIABILITY OF CITY FOR MARITIME TORTS.

The rule of the maritime law, which holds the owner of a vessel liable for injuries inflicted through negligence or misconduct in its navigation to the extent of his interest in the vessel, is not based on the relation of master and servant, but rests upon the fact of ownership alone, the vessel itself being regarded as the offender; and the principle on which a city is held to be exempt from liability for negligent acts of its firemen, the reason being that they are not its servants in its corporate capacity, has no application to the case of a marine injury resulting to another vessel from the negligent handling of a fire tug owned by the city. For such an injury the tug itself is liable, and the city may be held responsible in a court of admiralty to the extent of the value of the tug.

In Admiralty.

Roger M. Lee, for libellant.

Miner G. Norton and Ford, Boyd & Crowl, for respondent.

RICKS, District Judge. This is a proceeding in admiralty against the city of Cleveland for injuries sustained by the libellant through the alleged negligence and carelessness of the fire tug *John H. Farley*. Mr. Henderson alleges that he is the sole owner of the schooner *Typo*;

that said vessel is 130 feet long, of several hundred tons burden, and has been duly enrolled and licensed for, and engaged in, trade and navigation upon the Great Lakes and their connecting and contributory waters. He avers: That the city of Cleveland was the sole owner of a certain steam vessel, called the John H. Farley, which was at all times herein mentioned a vessel of the United States, of more than 10 tons burden, duly enrolled, and engaged in navigation upon the Cuyahoga river; which said river was at all times herein mentioned, and is, a navigable water way of the United States. That on November 7, 1897, said schooner Typo lay in said Cuyahoga river, safely moored at a dock, a short distance above Seneca Street Bridge, which was a customary and proper place for such a vessel to be moored; and while so moored at said dock, and stationary, the weather being clear, said steamer John H. Farley, about 1 o'clock p. m. of said last-mentioned day, negligently collided with the stern of said schooner, damaging said schooner in the manner hereinafter set out. Said collision occurred without any fault on the part of those in charge of the said schooner Typo, which, being moored at said dock, was powerless to avoid said collision; and said collision was caused solely by the negligence and want of care and skill on the part of those navigating said steamer John H. Farley. There is no dispute about the fact that the schooner Typo was safely moored at a dock near the Seneca Street Bridge, which was and is a suitable and proper place for vessels to moor engaged in the business which said schooner was carrying on at that time. Being a sailing vessel, moored to a dock, without power to care for herself, the rule is settled that, under such circumstances, a moving tug, coming down upon said schooner from any direction, must use at least ordinary care in keeping out of the way of said schooner so as to avoid doing her damage. The defense is that the tug Farley is a fire boat, owned by the city of Cleveland, and a very valuable and important part of the outfit for fighting fires, especially on the flats and along the river banks. The said tug Farley has a basin cut on the south side of said river, which is called by the fire department a station for the fire tug Farley. On the opposite side of the river, only a few hundred feet from it, is the standpipe into which the tug forces water up the hill and along the river, aiding the fire department in extinguishing fires. The defense is that a fire tug, being engaged in this important and necessary and governmental work, enjoys a sort of immunity from claims for damage inflicted upon the vessel property along the river, because, as counsel for the city say, it is engaged in this important work, and it is better that occasionally damage be done, by the speediest movements of the fire tugs, to craft along the river, than to have a million dollar fire have time to catch and spread while the vessel is detained by moving cautiously so as to protect vessels and other property on the banks of the river. This is true in a qualified sense. In this particular case it is not necessary to determine as to what extent the city's contention is correct, because there was an abundance of time for the Farley to have reached the standpipe without running any risk to itself

or other vessels in that vicinity. But the general proposition advanced is true in a qualified sense. Under the most imminent danger, and where speed and prompt action are most necessary, still fire tugs must exercise ordinary care in doing their work. The contention of the city's counsel would be a dangerous precedent. If fire tugs, under the pretext of immunity from danger, could move rapidly up and down the river, and around bridges and bridge protections, bumping and damaging vessel property moored at the docks, and helpless, without regard to the damage inflicted, they would enjoy a license which it would be unsafe to permit to continue. This court would be slow to announce any opinion that would in any way hamper these fire tugs in the efficient discharge of their duty. Every care should be taken to protect them when, by the exercise of ordinary care, damage results from their movements; so that the court, in fixing the rule to control their movements, says that in such emergencies only ordinary care is required on their part, and when they use ordinary care they will be protected. But, as before stated, in this case I do not think ordinary care was used. When the alarm was sounded, the tug could not move down the stream on account of two boats that were moored at the docks, so that, as Jones, the pilot, expresses it, "I had to sheer over across the river to the pipe line, and in going over struck the Typo. Stern of the Farley struck the Typo." It was necessary for the Farley to pass around the bridge protection in order to enable her to get to the pipe line; but, in passing around the bridge protection, she went further beyond it than was needed, the witnesses testifying that the space was from 40 to 50 feet; and in doing so her stern struck the stern of the Typo, and broke in her frames and water table for some distance. Several expert witnesses testified that the movements of the Farley were unseamanlike.

But it is not necessary to discuss further the facts upon which the charge of negligence is based. The Typo, being a sailing vessel, safely moored to the dock, and unable to move to protect herself, proof of injury to her makes it necessary that the owner of the tug causing the injury should defend and exonerate itself from the negligence charged. See *The Virginia Ehrman* and *The Agnese*, 97 U. S. 315, and the cases there cited. I am well aware that in some states the courts have gone to the very extreme, and have held that fire engines and hose carts, being driven to a fire, are exempted from all claims for negligence growing out of accidents or injuries caused by the speed at which they were going to the fire. But there is a distinction between the law of a state relating to fire engines and the rules in admiralty which relate to fire tugs under the same allegations of negligence. In admiralty, the party who has been wronged by a vessel has his right of action against the vessel in rem, or against the vessel and its owner in personam. The tug or fire vessel is responsible for injuries committed by its own crew, and, to the extent of the value of the vessel, is liable to the party injured. This principle runs through the whole course of admiralty practice and admiralty law, as laid down by the courts. Judge Grosscup, in the case of

Thompson Nav. Co. v. City of Chicago, 79 Fed. 984, repudiates the law as laid down in some of the states, and says:

"In admiralty the rule is this: The vessel committing the unlawful injury is considered the offender, and the owner is mulcted to the extent of his interest in the vessel; not because he stands in the relation of principal or master to the crew, but alone because of the fact of ownership. Thus, under laws preventive of piracy or smuggling, the vessel may be seized, condemned, and sold, notwithstanding the crew committing the unlawful acts were engaged by the owner for a lawful enterprise only, and were, in the commission of the unlawful acts, wholly outside the scope of their engagement. *U. S. v. The Malek Adhel*, 2 How. 209. Commenting upon this apparent anomaly of maritime jurisprudence, and showing that the doctrines advanced in the case then under consideration were not different from those prevailing generally in maritime law, Mr. Justice Story, at page 234, speaks as follows: 'The ship is also, by the general maritime law, held responsible for the torts and misconduct of the crew and master thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party.' It is thus apparent that the liability of the owner, to the extent of his vessel, for injuries caused in a collision by negligence or misconduct, is not dependent upon the relation of master and servant, * * * but rests solely upon the fact of ownership. * * * At common law the city is not liable for the negligent acts of its fire department, for the reason that the members of the fire department are not the servants of the city in its corporate capacity. The negligence of the firemen, therefore, is not attributable to the city. But in the case under consideration the injury done by the vessel, including its crew, to the libellant, is chargeable to the owner by virtue of the mere fact of ownership, and can be collected directly by seizure of the vessel, or indirectly by a suit in personam. In either case the liability rests, not in the relation of principal and agent, or master and servant, but in the bare fact of ownership."

In 28 Fed. 377, in the case of *The F. C. Latrobe*, Judge Morris, in discussing a question pertinent to the one now under consideration, says:

"By the maritime law, the liability of the owner of a vessel for the negligence of the master is not controlled solely by the rules of other systems of law applicable to the relation of master and servant. The rule of the maritime law is that the owner is always personally liable for the negligence or unskillfulness of those navigating his vessel, except only in those cases in which the possession and control of the vessel has passed to a charterer or other person so completely that the other person not only appoints the master and crew, but directs both the destination and employment of the vessel, and her mode of navigation. This almost universal rule, restricted by the limitation confining the extent of the recovery against the owner to the value of his vessel, or some portion of its value, has received the widest approval, as being founded on natural justice. Under it the vessels of all nations frequent the avenues of commerce upon equal terms, and their owners are alike responsible for faults of navigation resulting in injury to persons or property. * * * So strong and general is the recognition of the justice of this rule which holds the owner responsible for the damage done by his vessel, that, even with respect to public armed vessels, nations seldom neglect to make compensation to their own citizens, or those of other nations, in cases in which, upon proper investigation, it appears that the public vessel was in fault. And when, in the performance of any duty, either imposed upon or assumed by it, the municipality employs maritime instrumentalities, I think it should be held answerable under the maritime law, with those exceptions only which pub-

lic policy absolutely requires. If the vessel belonging to the municipality is used by it as a necessary instrument in the exercise of some municipal function, then, as was held by the chief justice in the case of *The Fidelity*, 16 Blatchf. 569, Fed. Cas. No. 4,758, public policy requires that the municipality shall not be deprived of its use, and therefore the maritime lien cannot attach; but, to my mind, no sufficient necessity or reason has been suggested for denying a remedy against the municipality as the owner of the offending vessel."

In 63 Fed. 298, in the case of *Workman v. Mayor, etc.*, of the City of New York, Judge Brown, after stating the facts of the case, says:

"The fire boat belonged to the city, but was under the control and management of the fire department, the heads of which are appointed by the mayor. It is contended that neither the mayor, aldermen, etc., nor the fire department, is legally answerable for these damages. Not the mayor, etc., it is said, because, though owner, it had no control over the management of the vessel, and its duties were not corporate duties. The fire department, it is said, is not liable, because not a corporation capable of being sued, nor having any funds for the payment of any decree. It is certainly a startling proposition that all the shipping of this port, foreign and domestic, should be at the mercy of the city fire department boats, and liable to be negligently run down and sunk at any moment, without responsibility for damages. By the maritime law, both the vessel and the owner are ordinarily liable for such a marine tort. But if the vessel is in the public service, she is not allowed to be withdrawn therefrom by arrest and sale, for reasons of the public convenience."

But all the dangers that might accrue to the city by virtue of the law thus announced could easily be remedied by legislation. A libellant proceeding in rem against a vessel which did him injury would not undertake to have the vessel seized while it was discharging its duty as a branch of the fire department. While the city was burning, the marshal, with his writ, could not undertake to tie up the fire tugs until the danger was past. The law, therefore, which in some of the states has been declared, as hereinbefore stated, on account of public policy, does not apply to the rules and practice in admiralty, and cannot therefore be sustained. This result necessarily makes it the duty of the court to overrule the exceptions to the defendant's answer, and to find that the tug *John H. Farley* and its owners are liable for the damage incurred. When this damage has been ascertained by a commissioner, the case will be ripe for further proceedings.

CONSOLIDATED WATER CO. v. CITY OF SAN DIEGO et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 460.

1. COURTS—JURISDICTION—FEDERAL QUESTION.

A bill to annul a city ordinance fixing rates to be charged by a water company, which are claimed to be so unreasonably low as to amount to a practical taking of the company's property mortgaged to complainant, without due process of law, etc., in violation of the United States constitution, presents a federal question.

2. INJUNCTION TO PROTECT MORTGAGED PROPERTY.

In a suit by a mortgagee of the property of a water company to restrain the enforcement of a city ordinance fixing rates of charge for water furnished by it, on the ground that such rates were so unreasonably low as to amount to a taking of the company's property without due process of law, the company is a necessary party complainant; its rights being directly affected by any decree which could be rendered therein.

Appeal from the Circuit Court of the United States for the Southern District of California.

John D. Works, Bradner W. Lee, and Lewis R. Works, for appellant.

H. E. Doolittle, City Atty., for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity, brought by the Consolidated Water Company, a corporation of West Virginia, as the holder and owner of certain bonds issued by the San Diego Water Company, a corporation of California (said bonds being secured by a mortgage upon the San Diego Water Company property, which supplies the city of San Diego and its inhabitants with water for domestic and other purposes), against the city of San Diego, the board of aldermen of said city, and the board of delegates of said city. The object of the suit is to obtain a decree of the court declaring null and void an ordinance of the city, enacted in 1896, fixing the rates at which the water supplied by the San Diego Water Company to the city should be furnished, upon the ground that the rates established by the ordinance are so unreasonably low as to amount to a practical taking of the property mortgaged to the complainant, without just compensation, contrary to the provisions of the constitution of the United States. It will be seen that the jurisdiction of the court does not depend upon the diverse citizenship of the parties. A federal question is presented, which gives the court jurisdiction, viz. whether the ordinance set out in the bill violates the provisions of the constitution of the United States which declare that no person shall be deprived of his property without due process of law, and securing to every person the equal protection of the laws. The question as to the jurisdiction of the court will not, therefore, be discussed.

The defendants demurred to the bill upon the ground, among others, "that it appears upon the face of the said bill of complaint that

the San Diego Water Company is a necessary and indispensable party complainant in this action, but that the San Diego Water Company has not been made a party to this action." The circuit court sustained this ground of the demurrer; and, complainant having declined to amend, the court entered a decree dismissing the bill, and gave judgment in favor of the defendants for their costs. This appeal is taken from that decree, and the sole question presented for our consideration is as to whether or not the court erred in sustaining the demurrer. There has been an elaborate discussion of the various grounds of the demurrer, and a copious citation of authorities upon all the points discussed by counsel. We shall limit the discussion to the ground of demurrer which was sustained by the circuit court.

Upon the facts alleged in the bill, is the San Diego Water Company an indispensable party to the suit? What are the facts? The bill shows that the title to the property mortgaged to secure the bonds owned by the complainant is in the San Diego Water Company; that the whole amount expended in the construction of its water plant amounted to more than \$1,000,000; that it constitutes the only property owned by the San Diego Water Company; that the only means by which said company can make and realize any revenue by which to pay its operating expenses, and for the maintenance of its plant and system, and the interest falling due each year upon the said bonds, and to pay the principal thereof when the same falls due, are the sums which it is entitled to collect for water rates, fixed by the common council of the city of San Diego; that, unless reasonable rates are allowed therefor, neither the said interest nor principal can be paid; that the annual necessary expenses of the San Diego Water Company in the operating and maintenance of its plant, not including either the interest on its bonds or the natural depreciation of its distributing system and plant, commencing July 1, 1896, and ending June 30, 1897, will amount to not less than \$50,000; that the amount of interest due the complainant each year on said bonds is the sum of \$50,000; that the amount of the annual depreciation of said plant is \$40,000; that unless an amount sufficient to pay the said operating expenses, and to replace and make good the loss to said complainant by reason of the natural depreciation, is provided for by rates, the security of the complainant for the payment of the said bonds will be rendered practically valueless; that unless such rates are fixed so as to enable the San Diego Water Company to pay the interest on said bonds over and above its said operating expenses, and the amount necessary to make good said losses, the complainant will be compelled to lose the interest on the bonds; that in order to pay said operating expenses, and make good said losses, and pay the interest on the bonds, the rates must be so fixed by the said common council as to afford the said company \$140,000 per annum; that the distributing system of the said water company is perishable property, and the same will be required to be replaced at least once in 15 years; that so long as the ordinance (set forth in the bill) remains in force, and the San Diego Water Company is compelled to furnish water thereunder, it will be required and compelled

to supply water at a positive loss to itself. And in the prayer of the bill the complainant asks that the city of San Diego, and the common council thereof, be forever enjoined from enforcing said ordinance, as against the San Diego Water Company; that the said city of San Diego and the said common council be enjoined from proceeding against the San Diego Water Company to forfeit its said plant and property, if it should fail and refuse to comply with the terms of the said ordinance; that the said common council be required to immediately pass and adopt another, and legal, ordinance, fixing reasonable and just rates to be charged by the San Diego Water Company for water to be furnished to the said city and its inhabitants.

From this brief reference to the allegations of the bill, it will readily be seen that the San Diego Water Company has an interest in the subject-matter of the suit, and that any decree that might finally be rendered therein would affect its interest. It is certainly interested in obtaining the relief sought for by the complainant, and would doubtless be entitled, in its own behalf, if so disposed, to bring a suit in its own name, and litigate the same question, in a competent court. Its presence is necessary to a full and complete determination of the questions in controversy in this suit. To determine some of the questions raised by the bill as to the reasonableness of the rates fixed by the ordinance, it will involve an investigation of the management of the affairs of the company. In *Shields v. Barrow*, 17 How. 130, 139, indispensable parties are described as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." See, also, *Barney v. Baltimore City*, 6 Wall. 281, 284; *Cunningham v. Railroad Co.*, 109 U. S. 446, 456, 3 Sup. Ct. 292, 609; *Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691.

In *Gregory v. Stetson*, 133 U. S. 579, 586, 10 Sup. Ct. 422, 424, where the circuit court entered a decree dismissing the bill for want of proper parties, Lamar, J., in delivering the opinion of the court, said:

"We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in Story, Eq. Pl. § 72: 'It is a general rule in equity * * * that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, are to be made parties to it, either as plaintiffs or as defendants, * * * so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view, only, of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.' See, also, 1 Daniell, Ch. Pl. & Prac. 246 et seq. In the case before us, we are unable to see how any final decree could be rendered, affecting the parties to the contract sued on, without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right, without having him either actually or constructively before it."

See, also, *Davenport v. Dows*, 18 Wall. 626; *Bland v. Fleeman*, 29 Fed. 669, 673; *Water Co. v. Babcock*, 76 Fed. 243; *Mangels v. Brewing Co.*, 53 Fed. 513; *Board v. Blair*, 70 Fed. 414, 419.

The general rule as to parties, as expressed in many of the authorities, is to the effect that all persons should be made parties to a suit in equity who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree. And in a case like the present, where the trial of the suit would necessarily involve the management and conduct of the affairs, and an adjudication of the rights, of the San Diego Water Company, it is essentially necessary that it should be made a party to the suit, either as a plaintiff or a defendant. 1 Fost. Fed. Prac. § 42; *Gaylords v. Kelshaw*, 1 Wall. 81; *New Orleans Waterworks Co. v. City of New Orleans*, 164 U. S. 471, 480, 17 Sup. Ct. 161; *Chadbourne v. Coe*, 45 Fed. 822, 825; *Gardner v. Brown*, 21 Wall. 36, 40; *Mallow v. Hinde*, 12 Wheat. 193, 198; *California v. Southern Pac. Co.*, 157 U. S. 229, 15 Sup. Ct. 591.

There is nothing contained in the opinion in the case of *Consolidated Water Co. v. City of San Diego*, 89 Fed. 272, in opposition to the views expressed by the court in overruling the demurrer in the present case. In that case the court said:

"The interest conveyed by such a mortgage vests, in my opinion, in the mortgagee a separate and independent interest, which the mortgagee has a separate and independent right to protect, when unlawfully assailed; taking care, of course, to bring into the suit all necessary parties. Such was the view and the ruling of this court in the case of *Consolidated Water Co. v. City of San Diego*, 84 Fed. 369, and I see no good reason to change them."

We are of opinion that upon the facts, and under the principles announced in the authorities we have cited, the San Diego Water Company is not only a necessary, but an indispensable, party to the suit. The court did not err in sustaining the demurrer. The judgment of the circuit court is affirmed.

ILLINOIS CENT. R. CO. v. ADAMS, Revenue Agent of State of Mississippi, et al. (two cases).¹

YAZOO & M. V. R. CO. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. April 25, 1899.)

Nos. 805-807.

APPEAL—CONSTITUTIONAL QUESTION—JURISDICTION.

A bill to restrain the collection of taxes against a railroad company alleged exemption from taxation under the charter, and that the action of defendants, the revenue agents and railroad commission of the state of Mississippi, under the laws of such state, has created a lien on the property of plaintiffs, in violation of the charter contract and of the constitution of the United States, and that the contract exempting the property from taxation is protected by such constitution. *Held*, under Act March 3, 1891, § 5, establishing courts of appeals, and providing that in any case involving the construction or application of the constitution of the United States appeal may be taken direct to the supreme court, and section 6, conferring on the court of appeals appellate jurisdiction in all cases other than those provided for in the preceding section, an appeal from an order

¹ Rehearing denied.

discharging restraining order issued in the cause, and refusing an injunction, does not lie to the circuit court of appeals.

Appeals from the Circuit Court of the United States for the Southern District of Mississippi.

These three cases were argued together. The purpose of each suit is to enjoin the assessment and collection of taxes. A temporary restraining order was obtained in each case, a motion made for an injunction, and a motion made by the defendants to discharge the restraining order. The court in each case refused the injunction, and granted the motion to discharge the restraining order. The complainants brought the cases by appeal to this court.

In the case of the Illinois Central Railroad Company against Wirt Adams, revenue agent of the state of Mississippi, the railroad commission of the state of Mississippi, the Canton, Aberdeen & Nashville Railroad Company, and others, the bill alleges that the legislature of the state of Mississippi, in the year 1882, granted a charter to the Canton, Aberdeen & Nashville Railroad Company. The charter provided that the property of the corporation should be exempt from taxation for a period of 20 years from the date of the approval of the act. The charter authorized the company to consolidate with any other railroad company and to lease its property. The complainant advanced \$2,536,924.13 to build the Canton, Aberdeen & Nashville Railroad, and received from it a lease of all of its property and rights, including "its exemption from taxation" granted in its charter. It is alleged that, under legislation subsequent to the charter, the office of state revenue agent and the railroad commission of the state of Mississippi were created; that laws were enacted to provide for the assessment and collection of taxes and escaped taxes; that the supreme court of the state of Mississippi had so construed these laws and the constitution of the state as to make void the exemption from taxation in section 8 of the said charter. The bill shows the railroad commission of Mississippi and the revenue agent have notified the complainant and the Canton, Aberdeen & Nashville Railroad Company that they are liable for taxes on the property of the latter road for the years from 1886 to 1897, inclusive. It is alleged that steps were taken to assess and collect these taxes, notwithstanding the charter exemption. The bill also shows that the complainant has a mortgage on the property of the Canton, Aberdeen & Nashville Railroad for a sum greater than its value. Then, in the tenth paragraph of the bill, it is alleged that the action of the defendants the revenue and railroad commission of the state of Mississippi "has created, as they claim, a lien upon your orator's property known as the 'Canton, Aberdeen & Nashville Railroad,' in violation of the obligation of said charter contract and of article 1 of section 10 of the constitution of the United States. * * *"

And the complainant continues that, if its prior lien is displaced by these means, it will be "in violation of the fourteenth amendment of the constitution of the United States." The twenty-third section or paragraph of the bill is as follows: "Your orator further complains and shows that the fixing of a lien upon said railroad and your orator's property in said state, by the making of said assessment of taxes as aforesaid, and the collection of said taxes, as defendant the revenue agent will do, unless restrained, and is now in the act of doing, is a violation of fourteenth amendment, section 1, of the constitution of the United States, in that it will deprive your orator, and also the Canton, Aberdeen & Nashville Railroad Company, and also its stockholders, and also its creditors, each, of property without due process of law, and your orator claims the protection of said federal constitution against said lien, seizure, sale, or claim for taxes for the years above named, and against the taking of its property, or fixing a lien thereon, for the payment of said alleged taxes, or without due compensation." In the twenty-sixth section of the bill it is alleged that "said contract [referring to the charter] exempting said property from taxation by cities and towns is protected by article 1, § 10, of the constitution of the United States."

In the case of the Illinois Central Railroad Company against Wirt Adams, agent, etc., the railroad commission of the state of Mississippi, the Yazoo & Mississippi Valley Railroad Company, and others, the bill alleges that the

Yazoo & Mississippi Valley Railroad Company became entitled, by reason of its charter, to exemption from taxation upon certain conditions stated. It is also alleged, in detail, how the complainant has become entitled to the benefit of such exemption, and that it would have to pay the taxes if they are collectible. There, as in the first case, it is alleged that the revenue agent and the railroad commission of Mississippi are taking steps to collect the taxes for certain years. It is shown that the proceedings to enforce the collection is by authority of statutes passed since the date of the charter creating the exemptions. It is also alleged that, under the later decisions of the supreme court of Mississippi, the exemption from taxation allowed by the charter is not effective. The gravamen of the complaint is that the acts passed by the Mississippi legislature, since the granting of the charter for the assessment and collection of taxes and escaped taxes, as now construed by the supreme court of Mississippi, impair the contract created by the charter, and that this is in violation of the constitution of the United States. The last sentence in the nineteenth section of the bill is as follows: "And your orator says that such collections of said taxes will impair the obligation of your orator's contract of purchase of the said bonds as aforesaid, in violation of the protection afforded by the constitution of the United States; and also will deprive it of its property without due process of law, and will withhold from it the equal protection of the law, in violation of the fourteenth amendment of the said constitution."

In Yazoo & Mississippi Valley Railroad Company against Wirt Adams, revenue agent of the state of Mississippi, and others, similar averments are made as to exemption from taxation, and that said revenue agent is proceeding to enforce collection by virtue of legislation and judicial decisions made since the exemption was allowed by charter. In this case the complainant and defendants are all citizens of Mississippi, and the complainant relies on the case involving a federal question to establish the jurisdiction of the circuit court in which the bill was filed. The twentieth section of the bill is in these words: "Your orator now avers that the said demands of the said defendants, and their threatened action in the prosecution thereof, are asserted under and are taken under the revenue laws of the state of Mississippi passed by the legislature of said state in the Annotated Code, and of various acts amendatory thereof, at subsequent sessions of the legislature, and the act of 1894, defining the office and powers of the state revenue agent, all of which were enacted and passed subsequent to the acts hereinbefore cited, as investing your orator and the said Natchez, Jackson & Columbus Railroad Company and the said Louisville, New Orleans & Texas Railway Company with their rights in the premises as aforesaid, and such demands and such threatened action on the part of the defendants herein are in contravention of the said contract rights of your orator, and in violation of section 10, art. 1, of the constitution of the United States, which forbids any state to pass any law impairing the obligation of a contract."

The prayer of each of the bills was to enjoin the defendant Wirt Adams from bringing a suit to collect the taxes, and, generally, for an injunction against any steps to collect the taxes; for temporary injunctions pending the litigation; and for a permanent injunction against the collection of the taxes on the final hearing of the cases. The restraining orders were issued and served. The complainant in each case moved for a temporary injunction. The defendants resisted this motion, and on their part moved to discharge the restraining orders. The court, as has been stated, refused and overruled complainant's motion for injunctions, and granted the motion of the defendants. The orders show that the court was of opinion that it had no jurisdiction of the cases. The complainants appeal, and assign as errors the refusal of the court to grant the injunction and the discharge of the restraining order.

In the first and second cases the complainant corporation, the Illinois Central Railroad Company, is alleged in the bills to be a corporation under the laws of the state of Illinois. In the first case it is alleged that the defendant corporation the Canton, Aberdeen & Nashville Railroad Company is a corporation under the laws of Mississippi, and that the other defendants are citizens of Mississippi. In the second case, the defendant the Yazoo & Mississippi Valley Railroad Company was incorporated under the laws of Mississippi,

and the other defendants are citizens of Mississippi. In the third case all the parties are citizens of Mississippi.

Edward Mayes, for appellant.

F. A. Critz, R. C. Beckett, and M. Green, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case, delivered the opinion of the court.

The appeals in these cases are taken from interlocutory decrees of the circuit court, each discharging a restraining order and refusing to grant an injunction. The act of February 18, 1895 (31 C. C. A. xlii., 90 Fed. xlii.), amending the seventh section of the act to establish the circuit courts of appeals, provides:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction to the circuit court of appeals."

It will be observed that the right of appeal is granted only in cases in which an appeal from a final decree could be taken to this court. Unless, therefore, appeals would lie to this court from final decrees in these cases, appeals are not allowed from interlocutory orders or decrees in them. The appellate jurisdiction from the district courts and circuit courts is divided between the supreme court and the circuit courts of appeals. The cases in which appeals or writs of error may be taken direct to the supreme court are stated in section 5 of the act of March 3, 1891, establishing the circuit courts of appeals. Omitting instances not material here, the act states these cases:

"In any case that involves the construction or application of the constitution of the United States. * * * In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." 26 Stat. 826.

If final decrees had been rendered in these cases, would this court have jurisdiction of appeals from them? This court has no appellate jurisdiction except that conferred on it by the statute. Section 6 of the act confers on it appellate jurisdiction from the district and circuit courts "in all cases other than those provided for in the preceding section of this act." An inspection of the record shows that constitutional questions are involved in these cases. The arguments at the bar and printed briefs filed discussed at length the question whether or not these are suits against the state of Mississippi, within the prohibition of the eleventh amendment of the constitution of the United States. On the part of the appellees, it is insisted that a proper "construction" and "application" of the eleventh amendment would defeat these suits, because it is argued that they are, in effect, suits against the state of Mississippi. On the part of the appellants, it is contended that the suits are not against the state of Mississippi, and not within the constitutional prohibition, but that they are suits against officers who are attempting to enforce void laws. This question is submitted

to the court as necessarily raised by the averments and prayers of the bills. It is not essential to a decision in these cases, however, to consider these contentions; for, by the averments of the bills, nothing is left to inference as to the complainants' claims raising other constitutional questions. The gravamen of each case is that the complainant is being deprived of contract rights secured by the constitution of the United States. The claim in each case is that the complainant is entitled by contract to be exempted from paying certain taxes, and that, pursuant to statutes of the state of Mississippi passed subsequent to the charters or contracts in question, the officers of the state are proceeding to assess and collect these taxes, —and that to do this would deprive the complainant of rights secured by the constitution of the United States. The complainants claim the protection of article 1, § 10, of the constitution of the United States, providing that "no state * * * shall pass any law impairing the obligation of contracts. * * *" The court that renders final decrees in these cases must, either directly or indirectly, decide these constitutional questions. By the record the cases involve the "construction or application of the constitution of the United States," and also are cases in which the laws of a state "are claimed to be in contravention of the constitution of the United States." The cases are not, therefore, within the appellate jurisdiction of this court. *City of Macon v. Georgia Packing Co.*, 9 C. C. A. 262, 60 Fed. 781; *Town of Westerly v. Westerly Waterworks*, 22 C. C. A. 278, 76 Fed. 467; *Scott v. Donald*, 165 U. S. 58, 72, 73, 17 Sup. Ct. 265; *Carey v. Railway Co.*, 150 U. S. 170, 14 Sup. Ct. 63; *City of Indianapolis v. Central Trust Co. of New York*, 27 C. C. A. 580, 83 Fed. 529.

In one of these cases—the last one stated—the jurisdiction of the circuit court is dependent alone on the sufficiency of the bill in presenting these federal, constitutional questions; and, if the court arranges the parties in the other two cases according to their respective interests, they would, probably, also be dependent on the subject-matter of the suits for jurisdictional averments. We express no opinion on the question of the jurisdiction of the circuit court, further than to say that the constitutional questions on which we base our conclusion as to the appellate jurisdiction of this court were necessarily considered in reaching a decision on the question of the jurisdiction of the circuit court. This much seems pertinent, if not necessary, in view of the fact that the interlocutory orders of the circuit court recite that, in its opinion, it was without jurisdiction of the cases. The appeals are dismissed.

HUMES v. CITY OF FT. SMITH, ARK.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. May 2, 1899.)

1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY — INJUNCTION SUITS.

The amount involved in a suit for an injunction, for the purpose of determining the jurisdiction of a federal court, is the value of the right to be protected, or the extent of the injury to be prevented, by the injunction.

2. POLICE POWERS OF STATES—LICENSING PRIVILEGES OR OCCUPATIONS.

Whenever a calling or business is of such a nature that it may fairly be deemed against public policy, or detrimental to the public welfare, and might be prohibited entirely, a state legislature may provide that it shall be licensed, and its action in that regard is not an exercise of the power of taxation, but of its police powers, and is not subject to judicial control.

3. SAME—GIFT ENTERPRISES—DEALERS IN TRADING STAMPS.

The legislature of Arkansas passed an act authorizing cities of the first and second class to license, tax, and regulate gift enterprises by imposing a license tax on any person, firm, or corporation engaged in such enterprises not exceeding \$1,000 per year, and on any person, firm, or corporation aiding or patronizing the same not exceeding \$500 per year. It defined gift enterprises as including the premium stamp, periodical ticket, trading stamp, and similar schemes and devices by means of which certain merchants, manufacturers, and other persons engaged in lawful callings are advertised, exploited, and patronized to the exclusion of others on like terms. A city of the first class passed an ordinance in conformity to such statute, containing the same definitions, and imposing monthly licenses on all persons or concerns engaged in gift enterprises or patronizing the same, within the limits fixed by the statute. *Held*, that the act and ordinance were valid, and not in violation of a provision of the state constitution requiring equality of taxation, or of the fourteenth amendment to the federal constitution, as applied to the business of a dealer in trading stamps, which he sold to certain merchants of the city only, to be given by them to their customers with their purchases, and which were redeemed by the seller in "presents" on their being presented by the customers in certain numbers.

In Equity.

On the 24th of March, 1899, the complainant, John C. Humes, filed his bill in equity in this court, alleging that he is a citizen of the state of Missouri, and that the defendant is a municipal corporation existing under the laws of Arkansas. He also alleges that he is engaged in business within the corporate limits of said city, under the style of the Co-operative Premium Association; that in conducting his business he solicits merchants of the city to patronize him, and that to such as agree to do so he issues stamps, for which they pay; that he issues a great number of copies of a little book in which these stamps can be pasted, and which also contains a directory, giving the names, addresses, and occupations of all the merchants so agreeing to patronize him; that he sends out a large number of canvassers, who place copies of the book in every household in the city, and explain to every one the advantages of patronizing the merchants holding the stamps; that when a person purchases goods from a merchant who does business with complainant, and pays cash for the amount of his purchase, or pays his bill therefor promptly on first presentation at the end of the month, he is entitled to demand and receive stamps issued by complainant in exact proportion to the amount of his purchase; that he has a store in said city, in which he keeps a stock worth several thousands of dollars, embracing a vast assortment of useful and ornamental articles for the home, varying in cost from some trifles to things of considerable expense; and the persons receiving these stamps can, whenever they desire, present them at complainant's store, and receive in exchange therefor any article they may select of the value of the stamps surrendered. The complainant attaches to his bill a copy of the book above re-

ferred to, which he makes an exhibit, and which will be referred to hereafter. He alleges that the tendency of his business is to encourage thrift and prompt payment of debts, and that it is beneficial alike to the public and the merchants who use the system, it enabling the former to get more for the money, while it advertises the latter, increases their custom and their cash sales, and aids them in the collection of their debts. He alleges that the defendant, urged thereto by sundry merchants who have conspired to break up his business, passed the following ordinance:

"Ordinance No. 496.

"An ordinance defining gift enterprises, and fixing a license and tax thereon.

"Be it ordained by the city council of Fort Smith:

"Section 1. That it shall be unlawful hereafter for any person, firm or corporation to engage in, aid, abet or patronize any gift enterprise as herein-after defined without having first obtained and paid for a city license therefor from the proper city authorities, as provided in section 2 of this ordinance.

"Sec. 2. That every person, firm or corporation who shall engage in or pursue the avocation, business or enterprise of selling or giving away premium stamps, periodical tickets, trading stamps, or checks or other devices to merchants, manufacturers or other persons engaged in mercantile business, shall pay to the city of Fort Smith a license of seventy-five dollars a month, in advance on the first day of each and every month, and license taken out at any time during a month shall be for the sum of a full month's license, and expire on the first day of the succeeding month.

"Sec. 3. Every person, firm or corporation who shall offer premium stamps, periodical tickets, trading stamps, or similar schemes and devices for the purpose of inducing trade within the city of Fort Smith, shall pay a license to the city of Fort Smith of forty dollars per month, to be paid in advance on the first day of each and every month while so engaged in said business, and said license taken out at any time during a month shall be for the sum of a full month's license, and expire on the first day of the succeeding month.

"Sec. 4. Any person, firm or corporation who shall violate any of the provisions of this ordinance shall be fined in any sum not less than ten dollars nor more than twenty-five dollars, and each day that any person, firm or corporation shall be engaged in business in violation of this ordinance shall be deemed and considered a separate offence.

"Sec. 5. The term 'gift enterprise' as herein employed shall include the premium stamp, periodical ticket, trading stamp, and similar schemes and devices wherein by means of stamps, checks, tickets or other devices certain merchants, manufacturers and other persons engaged in lawful occupations or callings are advertised, exploited and patronized to the exclusion of others on like terms.

"Sec. 6. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed, and this ordinance shall be in full force and effect from and after its passage and publication.

"Passed and approved March 20, 1899.

"[Signed]

Tom Ben Garrett, Mayor.

"Attest: D. B. Sparks, City Clerk."

The complainant also alleges that the license is vastly in excess of the possible expense of regulating his business, and that it is many times larger than the license fee imposed on any other legitimate business conducted in said city; that the object of fixing the license at so high a rate was to destroy his business, and that, if the ordinance is enforced, that result will follow. He also alleges that the 38 merchants who have adopted his scheme will be liable to prosecution in civil actions, as well as all the numerous agents and canvassers employed by him, and a multiplicity of litigation will result, unless the ordinance is enjoined; that the contracts of the complainant with said merchants require them to use the stamps for the term of a year, and, if said merchants are prevented from using the same, it will bring about a multiplicity of suits between them and the complainant; and that, unless the defendant is restrained, it will use said ordinance as a means of destroying his business, harassing and oppressing himself and customers by civil suits

and by prosecution. He then alleges that the city is insolvent, and that, if he should pay the license, he could not recover it at law; that it would require many years to determine the validity of said ordinance in the courts, and all license fees paid by him and his customers in the meantime would be lost; that the defendant city consumes in its running expenses all the money that it can raise under the constitutional limit of taxation, so that there would be no way of enforcing the collection of any judgment which the complainant might recover against it for license fees paid. Upon these facts he prays for an injunction restraining the enforcement of the ordinance.

When the bill was filed, by consent of parties a temporary restraining order was issued. On the 31st of March the defendant city filed its answer, in which it states: That it is a municipal corporation, and a city of the first class, organized and existing under the laws of the state of Arkansas, and within the jurisdiction and limits of this court. Denies that the complainant has a store within said city in which he keeps a stock of goods worth several thousand dollars, embracing the articles mentioned in the bill, and alleges that said stock is of slight value, and consists of cheap and invaluable articles. Denies that the business conducted by complainant encourages thrift, or the prompt payments of debt, and alleges that said business is beneficial to no one except the complainant, and alleges that the said business adds to the expenses of the public generally to the extent of the cost of the stamps sold, and for which there is no corresponding benefit; that its tendency is to divert from the regular channel of business all cash trade to those who patronize the complainant, which is an interference with the regular and legitimate course of trade, and tending to cause a great loss to all those merchants who are not allowed to patronize the complainant. It alleges that complainant will only sell and furnish stamps to certain merchants and persons in each line and branch of trade, and not to all merchants. It denies that the ordinance was passed because it was urged thereto by sundry merchants who refused to patronize the complainant. Denies that the ordinance was passed to render the complainant's business impossible, or that the license imposed by the ordinance was intentionally fixed at so high a rate that it cannot be paid out of the profits of the business, or that it was the object of said ordinance to destroy the petitioner's business. It denies the complainant will be damaged by reason of said ordinance in the sum of \$2,000. It denies its insolvency. Denies the amount in controversy in this action exceeds the sum of \$2,000. It alleges that the amount in controversy is far less than \$2,000, and alleges that the complainant is amply protected at law; and also denies the jurisdiction of the court. Further answering, it alleges that the ordinance set out in the complainant's bill was passed, and approved by the mayor of the defendant city, and became a law, on the 20th day of March, 1899; that the defendant city is a city of the first class, and that the ordinance was passed under and by virtue of the express authority invested in all cities of the first and second class by the state of Arkansas by an act of the state legislature passed and approved, and in full force and effect from and after the — day of —, 1899, and sets forth the act, which is in words and figures as follows, to wit:

"An act defining gift enterprises and authorizing cities of the first and second class to license, tax and regulate the same.

"Be it enacted by the general assembly of the state of Arkansas:

"Section 1. All cities of the first and second class are hereby authorized and empowered to license, tax and regulate gift enterprises, and all persons, firms and corporations aiding, abetting or patronizing the same: provided that such license or tax shall not exceed one thousand dollars per annum for each gift enterprise, and five hundred dollars per annum for each person, firm or corporation aiding, abetting or patronizing such gift enterprise.

"Sec. 2. The term 'gift enterprise' as herein employed shall include the premium stamp, periodical ticket, trading stamp and similar schemes and devices, wherein by means of stamps, checks, tickets or other device, certain merchants, manufacturers and other persons engaged in lawful occupations or callings are advertised, exploited and patronized to the exclusion of others on like terms."

The answer then alleges that said act of the legislature was authorized by the constitution of the state, which has the power to lay and levy all taxes, and that the constitution authorized the legislature to delegate the power to pass such ordinance to municipal corporations. It also alleges that the ordinance was passed for the purpose of regulating, licensing, and taxing the privilege of the complainant and others engaged in the business of gift enterprises, and all other businesses of like kind and class. It also alleges that the object and purpose of the bill is to prevent criminal prosecutions, and that this court has no jurisdiction to grant an injunction for such purpose.

At the same time the answer was filed, the defendant filed a motion to dissolve the injunction for the following reasons: (1) That the court is without jurisdiction of the subject-matter herein. (2) That the bill filed herein does not state facts sufficient to entitle petitioner to the relief sought. (3) That the bill seeks to enjoin the prosecution of criminal proceedings. (4) That the bill does not show cause for equitable relief, but shows upon its face that there is adequate remedy at law. The motion was argued and submitted on the bill and answer, and afterwards, by consent, a replication and an agreed statement of facts were filed, and the cause submitted to the court on briefs for final hearing.

The facts, so far as they are important to the decision of this case, are as follows:

The complainant is a citizen of Missouri, and engaged in the premium stamp business in the city of Ft. Smith prior to the passage of the act of the legislature and the ordinance of the defendant city, both of which are hereinbefore correctly set forth. Complainant keeps on display in a storehouse on the principal street in the city a stock of articles for the home, both useful and ornamental, which said articles are not kept for sale, but for the purposes hereinafter stated. The complainant's business consists in this: He manufactures a large number of little books, in which, among other things, are contained 20 pages, on each page of which are contained 24 stars, far enough apart so that a stamp, which the complainant manufactures, and about the size of a postage stamp, and made much in the same way, may be pasted on each star. He selects one or more merchants in each line of business in the city, and enters into a contract with them to use his system of business. Having procured such merchants to enter into contract with him, their names and the number of their business houses, and the lines of business in which they are engaged, are printed in this little book. He then sends out canvassers to distribute these books, to explain them, and to induce persons with whom the books are left to do business with the merchants who have agreed with him to adopt his system of business. The merchants who enter into this contract purchase from him stamps. These stamps are sold at from \$3 to \$5 per 100. The merchants who buy the stamps give to each of their customers a stamp for each 10 cents worth of goods that he purchases; that is to say, if the customer buys 30 cents worth of goods, he gets three stamps; if he buys 85 cents worth of goods he gets eight stamps; if he buys \$10 worth of goods he gets 100 stamps. When a purchaser has received stamps sufficient in number to cover 10, 20, or 30 pages of the book, he may take the book to the place of business of the complainant, and there receive a present of his own selection from the stock which he keeps on hand. No person can purchase these stamps except persons who do business with the plaintiff. If the customer pays cash for his goods, or pays his bill promptly at the end of the month, he has the right to demand of the merchant the stamps in question; but if he does not pay promptly at the end of the month, and the merchant chooses, he can give him the stamps anyway. The stamps have the same purchasing power in the hands of any holder, and are given indiscriminately to all customers patronizing the merchants having contracts with the complainant. The complainant keeps his store open at all ordinary business hours, and the customer can select any article in the store within the price of the stamps which he holds. The complainant, in making contracts with his customers, restricts himself to the number of persons in each line of business with whom he will do business. Complainant will not redeem his stamps unless they amount to as much as 48 in number, which represents a purchase of \$4.80 worth of goods. In addition to redeeming stamps by giving to persons hold-

ing the same such articles as they have stamps to pay for, the complainant presents any article from his store, marked for sale at 90 pages of stamps, to that person who at the end of each month presents the largest number of stamps, and these gifts are outside of the regular purchasing value of the stamps.

Printed upon the little book which he distributes is the following: "Citizens' Stamp Book. Issued Free by the Co-operative Premium Association, for the purpose of making valuable presents to all those who give any or all of the within-named merchants the benefit of their trade. For further information as to its use, see within. Remember the premiums cost you absolutely nothing." Immediately following is this explanation: "We, the firms whose names appear in the directory of this book, representing every line of retail trade in the city, respectfully announce to the public that we will give the premium stamps issued by the Co-operative Premium Association free to every person purchasing goods from us, one premium stamp for each and every ten cents spent with us, provided our customers ask for them. The stamps to be given only to customers paying cash, or those who pay their bills in full at least once every thirty days, and only to be given at the time of paying bills. Thus, if your purchase amounts to 30 cents, you will receive 3 stamps; 85 cents, 8 stamps; \$10.00, 100 stamps, etc. * * * When the book is filled, take it to the office of our headquarters, at the address below, and you will receive any of the premiums you wish to select from our catalogue, listed under Class A, absolutely free of charge. * * * Remember it is not necessary to fill this book with premium stamps before securing a premium, unless you prefer to do so, as we have premiums for each 10, 20, and 30 pages. See list of premiums, or call at our office and examine them." Then follows this: "Directory of Merchants who give premium stamps. Our object in making this proposition to the public is: First, the object of all judicious advertisers,—to gain new patronage by giving the money spent in advertising directly to the public in presents; and, second, to stimulate the prompt payment of bills, as every one must realize that we can sell goods cheaper and give better service, if we receive our money promptly, than we can if we are compelled to carry long accounts. It is therefore with pleasure that we each contribute our share toward making our customers beautiful and valuable presents, as a token of our appreciation of their patronage. Careful inspection of the names of the firm members of this association is respectfully invited, that the public will at once see that they are among the best and most reliable in the city, as only those who are known to keep good goods, and who sell at reasonable prices, were asked to join our association." Then follows a directory of firms doing business with the complainant. At the end of the book is the following: "Special Notice. This book is presented to —, with our compliments, for the purpose of being filled with our premium stamps, which will entitle the bearer to one of our handsome and valuable presents. If, for any reason whatever, the book is not used for this purpose, the holder will confer a special favor to keep it until called for by our representative. Please bear in mind that only the merchants named in this book can supply you with our premium stamps, and that they cost you absolutely nothing, as they are given free with every dime you spend for living necessities."

The contract between complainant and his customers is as follows, blanks being left for the name of the customer:

"Memorandum of Agreement.

"Fort Smith, Ark., —, 1898.

"This agreement by and between J. C. Humes, General Manager of the Co-operative Premium Association, party of the first part, and — of Fort Smith, Ark., party of the second part, witnesseth, that the said party of the first part, for the consideration hereinafter mentioned, agrees with the party of the second part to perform in a faithful manner the following: To print in the directory of his 'Citizens' Stamp Books the name, business, and address of the party of the second part; to deliver at the homes of the people of Fort Smith, Ark., and vicinity, 4,000 copies of said stamp books, and to instruct

and explain to them how they are to use the same, and to keep a correct list of the names and addresses of all persons to whom the same are delivered; to visit every home, in the city, through solicitors, at least once every ninety days, in the interest of the association, and in every way to use his best endeavor to promote the business interest and trade of the party of the second part. And the party of the second part agrees with the party of the first part, in consideration of the faithful performance of the foregoing, to receive from the party of the first part a sufficient amount of premium stamps to supply all persons who may call for them; the stamps to be given out as follows: One premium stamp for each and every ten cents represented in a purchase; ten stamps for one dollar, etc.; the stamps to be given when the purchases are paid for, provided bills do not run over thirty days, in which case the party of the second part can, at his option, refuse to give stamps; to pay the party of the first part (or his agent) fifty cents per hundred for all stamps thus used; to make weekly settlements for all stamps used or given out; to encourage the use of the stamp books and the collection of stamps by all buyers, and to co-operate in every way possible with the party of the first part to promote the best interests of all the merchants named in the books. The parties of the first and second part mutually agree that this contract shall remain in force for one year from date. No stipulation not appearing on this agreement will be recognized by either party."

The profits of complainant's business per annum amount to ——— dollars. The defendant city taxes a great many occupations and privileges, but none of them to the extent that it does the complainant's business. The complainant's customers or patrons are not prohibited by their contract, or prevented in any way by the complainant, in giving out the stamps as they see fit, without regard to whether the purchaser pays cash, pays his bill at first presentation at the end of the month, or pays months after the bill is due. The license tax imposed by the ordinance of the defendant city is \$75 a month, payable monthly. The defendant is a city of the first class, organized under the laws of the state of Arkansas.

George B. Rose, for complainant.

William B. Cravens, for defendant.

ROGERS, District Judge (after stating the facts as above). In the view which the court takes of this case, it is not important to determine all the questions discussed by counsel. The defendant insists that the court is without jurisdiction, because the amount in controversy does not exceed the sum of \$2,000; that is to say, that the amount which the complainant would have to pay for license to conduct his business does not amount to that sum. Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction. *Railway Co. v. McConnell*, 82 Fed. 65. Nor does the court think that the purpose and object of the injunction is to prevent criminal prosecutions. The bill was filed before any criminal prosecutions were instituted, and the object and purpose of the bill is to declare void the ordinance of the defendant city, and thereby prevent the destruction of, or at least great injury to, this business.

The complainant insists that the ordinance is in violation of section 5, art. 16, of the constitution of Arkansas, which is as follows:

"Sec. 5. All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed high-

er than any other species of property of an equal value, provided the general assembly shall have power, from time to time, to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

A proviso follows in this section, which it is unimportant to set out. The complainant also insists that the ordinance is in violation of the fourteenth amendment to the constitution of the United States. The view I am constrained to take of the facts renders it unnecessary to enter upon any dissertation upon the police power of the state, or upon constitutional law, or to review the numerous authorities cited relating to these subjects. In *City of Little Rock v. Barton*, 33 Ark. 443, which was a proceeding against a broker, that court say:

"The authority of the legislature to regulate the exercise of the privileges or the following of pursuits or occupations, does not fall properly within its taxing power, but within its police power. Pursuits which are detrimental may be prohibited altogether, or licensed for a compensation to the public. So persons desiring to exercise privileges and engage in callings really useful to society may be required to obtain licenses, and pay a reasonable compensation therefor."

Mr. Justice Bradley, in *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing Slaughter-House Co.*, 1 Abb. (U. S.) 398, Fed. Cas. No. 8,408, said:

"We may safely say that it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit, without unreasonable regulation or molestation."

It would thus appear that the supreme court of the United States excepts from the operation of the fourteenth amendment pursuits "injurious to the community." It recognizes the principle that such occupations or pursuits as fall within the police powers of the states are not affected by the fourteenth amendment. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273. Manifestly, the legislature of the state regarded this gift enterprise business as detrimental to the community. I do myself. I do not regard it as a legitimate business. The legislature might have prohibited it altogether, in the exercise of its police power; but it chose to license it, and make it a source of revenue to the city, as it does some other deleterious occupations, with which, in my opinion, the gift enterprise business should be classed. If right in this, the act of the city council, being clearly within the act of the legislature, is valid and binding, and neither the one nor the other infringes, I think, the provisions of the fourteenth amendment to the constitution of the United States.

In *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 700, 16 Sup. Ct. 714, 723 (which is a case the facts of which are entirely different from the ones in the case at bar), the supreme court of the United States said:

"These cases [referring to various cases referred to in the opinion], however, do not infringe upon the general principles, so frequently declared, that, where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained, wherever it can be done without the impairment of vested rights. Notwithstanding these cases, the general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and within legislative control; and in the exercise of such power the legislature is vested with a large discretion, which,

if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."

Illustrations of the exercise of this power are found in the cases cited in *Crutcher v. Kentucky*, 141 U. S. 61, 11 Sup. Ct. 851, and in the cases cited in *Louisville & N. R. Co. v. Kentucky*, *supra*. I am content, however, to rest my decision upon the reasoning and conclusions of the court in the case of *Lansburgh v. District of Columbia*, decided by the court of appeals of the District of Columbia and reported in 56 Alb. Law J. 493. While the details of that case are different from the details in this, the substantial facts are the same. That court, in summing up the facts, stated this:

"In like manner, we think the case may be decided without reference to the numerous decisions cited by counsel for the District, in each of which the element of chance in the distribution of gifts and prizes was the controlling fact. Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery or gift enterprise, as those words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the trading stamp company, we think, nevertheless, that they come within the prohibition of the statute, which, as before said, furnishes its own definition of 'gift enterprise.' Although one of the most shrewdly planned of the many devices to obtain something for nothing, and one apparently entirely novel, it could hardly have come more clearly within the scope of the statute had it been well known, and expressly in the contemplation of congress, at the time of the enactment. The Washington Trading Stamp Company and its agents are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device. With no stock in trade but that device, and the necessary books and stamps, and so-called 'premiums' with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant, who pays them in cash at the rate of \$5 a thousand. The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of another, and partly through fear of losing his own if he declines. Again, a limited number only (an apparently necessary feature of the scheme) are included in the list for the distribution of the stamps, and other merchants and dealers who cannot enter must run the risk of losing their trade, or else devise some other scheme to counteract the adverse agency. The stamps are sold at the rate of fifty cents per hundred to the contracting merchants, and yet purport to be redeemable with premium gifts at the assumed value of one dollar per hundred. Unless, therefore, the so-called 'premiums' to be distributed among the diligent collectors of the stamps are grossly overvalued, the scheme cannot maintain itself, for, in addition to the actual cost of the premiums, it has to bear the cost of the books and stamps, and the maintenance of its office and exhibition room. If the premiums should have any fair value, then the stamp company must inevitably rely upon the failure of the presentation of tickets for redemption by reason of its requirement that not less than 990 tickets—representing cash purchases of \$99.90—shall be pasted in a book, and produced at one time, to entitle the holder to his premium. In this event the company, if it actually contemplates making good its contracts, is relying upon a lottery; that is to say, the chances and advantages of its game for its expectations of profit or gain. There is not a shadow of rational foundation for the stamp company's claim that it confers a benefit upon buyers by procuring for them an actual discount. If its business were continued, and its contracts faithfully performed, its inevitable result would be, as in all unnecessary interventions of third persons or 'middle men'

between producer and consumer, an increase of cost to the latter. The prohibition of such a scheme is clearly within the power of congress, within this District, and the statute under which the prosecution has been maintained makes ample provision for its exercise."

I am unable to improve upon this statement as to nature and character of the complainant's business. It is insisted by counsel that the power of congress in the District of Columbia is not restrained by the fourteenth amendment. That contention is disposed of by what has already preceded. But the court of appeals of the District of Columbia, in the *Lansburgh Case*, 56 Alb. Law J. 490, said:

"It is not denied that the power of congress to legislate in respect of matters affecting the public health, safety, peace, and morals within the District of Columbia is the same as that of the state legislatures within their several jurisdictions. It is neither greater nor less; for 'all of the guaranties of the constitution respecting life, liberty, and property are equally for the benefit of all citizens of the United States residing permanently or temporarily in the District of Columbia as of those residing in the several states of the Union,'"—citing *U. S. v. Ross*, 5 App. D. C. 241, 247, 248, 23 Wash. Law Rep. 86; *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301.

I conclude that wherever the thing sought to be regulated is of such a nature as that the legislature might prohibit it outright, because detrimental to the public interests, or against the public health or public morals, the manner of dealing with it is a matter solely addressed to the legislature, and is beyond judicial inquiry. The temporary restraining order is dissolved, and the bill dismissed, with costs.

GROVE et al. v. GROVE et al.

(Circuit Court, D. Kansas, Second Division. April 29, 1899.)

1. **FEDERAL COURTS — POWER TO PERMIT AMENDMENTS AFFECTING JURISDICTION.**

A federal court has power to retain jurisdiction of a suit by the dismissal of parties who are not indispensable, but whose presence would deprive the court of jurisdiction, or by permitting amendments to supply necessary allegations as to citizenship of parties.

2. **FORECLOSURE OF MORTGAGE—PARTIES.**

A mortgagor who has parted with all his interest in the mortgaged property is not an indispensable party to a bill for the foreclosure of the mortgage.

3. **FEDERAL COURTS—JURISDICTION—LOCAL SUITS.**

Under section 8 of the judiciary act of 1875 (Rev. St. § 738), expressly retained in force by the act of August 13, 1888, a suit to foreclose a mortgage may be maintained in the circuit court of the United States in the district where the property is situated, where the requisite amount is involved, and the parties are citizens of different states, though neither is a resident of the district.

4. **SAME—PLACE OF BRINGING SUIT—WAIVER BY APPEARANCE.**

Exemption from being sued in any other district than the one of which defendant is an inhabitant is a personal one, which is waived by his filing a general demurrer to the bill.

5. **PARTIES — DISMISSAL AS TO UNNECESSARY DEFENDANTS — EFFECT OF APPOINTMENT OF RECEIVER.**

The appointment of a receiver in a foreclosure suit to take charge of the mortgaged property, and collect the rents therefrom, does not affect the right of the court to permit the complainant to dismiss as to defendants

who are not indispensable parties, and who have no rights in the property that will be affected by the receivership.

On Demurrer to Bill for Want of Jurisdiction.

J. H. Gillpatrick, for complainants.

Sankey & Campbell, for defendant Nostrum.

HOOK, District Judge. This is a suit brought by Henry S. Grove and Albert H. Harris, as executors of the estate of Anna M. Grove, deceased, to foreclose a mortgage upon real property in Harper county, Kan., executed by defendants William H. Grove, Mamie J. Grove, and John W. Hirst. The bill alleges that the complainants are citizens of the state of Pennsylvania; that defendants Grove are also citizens of the state of Pennsylvania, and that Hirst is a citizen of the state of Nebraska; that defendants Hughes, Davis, and Nostrum are citizens of the state of Missouri, and the other defendants are citizens of the state of Kansas. Anna M. Grove is alleged as being "late of the city and county of Philadelphia and state of Pennsylvania." The bill also shows that the note and mortgage in suit were executed by defendants Grove and Hirst to Conrad S. Sheive and William S. Magee, as trustees for Anna M. Grove; that Sheive died, and Henry S. Grove was, by appropriate proceedings in Pennsylvania, appointed as his successor in trust; that after the death of the beneficiary, Anna M. Grove, the trustees assigned the note and mortgage to the complainants, as executors. With one unimportant exception, the defendants, other than the mortgagors Grove and Hirst, are simply charged with having some interest in the mortgaged premises adverse and inferior to the lien of complainants, the nature and character of their interest not being set out.

The defendant Nostrum attacks the jurisdiction of the court on three grounds: (1) That the complainants being citizens of the state of Pennsylvania, and defendants William H. Grove and Mamie J. Grove, two of the three mortgagors, being also citizens of the state of Pennsylvania, the requisite diversity of citizenship does not exist; (2) that there is no allegation as to the citizenship of William S. Magee and Henry S. Grove, as trustees, and that, as the complainants derived title by assignment from the trustees, they cannot maintain this suit unless it affirmatively appears in the bill that their assignors could do so; (3) that, it appearing affirmatively in the bill that defendant William Nostrum is not a resident of the state of Kansas, he cannot be sued in the United States circuit court for this district by complainants, who are citizens and residents of Pennsylvania,—that is to say, that jurisdiction in this cause is founded solely on the diverse citizenship of the parties, and that it therefore comes within the provision of the act of August 13, 1888, requiring suit to be brought in the district of the residence of either the complainants or the defendants. During the argument complainants asked leave to dismiss the bill as to defendants William S. Grove, Mamie J. Grove, and John W. Hirst, the mortgagors, and to amend by alleging that the said mortgagors conveyed the mortgaged real property, and parted with all interest therein, to defendant Nostrum, and by alleging that the trustees who

assigned the note and mortgage to the complainants, and the beneficiary Anna M. Grove at the time of her death, were citizens of the state of Pennsylvania, and that the conditions covered by the proposed amendments existed at the time of the institution of this suit. The defendant Nostrum objected to the proposed amendments, denying the power of the court to retain jurisdiction by allowing the amendments, and denying the effect claimed for such amendments, if made.

Leave will be granted to the complainants to make the amendments as applied for within 10 days from this date. While the presence of William H. Grove and Mamie J. Grove as defendants would be sufficient to oust the court's jurisdiction, for the reason that they are citizens of the same state as complainants, it is nevertheless perfectly competent for the court to retain jurisdiction by a dismissal of the bill as to them, unless they are indispensable parties. The retention of jurisdiction by the dismissal of unnecessary parties is now a matter of every-day practice. The power to make dismissals and amendments for that purpose was settled long ago by Mr. Chief Justice Marshall. It may be done by striking out the name of a plaintiff (*Conolly v. Taylor*, 2 Pet. 556), as well as by the dismissal of a defendant (*Vattier v. Hinde*, 7 Pet. 252). It may even be done at the entry of the final decree (*Carneal v. Banks*, 10 Wheat. 181); and, while an amendment as to citizenship necessary to confer jurisdiction cannot be made while the case is pending on appeal in the circuit court of appeals, nevertheless the judgment may be reversed, and the cause remanded, with instructions to dismiss, unless, by proper amendment below, the requisite diversity of citizenship is made to appear. *Insurance Co. v. Barker*, 32 C. C. A. 124, 88 Fed. 814. The forty-seventh equity rule, dispensing with the joinder of persons who might otherwise be deemed necessary or proper parties, if such joinder would oust the jurisdiction of the court, is merely declaratory of the practice existing at the time of its adoption. The right of the court to retain jurisdiction by the dismissal of parties who are not indispensable is founded in good reason, for it would be an idle ceremony to deny the dismissal of objectionable parties, and to dismiss the bill of complainants, on the ground that the court had no jurisdiction, and then allow the complainants to recommence the suit, omitting the parties whose presence would oust the jurisdiction of the court. The practice observed for so many years is in the interest of a speedy determination of litigation.

Are the defendants Grove and Hirst indispensable parties? Parties in equity suits have been divided by the supreme court of the United States into three classes:

"(1) Formal parties, who have no interest in the controversy between the immediate litigants, but have such an interest in the subject-matter as may be conveniently settled in the suit, and thereby prevent further litigation; (2) necessary parties, who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them; (3) indispensable parties, who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly incon-

istent with equity and good conscience." *Marco v. Hicklin*, 6 C. C. A. 13, 56 Fed. 549.

The leave given to complainants to amend contemplates an allegation that defendants Grove and Hirst, the mortgagors, conveyed the mortgaged property to defendant Nostrum, and that they no longer retain any interest therein. It is well settled that, when a mortgagor has conveyed all of his interest in the mortgaged premises, and retains the equity of redemption no longer, he is not a necessary party to a suit for the foreclosure of the mortgage, and a decree may be obtained extinguishing all adverse claims against the property without the presence of the mortgagor. 2 Jones, Mortg. § 1404; *Townsend Sav. Bank v. Epping*, 3 Woods, 390, Fed. Cas. No. 14,120; 9 Enc. Pl. & Prac. 332.

As to the second contention of the demurrant, it is sufficient to say that the amendments obviate whatever objections would otherwise be well taken.

It is further contended by Nostrum that, as neither he nor the complainants are residents of Kansas, this court has no jurisdiction, for the reason that the act of March 3, 1887, as corrected by the act of August 13, 1888, provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." These provisions do not apply to a suit of this character. Local actions, such as the one at bar, are the subject of section 8 of the act of March 3, 1875 (18 Stat. 472). This section, which afterwards became section 738 of the Revised Statutes, is, so far as concerns the question under consideration, as follows:

"Sec. 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such a suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district," etc.

All jurisdiction and right mentioned in this section are expressly saved by section 5 of the act of August 13, 1888.

The precise question raised by demurrant is determined adversely

to him by the decision of the supreme court in *Greeley v. Lowe*, 155 U. S. 58, 72, 73, 15 Sup. Ct. 24, in which it is said:

"It is entirely true that section 8 of the act of 1875, authorizing publication, does not enlarge the jurisdiction of the circuit court. It does not purport to do so. Jurisdiction was conferred by the first section of the act of 1888 of 'all suits of a civil nature,' exceeding two thousand dollars in amount, 'in which there shall be a controversy between citizens of different states'; and this implies that no defendant shall be a citizen of the same state with the plaintiff, but otherwise there is no limitation upon such jurisdiction. Section 8 of the act of 1875, saved by section 5 of the act of 1888, does, however, confer a privilege upon the plaintiff of joining in local actions defendants who are nonresidents of the district in which the action is brought, and calling them in by publication, thus creating an exception to the clause of section 1, that no civil suit shall be brought in any other district than that of which defendant is an inhabitant. Hence it appears that the case of *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, really has no bearing, as that case involved only the rights of parties to personal actions residing in different districts to sue and be sued, and was entirely unaffected by Act 1888, § 5, which deals with defendants only in local actions, and expressly reserves jurisdiction, if the suit be one to enforce a lien or claim upon real estate or personal property. * * * The act of 1875 gave the right to sue defendants wherever they were found. The act of 1888 requires that they shall be inhabitants of the district. But, in both cases, an exception is created in local actions, wherein any defendant interested in the res may be cited to appear and answer, provided he be not a citizen of the same state with the plaintiff."

In *Dick v. Foraker*, 155 U. S. 404, 12 Sup. Ct. 124, it is held:

"The circuit court of the United States for the Eastern district of Arkansas has jurisdiction of a suit in equity, brought by a citizen of Ohio against a citizen of Illinois, to remove a cloud from the title to real estate situated in that district."

In considering the question whether circuit courts have jurisdiction under section 8 of the act of 1875, where there is but one defendant and neither party resides within the state in which the suit is brought, the court in *Wheelwright v. Transportation Co.*, 50 Fed. 711, said:

"It is to be observed that the language of the act is: 'When, in any suit commenced in any circuit court of the United States, one or more of the defendants shall not be an inhabitant of or found within the said district.' It would seem that this expression, 'one or more of the defendants,' means one defendant, if there is but one, or one or more, if there are several; for the necessity of the provision springs out of the fact that the res upon which the lien is sought to be asserted and enforced is located in a district not that of the defendant's domicile. If another defendant resided in the district, it would still leave an equal necessity for the provision as to the nonresident defendant. In this class of cases, it is the residence of the defendant away from the property sought to be affected which is the reason for conferring the jurisdiction; for the property must be in the district where the court sits, so that it can lay its hand upon it to enforce the lien. This would be equally true whether there was one or more defendants, or whether some of them were residents."

In *Single v. Manufacturing Co.*, 55 Fed. 553, it is said:

"Under Rev. St. § 738, which provides for serving nonresident defendants by publication 'in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought,' such a suit is maintainable in a circuit court when the parties are citizens of different states, although neither of them resides in the district where suit is brought."

In *Carpenter v. Talbot*, 33 Fed. 537, it is held that, under the act of congress of March 3, 1887, a suit by a citizen of Ohio against citizens of Vermont, New York, and Maine, to enforce a claim to property in Vermont, is properly brought in the district of Vermont. See, also, *Goodman v. Niblack*, 102 U. S. 562; *American F. L. M. Co. v. Benson*, 33 Fed. 456; *McBee v. Railway Co.*, 48 Fed. 243; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. 608, 614.

There is another reason why the third contention of counsel is not well founded. While the exact provision quoted from the act of August 13, 1888, does not appear in the previous acts of congress defining the jurisdiction of circuit courts, there are nevertheless provisions which are analogous thereto, and the interpretation of which by the courts are authorities in the consideration of the provision quoted. There is a uniform line of decisions of the supreme court of the United States, covering a period of nearly 70 years, to the effect that exemption from being sued in any other district than the one specified is a personal privilege, which may be waived by a general appearance or by pleading to the merits of the action. *Express Co. v. Todd*, 5 C. C. A. 432, 56 Fed. 104.

In this suit Nostrum filed an answer to the merits, and claimed to be the owner of the real property in controversy, and in the possession thereof. Thereafter the complainants filed replication to the answer. After the filing of the replication, Nostrum obtained the following order from the court: "Now, on this day, upon application of the defendant William Nostrum, he is given leave to withdraw the answer heretofore filed herein by him, and to file instanter his demurrer to complainants' bill." Nostrum, therefore, contends that, having withdrawn his answer, his appearance in the suit and his voluntary submission to the jurisdiction of this court were likewise withdrawn. It is not necessary to consider whether this would be the effect of the permission granted by the court, and the action of Nostrum in conformity therewith, nor whether the court could, without the assent of complainants, permit a party defendant to withdraw his person from the jurisdiction of the court, having once voluntarily submitted to it, because the record shows that subsequently Nostrum, by leave of court, filed a general demurrer to the bill, alleging that it did not state a cause of action in favor of complainants and against him. In other words, Nostrum again appeared to the merits, and his action in that respect is a submission of his person to the jurisdiction of the court, and is inconsistent with the objection now urged. This demurrer was followed by a stipulation between the complainants and Nostrum to the effect that the demurrer should stand confessed, and that the complainants might have leave to amend their bill within the time therein specified. Later, another stipulation was filed, extending the time for the filing of the amended bill until November 1, 1898, at which time it was filed. The objections now urged are by way of a demurrer to the amended bill.

It is also urged that because a receiver has been appointed in this suit it is therefore analogous to the case of *Association v. Alderson*, 32 C. C. A. 542, 90 Fed. 142. In that case certain lienholders who were citizens of the same state as the complainants were made parties

defendant, but the bill was subsequently dismissed as to them for the purpose of obviating objections to the jurisdiction of the court. The receiver who was appointed had been previously authorized to expend money in completing and furnishing the building in controversy, and to pay therefor in receiver's certificates; thus attempting to create a lien prior to all other liens, including those of the parties who were dismissed out. It is apparent that the rights and interests of those lienholders would be directly and vitally affected by the orders of the court in respect of the completion and furnishing of the building and the creation of additional liens on the property. They were held to be indispensable parties, and their presence in the cause ousted the court of its jurisdiction. The court referred to them as "essential and indispensable parties, directly and ultimately affected by the proposed decree." The defendant company, on whose property the receiver's certificates were to be fastened as a lien, was a private corporation, and in such a case the consent of all of the lienholders was indispensable. *Hanna v. Trust Co.*, 16 C. C. A. 586, 70 Fed. 2. In the case at bar no such condition exists, as the receiver appointed was authorized merely to take charge of, and to lease and receive the rents of, the property in controversy. He was not authorized to create any liens or charges that would affect in any wise the interests of the parties whom the complainants propose to dismiss from this suit. The demurrer will be overruled, with leave to present same again if complainants do not, within the time granted, amend their bill in accordance with the foregoing.

UNITED STATES v. CENTRAL PAC. R. CO. et al.

(Circuit Court, N. D. California. April 24, 1899.)

No. 4,119.

PUBLIC LANDS—SUIT TO CANCEL PATENT—MINERAL CHARACTER OF LAND.

In a suit by the United States for the cancellation of a patent to land issued under a railroad grant, on the ground that the land was mineral, the burden rests on the complainant to overcome the presumption in favor of the patent by satisfactory evidence, not only that the land was known mineral land at the time the patent was issued, but that it is chiefly valuable for mineral purposes. Evidence that gold placer mining had formerly been carried on in a stream on the tract, but that it had been abandoned as worked out prior to the date of the patent, and that neither at that time nor since had there been any mines on the land producing mineral and capable of being worked at a profit, is insufficient, as is also evidence of the mineral character of adjoining land.

This was a suit in equity to cancel a patent to land.

Samuel Knight, Asst. U. S. Atty.

William Singer and H. V. Reardan, for defendants.

MORROW, Circuit Judge. This is a suit in equity brought by the United States against the Central Pacific Railroad Company, as successor in interest to the Central Pacific Railroad Company of Cali-

ifornia and the Western Pacific Railroad Company, and several other defendants acquiring interests therefrom, to cancel and set aside a patent issued by the United States on October 12, 1867, to the Central Pacific Railroad Company of California for section 7, in township 16 N., range 11 E., Mt. Diablo meridian, in Nevada county, Cal. Under the act of congress approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes" (12 Stat. 489), and the act amendatory thereof, approved July 2, 1864 (13 Stat. 356), there were granted to the Central Pacific Railroad Company of California 10 alternate sections of the public lands of the United States, on each side and within 20 miles of the road of said company, designated by odd numbers, and not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim might not have attached at the time the line of road of said company should be definitely fixed. The section in controversy is an odd-numbered section on one side of the line of said railroad, and within 20 miles thereof. It was surveyed in June, 1866, and the township plat approved by the surveyor general of the United States on October 24, 1866. On June 1, 1867, the said section 7 was included in List No. 4 of selections filed by the Central Pacific Railroad Company of California in the Marysville land office, in the state of California, and on October 12, 1867, a patent thereon was issued to said company, duly signed, attested, and sealed by the proper officers of the United States government. By the acts of congress granting this land to the Central Pacific Railroad Company of California it was expressly provided that no lands should be granted to the said company which were mineral in character, excepting such as contained only coal or iron; and in the patent issued for the said section 7 there is the following clause: "Excluding and excepting from the transfer by these presents all mineral lands, should any such be found to exist in the tracts described in the foregoing, but this exception and exclusion, according to the terms of the statute, shall not be construed to include coal and iron land." It is claimed on behalf of the United States that gold mining had been carried on upon the land in controversy before the issuance of the patent, and that the character of the land was established as mineral other than coal or iron, and was so known to the defendants; that the patent was issued through mistake, inadvertence, and error, and without authority of law; that it is void and of no effect, and should be canceled, and the lands therein described be declared public lands of the United States.

On April 10, 1875, the Central Pacific Railroad Company of California conveyed, in fee simple, all of said section 7 to the defendants Allen Towle, George W. Towle, and Edwin W. Towle, who are now the owners and in possession of the land. The defendants admit that in early days mining was carried on in the bed and along the banks of a creek crossing the upper portion of the section, but assert that it had been abandoned as early as 1858; that the land was returned to the land department as agricultural, was patented as such in 1867, and so considered when purchased by the defendants Towle in 1875;

and therefore they are purchasers in good faith, and their title cannot now be disturbed.

The good faith of the defendants Towle in purchasing the land from the patentee must first be ascertained, and in determining this, as well as the question whether the patent for the land was erroneously granted to the railroad company, the controlling fact to be deduced is the known character of the land at the date of issuance of the patent. The evidence is voluminous, and somewhat conflicting. The burden of proof that the land was "known mineral land" at and prior to the delivery of the patent, on October 12, 1867, is upon the United States. Examining the complainant's evidence, it appears that the section of land in controversy is principally a high ridge, and at the date of the patent was covered with a fine growth of timber. A creek crosses the upper portion of the section, in the bed and along the banks of which mining was profitably carried on in the early days, from 1857 to about 1862, and for some few years afterwards the Chinese mined there. Since then it has been virtually abandoned as worked out. Mining claims have been located which approximately cover the section, but in each claim the lines extend to an adjoining section, and it is a noticeable fact that the only development or exploitation of these claims is outside of section 7. There appears to be a channel of gold-bearing gravel running through some of the contiguous land, but this fact cannot, of itself, give the land in section 7 a substantial mineral character, unless the section itself contains land valuable chiefly for its gold-bearing mineral. As was pertinently said by the supreme court in *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628: "There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable." So as to the land in question. Particles of gold have been found by the various prospectors in different parts of the section, but the evidence does not prove the existence of a deposit of sufficient value to justify the expenditure of time and money for its extraction. Even up to the date of taking testimony in this case, in 1887, no mines of any value appear to have been discovered or developed within the section. There is a marked unanimity of opinion among the authorities that, to overcome the presumption that a patent to public lands was issued upon sufficient evidence, clear and convincing proof must be produced, and, in the consideration of the mineral character of the land, not only must it satisfactorily appear that it was known mineral land other than coal or iron at and prior to the issuance of the patent, but it must be more valuable for mineral than for agricultural or other purposes. *Deffebach v. Hawke*, 115 U. S. 404, 6 Sup. Ct. 95; *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 430, 12 Sup. Ct. 543; *U. S. v. King*, 27 C. C. A. 509, 83 Fed. 188; *Alford v. Barnum*, 45 Cal. 482; *U. S. v. Iron Silver Min. Co.*, 128 U. S. 673, 9 Sup. Ct. 195; *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 588, 9 Sup. Ct. 343. "If upon the premises at that time [when title was acquired] there were not actual 'known mines' capable of being profitably worked for their product, so as to make

the land more valuable for mining than for agriculture, a title to them, acquired under the pre-emption act, cannot be successfully assailed." *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 328, 8 Sup. Ct. 131.

The folly of excluding so-called "mineral land" from agricultural or other purposes, when it has ceased to yield gold in paying quantities, and has no appreciable value in minerals, is discussed by Judge Deady in *U. S. v. Reed*, 28 Fed. 482. With regard to their known character, he says:

"The statute does not reserve any land from entry as a homestead simply because some one is foolish or visionary enough to claim or work some portion of it as mineral ground, without any reference to the fact of whether there are any paying mines on it or not. Nothing short of known mines on the land, capable, under ordinary circumstances, of being worked at a profit, as compared with any gain or benefit that may be derived therefrom when entered under the homestead law, is sufficient to prevent such entry."

It may be observed, further, that the claim of the government that the patent in this case was issued through mistake, inadvertence, and error does not appear to be supported by the rulings of the interior department as to what constitutes mineral land. In the case of *Dughi v. Harkins*, 2 Land Dec. Dep. Int. 721, Secretary Teller, in disposing of a contest between mineral and agricultural claimants, where the land was returned as agricultural by the surveyor general, expressed the following opinion as to proof of the mineral character of the land:

"This land was returned by the surveyor general as agricultural in character, and hence was subject to a homestead entry. In such case the agricultural character of the land continues until its mineral character is satisfactorily shown. * * * The burden of proof is therefore upon the mineral claimant, and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter, by possibility, develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral, and not from any theory that it may produce it." In other words, it is fact, and not theory, which must control in deciding upon the character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value."

The land decisions teem with opinions of this character by the successive secretaries of the interior, and are of persuasive force in determining a question so peculiarly within the jurisdiction of that department. The present owners appear to have purchased the land from the railroad company on account of the valuable timber then upon it, and have since cut a large portion of it, and converted it into marketable form at their sawmills. There is no conflict in the testimony as to the extent or value of the timber at the date of the patent, and the evidence, as a whole, is not sufficiently strong and convincing to prove the land chiefly valuable for its mineral. A decree will be entered in favor of the defendants.

At the time this settlement was made, Green had deposited along the railroad some stone which had not been placed in the bridges or culverts, and this stone was not included in this final estimate. In the year 1892 the company caused the remaining culverts and bridges between Clinton and Lisbon to be constructed by other contractors; and Green sued for the loose stone he had left along this track, and for the profits he would have made if he had been permitted to do this work. He set forth his causes of action in two counts in his petition. In the first one he pleaded the contract, the delivery of the loose stones along the track, their value, and the profits he would have realized if he had been permitted to put them in the form of masonry, and asked to recover \$865.64 and interest. In the second count he pleaded the contract, and the refusal of the company to permit him to construct the masonry for the bridges and culverts between Clinton and Lisbon, which had not been built in October, 1891, and sought to recover \$8,000, which he averred he would have gained if he had been permitted to complete this masonry under his contract. The company answered that it admitted that it had used some of the stones left along the track by plaintiff in error, and that it was liable for their value, but questioned the quantity and value alleged in the petition of the plaintiff, and denied that he was entitled to lay them up in masonry under the contract, or that he would have made any profit by so doing, if he had laid them. A verdict and judgment in favor of the plaintiff were rendered upon the first count of the petition, and no question concerning this result is presented to this court. In answer to the second count of the petition, the company pleaded the receipt and release of October 19, 1891, and alleged that it evidenced a cancellation of the contract, and a complete settlement and release of all liability of the company under it, except its liability for the loose stones along the track which it had subsequently used. The plaintiff replied that before and at the time the release was signed there was a parol agreement between the parties that the company waived its right to withhold the 10 per cent. until the completion of the contract; that the final estimate was not final; that the contract was not canceled thereby, but was to continue in force; that the plaintiff was to continue to perform it at some future time; and that, although the release reads that the \$9,362.23 was received in payment and discharge of all claims and liabilities of the company under the contract, yet that was not the fact. In support of the averments of this reply, the plaintiff testified, over the objections of the company, that, before and at about the time the final estimate and release was made, he had a conversation with Mr. Blunt, the chief engineer of the defendant in error, in which the latter said to him that the president of the company was going to discontinue work for the present, and he could not tell how long it would be before the work would be resumed; that, as the duration of the suspension of the work was so indefinite, it would not be fair for the company to retain the 10 per cent., and he would put it in his voucher; that the stone on the right of way would go into his next estimate when he built it into the masonry; that he would allow him to take his tools from the right of way of the railroad, to repair them, but that he wanted him to hold himself in readiness to build again; and that he agreed and promised to do so. He also testified that no conversation was had about ending the contract; that he never received any consideration for the release, except the money due to him upon his work, and that, when it was presented to him for his signature, he objected to its form, and Mr. Blunt assured him that it was the company's general form of receipt, that it meant nothing but the work built up to that time, that it had no reference to the future; and that it was upon that understanding that he signed it. At the conclusion of the trial, the court struck out this oral testimony, on the ground that it contradicted the written contracts of the parties, and instructed the jury to return a verdict for the company on the second count of the petition. This is the ruling which is challenged by the writ of error in this case.

Charles A. Clark (James W. Clark, on the brief), for plaintiff in error.

F. F. Dawley and C. E. Wheeler (N. M. Hubbard and N. M. Hubbard, Jr., on the brief), for defendant in error.

throughout the contract, almost entirely the personal following of Mahin.

In December, 1898, the connection between complainant and Mahin was dissolved. The dissolution was consented to by both parties, and was within the legal right of each. Neither took advantage of the other in that respect. The dissolution left Mahin at liberty to set up in business for himself. He had, without question, the right to thereafter avail himself of every advantage his previous experience had brought to him. He had the right to promote his interest wherever the field lay open. It is charged that he took with him the office help of the complainant. The evidence of this charge lies in a single circumstance, viz. that the men and clerks left at one time, and together joined Mahin's new business. But each has submitted his affidavit denying explicitly that there was any solicitation upon the part of Mahin; and, bearing in mind that Mahin had been the personality behind complainant's Chicago business, that the men had been his employes, in personal contact with him alone, that the business was, indeed, substantially his business, the affidavits do not appear strained or untrue. I can find no sufficient evidence upon which to base an order for complainant in this respect.

It appears that during the connection between complainant and Mahin there were kept by the latter in a book previously purchased by him, and used during the period of his employment with the J. Walter Thompson Company, certain tabulated memoranda relating to the rates charged by publishers. It also appears that during this connection a scrap book was kept by Mahin, in which was gathered information pertinent to the business as it went along. The complainant insists that the information gathered in these two books, though written by Mahin into books which, as blank books, belonged to him, is, in law, the property of the complainant. On the contrary, Mahin insists that the books, as books, are his, that the data in the scrap book, except such as had been cut out and delivered to complainant at the Chicago agency, had no relation to the complainant's business; that the data in the memorandum book were simply a convenient tabulation of what the complainant possesses in another equally convenient form; and that none of the data is, in any sense, the exclusive property of the complainant. Whether any of the information gathered into the scrap book is exclusively complainant's can only be ascertained by a minute examination. Whether the information gathered into the memorandum book is in the nature of a business secret, which an agent is not permitted to carry off, depends for determination, also, upon such an examination. Mahin offers to surrender everything that may be found to belong to complainant. This part of the case, therefore, I will refer to a master to report what portion, if any, of the information gathered into these books belongs exclusively to the complainant.

Complainant charges that Mahin has enticed away its clients, and has been procuring them to cancel contracts with the complainant not yet fully performed. As to the first part of this charge, I hold it was within Mahin's right, after the connection ceased, to not only receive, but to solicit, the patronage of these clients. Whether he could right-

pel of these writings? He endeavors to do so in three ways: By testimony of the oral statements of Blunt, the engineer of the company, before and at the time when the release was made; by testimony that there was no consideration for the release; and by construction of the contracts.

Laying aside for the moment the question of consideration, the parol evidence upon which the plaintiff relies consists of testimony of the oral statements of Mr. Blunt prior to the execution of the release, and of his interpretation of its meaning when it was signed. The former tends to establish a parol agreement made before the release was executed, and while negotiations for it were progressing, to the effect that the payment in full for the work done under the contract, including the 10 per cent., should not cancel the original agreement, and evidence its complete execution, as it provided; that the final estimate which Green signed should not be a final estimate, but an intermediate one; and that, in essential particulars, the legal effect of the transaction should be contrary to that evidenced by the writings. No rule or principle of law occurs to us under which this testimony could have been admissible. It flies in the teeth of the rule that parol evidence cannot be received to contradict or modify written contracts, and of the conclusive presumption that the whole engagement of the parties, and the manner and extent of their undertaking, are expressed in their written agreements. *McKinley v. Williams*, 74 Fed. 94, 101, 20 C. C. A. 312, 319, and 36 U. S. App. 749, 761; *Thompson v. Libby*, 34 Minn. 374, 377, 26 N. W. 1; *Wilson v. Ranch Co.*, 73 Fed. 994, 999, 20 C. C. A. 244, 249, and 36 U. S. App. 634, 643. The testimony as to Blunt's interpretation of the release was equally objectionable. It was when Green was about to sign it that Blunt told him that it did not mean what it plainly read, that it covered nothing but the work up to that time, and that it had no reference to the future, when it expressly provided that he received the money in full payment and discharge of all work and materials mentioned in the contract, and of all liability of the railway company in any manner arising thereunder. The question which this evidence presents has been repeatedly considered and decided by this court, and our conclusion upon it has been embodied in this rule:

"No representation, promise, or agreement made or opinion expressed in the previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms, and prevented the complainant from reading it."

The reason for this rule is stated, many authorities in support of it are cited, and some of them are reviewed, in *Insurance Co. v. McMaster*, 87 Fed. 63, 68-72, 30 C. C. A. 532, 538-540, and 57 U. S. App. 638, and it is useless to repeat them here.

Turning now to the argument of counsel for the plaintiff in error upon the question of consideration, their contention is that the only consideration for the release of the liability of the company to pay for the work and labor done after October 19, 1891, was the fact

injure the defendant Mahin in his independent venture in business, while conferring little benefit upon the complainant. Few of the Chicago agency clients yet remain with complainant, and defendant Mahin promised at the hearing that no effort would be made to procure other cancellations of contracts. I am impressed with the belief that whatever has been done in that direction heretofore by Mahin was under a mistaken belief of right, and was not under the exercise of malice towards the complainant, or with a purpose to unfairly treat him. On the whole, I think the ends of justice will be best subserved by remitting the complainant to his rights at law. It is not at all clear from the showing made by the affidavits that the complainant has not provoked every step taken by Mahin. If, as is insisted, complainant sought, after Mahin had obtained these clients for the Chicago office, to divert them from Mahin's influence, and bring them, or some of them, into a relationship outside of Mahin's right of participation in the profits, one's sense of fair play justifies his dissolution of the connection, and his subsequent steps towards keeping what he, in fact, had built up within that connection.

Upon the whole case, the injunction will for the present be denied, and the case go to a master to report respecting the character of the books and the rights of the parties relating thereto.

CENTRAL OF GEORGIA RY. CO. v. PAUL.

(Circuit Court of Appeals, Fifth Circuit. April 18, 1899.)

No. 777.

1. CORPORATIONS—TRANSFER OF PROPERTY—RIGHTS OF CREDITORS.

Where a plan for reorganization is entered into by the stockholders and secured creditors of an insolvent corporation, and is carried out, pursuant to which all the property of the corporation is sold by foreclosure and otherwise, and transferred to the new corporation, whereby the stockholders of the old corporation retain their interest and rights, and by virtue thereof are either stockholders in the new corporation, or are otherwise provided for, this is a fraud on an unsecured creditor of the old corporation, so that she may hold the new corporation for her claim.

2. DECREE—AFFIRMANCE.

A decree rendered on intervention in liquidation proceedings, on full hearing, against one allowed to make full defense, having done full equity between the parties, will be affirmed, though intervener might more properly have filed a bill for the relief obtained.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

On March 4, 1892, Rowena Clark, a stockholder of the Central Railroad & Banking Company of Georgia, filed her bill in the circuit court, assailing the validity of a certain lease made by the Central of its entire railroad and property to the Georgia Pacific Railroad Company, under which lease the Richmond & Danville Railroad Company was then operating and controlling the same. She also assailed the legality of the control exercised over the Central by the Richmond & West Point Terminal Railway & Warehouse Company by means of a majority of shares of Central stock owned by it. The bill prayed for the cancellation of the lease; injunction against the continued use of the

said majority of stock; for an injunction and receiver. As detailed in the bill, the object of the same was to protect the Central and to preserve its autonomy. On this bill the court issued a temporary injunction, and appointed E. P. Alexander a temporary receiver, directing him to make no change in keeping the Central's books. On subsequent hearing, March 28, 1892, the court appointed receivers, with the usual powers granted to receivers of railroads; directing them to take and operate the property pending a reorganization of the board of directors of the Central, and generally providing for the maintenance of the Central System. On July 4, 1892, the Central filed its bill against the Farmers' Loan & Trust Company of New York City, the Central Trust Company of New York, and a number of railroad corporations, in which bill was set forth the proceedings in the Rowena Clark cause, above mentioned, a description and list of all the railroads, and assets and property of the Central, including its leasehold interest in other railroads. This bill averred that the Central is now insolvent, in the sense that it is unable to meet its maturing obligations, but that if the integrity of its system is maintained, and its properties and interests preserved, until a proper plan of reorganization can be effected, it can be re-established upon a sound basis, and restored to prosperous conditions; to accomplish which, however, the immediate interposition of a court of chancery is absolutely necessary, for the purpose of protecting the integrity of the system, and saving it from disintegration, and preventing the serious and irreparable losses that the disruption would entail upon the stockholders, creditors, and other persons interested in the property. The bill prayed that all of the property and assets of the Central be taken in charge by a receiver to be appointed by the court, to be administered as a trust fund for the stockholders and all interested; that the receivers first pay current expenses of maintaining and operating the Central, and steamship lines and other properties, and all labor, supplies, and rentals, and such other charges as are necessary to be made in order to prevent the forfeiture of the Central's rights and interests in the properties which constitute its said system, etc. Under this bill on July 15, 1892, the court discharged the receivers under the Rowena Clark bill, and appointed H. M. Comer sole receiver; and in and by this order the court directed that the receiver assume and pay all the liabilities and expenses incurred under the Rowena Clark receivership, take possession and charge and control of said corporations named in the bill, and other property and assets of every kind, and to operate the same, and to take possession, charge, and control of all the railroads and steamship lines, and railroads and steamships owned, leased, or otherwise controlled, operated by said Central Railroad & Banking Company, to manage and operate the same, etc., under the order and protection of the court, having and exercising all the rights and franchises belonging or appertaining to said corporations, to the end that the integrity of the Central Railroad System may be preserved. The order authorized the receiver, after defraying operating expenses, to pay out of the net earnings the rental and other fixed charges accruing to other companies, or resulting from the uses or operations of other lines and property as a part of said system; and all the corporations named in the bill were restrained and enjoined, pendente lite, from in any wise interfering with the receiver's possession.

After various pleadings not necessary to notice, on February 20, 1893, the Farmers' Loan & Trust Company, on leave of the court, filed its bill for foreclosure and for the appointment of a receiver, particularly making a party thereto the Central Trust Company of New York, as trustee of the second or consolidated mortgage bonds. This bill showed that the mortgage held by the Farmers' Loan & Trust Company covered all the railroads, and also all the property and assets of the Central Railroad & Banking Company of Georgia. It averred that the Central's auxiliary lines held under lease were a part of the property mortgaged, and all should be sold together. It recited the receivership under the bills of Rowena Clark and of the Central Railroad & Banking Company. It averred default of the Central, the inadequacy of the security, and then that "the mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your orator's trusts."

After other suitable allegations and prayers looking to a foreclosure and sale, the complainant prayed for a receiver, as follows: "Until such sale can be had, and the proceeds thereof distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises, and appurtenances so mortgaged to your orator in trust as aforesaid, and all the rights, franchises, and property of the Central Company, of whatever name, nature, and description, including all its money on hand, and the earnings of the same, and all the rights, franchises, and property of the South-western Railroad Company of Georgia, of every kind and description, be placed in the hands and under the control of a receiver to be appointed herein by this court, with such proper powers as are right and equitable to be conferred; such receiver to be the same person appointed in like manner by the other courts, having jurisdiction of portions of the mortgaged property, respectively." Upon this bill the court ordered that "Hugh M. Comer, the receiver of the court under the litigation now pending in said court, be made, and he is hereby appointed, temporary receiver under the above bill. This appointment is cumulative and supplementary to the orders heretofore made, and is not intended to vacate or affect any previous order." On May 1, 1893, the Central Trust Company of New York answered the bill of the Farmers' Loan & Trust Company, and, among other things therein, admitted as true the proceedings and orders of court as alleged in the bill, under which the leased property was taken possession of and operated by the receiver; but the Central Trust Company alleged that the court had no jurisdiction over the suits in which said orders were passed, but did not set out wherein the defective jurisdiction, if any, existed. The answer contained other matter, not necessary to recite. Some other bills and answers were filed, and many interventions, and there was much litigation; but on January 4, 1894, a consolidation having been previously ordered, a decree of foreclosure was rendered in favor of the Farmers' Loan & Trust Company on its mortgage and deed of trust, and leave was given to the Central Trust Company of New York to file a cross bill to foreclose its claim and mortgage on the Central's properties. This cross bill, subsequently filed and prosecuted, was brought in the interest of, and pursuant to, a new reorganization scheme, fully set out in the record.

On August 26, 1895, on the said cross bill and pleadings thereto, the court passed a final decree of foreclosure in favor of said Central Trust Company, which provided that in case of further default the said Central Railroad be sold in one parcel, without valuation, appraisalment, redemption, or extension, and that of the price for which the property might be sold \$50,000 should be paid in cash, and that upon the confirmation of same, and from time to time thereafter, such further portions of the purchase price should be paid in cash as the court should direct, in order to meet the expenses of foreclosure and sale, and allowed preferential claims; and, further, that upon confirmation of the sale the approved purchaser or purchasers should take the property purchased subject to the lien, if any, of all debts, obligations, and liabilities of the receivership "heretofore or hereafter to be lawfully incurred by or under the authority of the court, or arising under the operations of said railroad, and subject also to the lien of any and all claims heretofore filed in this cause, or in the causes consolidated herein, which the court has allowed or adjudged, or shall adjudge, to be prior in lien or superior in equity to said consolidated mortgages hereby foreclosed and ordered to be paid." Under this decree of foreclosure a sale was made to Samuel Thomas and Thomas F. Ryan, which sale was confirmed by the court October 17, 1895; the said decree of confirmation reciting that the sale was subject, however, to all the decrees, mortgages, liens, receivers' debts, and preferential claims, and to all the equities reserved, and to all and singular the conditions of purchase as recited in the final decree aforesaid, and the continued right of the court to adjudge and declare what receivers' or corporate debts were prior in lien or in equity to the lien of the consolidated mortgage foreclosed, or ought to be paid out of such proceeds and sale in preference to the bonds secured thereby; and the court expressly reserved for future adjudication, with the power thereby to bind the property sold, all liens and claims and equities specified and reserved by the final decree of foreclosure of August 26, 1895.

Following the foreclosure sale of the railroad property covered by the mortgage to the Central Trust Company, the Central Railroad & Banking Company of Georgia, and the receivers thereof, reported to the court that there were large assets and property belonging to the Central Railroad & Banking Company, which were not covered by the mortgages, and not appurtenant to the railroad. The petition recited as follows: "Third. The Central Railroad owns a considerable amount of property which cannot be covered under the general description of the railroad and the appurtenances thereof. For example, besides its railroad, it has for many years past been in the active operation of a bank, under its charter granted to it by the state of Georgia, and the assets of the banking department of said corporation are not appurtenant to the railroad. Fourth. There is a large amount of real estate, title to which is held by the Central Railroad, at various points along its line, and also on the lines of the Augusta & Savannah Railroad and the Southwestern Railroad, which it has operated for years under lease, and also on the lines of the Montgomery & Eufaula, the Savannah & Western, and the Port Royal & Augusta Railroads, which have been operated as a part of its system, title to which may not pass under the mortgage foreclosure hereinbefore referred to. Attached hereto, and marked 'Exhibit A,' is a description of certain lands which are either in whole or in part not actually used for railroad purposes, and about which doubts have been expressed as to their being covered or not by the mortgage, and as to the title thereof passing under the foreclosure sale. Complainant and the receivers are advised by counsel that many of the tracts of land set out in the said exhibit are covered by the mortgage, and that title thereto will pass under the foreclosure sale; but, in order to make sure of using all of the assets of the Central Railroad for the creation of a fund for the payment of its creditors and distribution among its stockholders, it has been thought best to make the said exhibit include all of the property therein described." And the prayer of the petition was that all the property described should be sold at public outcry. On this petition a decree was entered to the effect that the Central Railroad & Banking Company of Georgia was insolvent, unable to pay its just debts and liabilities, and directing the sale of all the remaining properties and assets of the company, called the "overflow property," to the end that the proceeds of the same might be distributed among the creditors of the company. Thereafter, on petition, Thomas and Ryan, purchasers of the railroad property, representing, among other things, that they were large creditors of the Central Railroad & Banking Company, reciting the amounts, and that they were practically the sole owners of the entire unsecured floating debt of the Central Railroad & Banking Company of Georgia, prayed for an order turning over to them all property in the hands of the receivers, which petition, with minor exceptions, was granted.

Very soon after the litigation began, reorganization was contemplated, and was worked for by the bondholders and other parties to the litigation. The bill of the Central Railroad & Banking Company of Georgia against the Farmers' Loan & Trust Company, filed July 4, 1892, under which the receiver was appointed, asked for reorganization under the protection of the court. On October 17, 1892, and on December 10 and 17, 1892, the receiver filed petitions asking for authority to take certain steps in the interest of reorganization. These petitions were granted, and about \$20,000 were paid by the receivers for expenses thus caused. In January, 1893, various other petitions were filed by the receiver to effect reorganization, and, under orders of court, contracts were made with the Hollins syndicate for reorganization. The Hollins plan failed, and a new scheme was devised, in which the reorganizers were bond, stock, and debenture holders of the Central Railroad & Banking Company of Georgia, under which all properties of the said company were to be sold as follows: (1) All of the properties of the Central Railroad & Banking Company of Georgia covered by mortgage were to be sold under foreclosure of mortgage to the Central Trust Company, as trustee, to secure the \$13,000,000 consolidated bonds. This foreclosure was to be accomplished by the cross bill of the Central Trust Company. (2) The collateral securing the floating debt and bills payable of the Central Railroad & Banking Company of Georgia, and its receivers, were to be sold to the reorganizing purchasers under-

order of court. (3) The collateral bonds were for the present to remain outstanding, secured by the collateral pledged to protect them, consisting of bonds and stocks. All other property of the Central Railroad & Banking Company of Georgia not covered by the foregoing mortgages and pledge, including the cash in the receivers' hands, was to be sold, under order of court, to the reorganizing purchasers. This property was afterwards termed the "overflow property." This reorganization plan further provided that upon the foreclosure of the mortgages and the purchase of the property the purchaser would organize a new corporation, to be called "The Central of Georgia Railway Company," which was to be vested with the title to the railroads and properties covered by such mortgages and pledge, and that such new corporation should issue to the purchasers securities as follows: \$7,000,000 first mortgage 50-year gold bonds, bearing 5 per cent. interest; \$16,500,000 consolidated 50-year gold bonds, bearing 5 per cent. interest; \$3,500,000 first preference income bonds; \$6,500,000 second preference income bonds; \$4,000,000 third preference income bonds; \$5,000,000 full-paid common stock,—and that said securities were to be distributed to the security holders as in said agreement prescribed, particularly providing for certain common stock holders, known in the litigation as the "minority stockholders," as follows: "The purchasers agree to take up and exchange so much of the 32,800 shares of present stock of the Central Railroad & Banking Company of Georgia owned by the public, when and as such stock is deposited in the Mercantile Trust Company of New York for such purpose, at the rate of par for the third preference income bonds of the new company." The record shows that this reorganization plan was fully carried through. Thomas and Ryan acted as agents for the reorganization syndicate, and, having purchased all the property and obtained all the assets of the Central Railroad & Banking Company of Georgia, turned the same over to the new Central of Georgia Railroad Company, which issued the new securities in accordance with the reorganization scheme. No provision appears to have been made in the reorganization agreement for the distribution of the full-paid common stock to be issued by the new company; but from matters appearing in the record, and not disputed, the majority stock of the Central Railroad & Banking Company of Georgia, to wit, 42,000 shares formerly held by the Richmond-West Point Terminal Railway Company, were exchanged for the entire capital stock of \$5,000,000 of the new company. Thus it appears that one result of the proceedings in foreclosure and liquidation was that the entire stock of the Central Railroad & Banking Company of Georgia was recognized, and allowed to participate in the reorganization, and the holders of such stock retained a certain large and valuable interest in the newly-organized company. The record further shows that the new Central of Georgia Railway Company (the reorganization itself) filed its petition in December, 1896, praying that it be substituted as defendant in the place and stead of Thomas and Ryan, and that a decree be rendered vesting them with all the assets of the defendant corporations and their receivers, which petition was granted, saving only that Thomas and Ryan were not discharged as parties, nor relieved from an accounting for the assets received by them from the receivers.

In the litigation, the history of which is hereinbefore partly recited, Mary F. Paul intervened on the 31st day of January, 1896, claiming that she was entitled to dividends on stock of the Southwestern Railroad Company which had been accruing during a period of time 20 years previous to the receivership of the Central Railroad; that the said dividends so due to her constituted a trust fund, which prior to the 4th of March, 1892, was held by the Central Railroad, and since that time by its receivers; and that she had an equitable lien upon the property and assets of the Central Railroad, which was superior to that of all other persons. One share of the stock of the Southwestern Railroad upon which she claimed a dividend stands on the books of the Southwestern Railroad Company in the name of John Richardson, trustee of J. S. Caruthers and wife, and the other ten shares stand on the books of the company in the name of J. Richardson, executor; and she has brought suit against the Southwestern Railroad Company to compel that company to issue to her, individually, a scrip for said stock, to which she is legally entitled, and the said suit is now pending and undetermined in the

superior court of Bibb county, Ga. In 1869 the Southwestern Railroad Company leased its railroad and appurtenances to the Central Railroad & Banking Company of Georgia, and part of the consideration of said lease is the following: "And the said Central Railroad and Banking Company of Georgia hereby covenants and agrees to and with the said Southwestern Railroad Company, that, during the months of June and December in every year during the continuance of the term hereby granted, it will declare and pay to the stockholders of the said Southwestern Railroad Company dividends which shall bear to the dividends declared and paid to its own stockholders the ratio of eight to ten (that is to say, \$8 to each share of Southwestern Railroad stock to every \$10 declared and paid to each share of its own stock), and that no semiannual dividend so declared and paid to the stockholders of the Southwestern Railroad Company shall be less than at the rate of seven per centum per annum on the par value of their stock, and that whenever any stock dividend, or division of assets or accumulation shall be declared, paid, or made to the stockholders of the said Central Railroad and Banking Company of Georgia, a similar dividend for the distribution shall be paid and made to the stockholders of the Southwestern Railroad in the same proportion of eight to ten, and that all said dividends and distributions of every sort shall be paid to the stockholders of the Southwestern Railroad Company at Macon and Savannah, as the said company has heretofore paid its dividends, and be free of all taxes to the stockholders." It seems to be admitted that the said Mary F. Paul is the owner of said 11 shares of stock; but it appears that she has not yet been registered upon the books of the Southwestern Railroad Company as a stockholder. Her suit to compel the issue of the scrip to her is pending and undetermined. The defendant admitted that the amount of dividends is correctly stated in the intervention, but denied that the dividends were ever held as a trust fund, and set up the fact that there had never been any specific appropriation of money to pay the dividends due the Southwestern Railroad stockholders, and denied that the intervener had any equitable lien. It contended that she was merely a general creditor, without equitable lien, and not entitled to a preference. The master, to whom the cause was referred, found that the intervention was prematurely filed, upon the ground that the intervener, not having become a registered stockholder of the Southwestern Railroad Company, was not in a position to demand dividends previously declared upon the stock. The court set aside the master's report, and rendered a decree for the sum of \$1,640.50 in favor of the intervener, and put its decree upon the ground that the receiver having been ordered on March 7, 1892, to pay in full any depositors who had money on deposit in the banking department of the Central Railroad & Banking Company of Georgia, the claim of this intervener being in the nature of a deposit in said banking department, her claim was properly within the scope of that order and should be paid. From this order the Central of Georgia Railway Company sued out this appeal, assigning errors as follows: "(1) The Central of Georgia Railway Company is not liable, under the order substituting it as defendant in this case, for any debts of the Central Railroad & Banking Company of Georgia, except such as are of a preferential nature, and this debt is not of this kind. (2) The claim of the intervener is an unsecured claim not entitled to a legal lien or equitable preference. (3) The Central Railroad & Banking Company of Georgia did not hold the dividends due the intervener as a trust fund, there being no specific appropriation of money to the payment of dividends. (4) The Central Railroad & Banking Company of Georgia did not hold the money due to the intervener as a deposit in its banking department. (5) The order of this court dated March 7, 1892, wherein the receivers were ordered to pay in full any depositors who had money on deposit in the banking department of the Central Railroad & Banking Company of Georgia, and which is referred to in the decree, is not applicable to the claim of this intervener, and, in addition, said order was passed at a time when the Central Railroad & Banking Company of Georgia was not alleged to be or found to be insolvent. (6) There is nothing in the nature of the claim itself which would entitle it to an equitable preference over any other creditor in this cause. (7) If the court decides that intervener's claim is entitled to priority, the decree ought to provide that it should not be paid until she becomes a registered stockholder."

T. M. Cunningham, Jr. for appellant.

W. L. Clay, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After reciting the foregoing, the opinion of the court was delivered by PARDEE, Circuit Judge.

There is no substantial dispute that the appellee, Mary F. Paul, was and is a creditor of the Central Railroad & Banking Company of Georgia, and the question is whether the Central of Georgia Railway Company is liable for her demand. The case shows that the sale of the railway properties under the foreclosure at the suit of the Central Trust Company, the sale of the collateral securing the floating debt claims, and the sale of the "overflow property," all were in pursuance of a reorganization plan, which was carried out, and resulted in the transfer of all the property and assets of the Central Railroad & Banking Company of Georgia to the Central of Georgia Railway Company; and the active participating reorganizers were not only the creditors of the Central Railroad & Banking Company of Georgia, secured by mortgage and otherwise, but included as well the stockholders of said company; so that, for the purposes of the present case, it is an indisputable fact that, notwithstanding all the sales of property and other transactions in liquidation, the stockholders of the Central Railroad & Banking Company of Georgia retained their interest and rights, and by virtue thereof are now either stockholders of the new reorganization, Central of Georgia Railway Company, or are otherwise provided for, and that the new company has acquired, and now holds, all the former property and assets of the old company. It would seem from this state of facts that the appellee has the right to look to the new company for the payment of her claim. *Railroad Co. v. Howard*, 7 Wall. 392, is directly in point. As epitomized in the syllabus, it is as follows:

"A sale under foreclosure of mortgage on an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the stockholders, under which arrangement the mortgagees, according to their order, got more or less of their debt (100 to 30 per cent.), and the stockholders of the company the residue of the proceeds, a fraction (16 per cent.) of the par of their stock, held fraudulent as against general creditors not secured by the mortgage; and this although the road was mortgaged far above its value, and on a sale in open market did not bring near enough to pay even the mortgage debts, so that in fact, if there had been an ordinary foreclosure, and one independent of all arrangement between the mortgagees and the stockholders, the whole proceeds of sale would have belonged to the mortgagees."

In other adjudged cases we find principles declared as follows:

"Equity regards the capital stock and property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue such properties into whosoever possession the same may be transferred, unless the stock or property has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profits, until all the debts of the corporation are paid." *Scammon v. Kimball*, 92 U. S. 362, 367. "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors

are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them. Story, Eq. Jur. § 1252; Curran v. Arkansas, 15 How. 304; Graham v. Railroad Co., 102 U. S. 148, 161; Railroad Co. v. Howard, 7 Wall. 392; Goodin v. Canal Co., 18 Ohio St. 169." Railway Co. v. Ham, 114 U. S. 587, 594, 5 Sup. Ct. 1081. "Any device by which the assets of an insolvent corporation are to be parceled out between shareholders, leaving creditors unpaid, is a fraud of which creditors affected may complain. That such creditors may follow the purchase money thus wrongfully paid into the hands of stockholders is very clear. That shareholders have only a right to the surplus after all debts are paid is familiar law." Railroad Co. v. Evans, 14 C. C. A. 116, 128, 66 Fed. 822.

In one of the many orders issued by the court in the liquidation proceedings was an invitation to the general creditors of the Central Railroad & Banking Company of Georgia to intervene and assert their claims against the funds derived from the sale of the "overflow property," in pursuance of which the present appellee intervened, asserting her claim. To recover the entire amount of her demand from the new company, on the view herein presented, she might have been driven to a bill in equity; but as there has been a full hearing in the present proceeding, and the appellant has been permitted to make a full defense, and as the decree appealed from does full equity between the parties, it may well be affirmed without further pleading. Taking this view of the case, it is unnecessary to consider whether there is any trust or other fund still under control of the court out of which appellee can be paid, or whether the appellee's claim is entitled to consideration as one in which a special or general deposit to her credit was made in the banking department of the Central Railroad & Banking Company of Georgia. The decree appealed from is affirmed.

TOMPKINS v. CRAIG et al.

(Circuit Court, E. D. Pennsylvania. May 11, 1899.)

EQUITY — MULTIFARIOUSNESS OF BILL — SUIT AGAINST STOCKHOLDERS TO RECOVER ASSESSMENTS.

A receiver of an insolvent Iowa bank cannot maintain a suit in equity in a federal court against a number of stockholders to recover assessments levied under the state statute, as the liability of the defendants is several, arising on their contracts of subscription, each of which is a separate obligation, and is a legal, and not an equitable, liability.

On Demurrer to Bill.

A. T. Jenkins and Charles Chauncey, for complainant.
 Theo. F. Jenkins, for respondents.

McPHERSON, District Judge. The plaintiff is the receiver of an insolvent Iowa bank, and the defendants are stockholders residing in this district. The bill is brought to collect an assessment of 50 per cent. levied upon each of the defendants under the Iowa statute, which provides that all stockholders in corporations organized to transact a banking business shall be "individually and severally liable to

the creditors of such association or corporation of which they are stockholders or shareholders, over and above the amount of stock by them held therein, to an amount equal to their respective shares so held, for all its liabilities accruing while they remained such stockholders. * * * Laws Iowa 1880, c. 208, § 1. The assessment was levied by the district court of Woodbury county, and was sustained by the supreme court of the state. The report of the case will be found in 70 N. W. 752, and in 72 N. W. 1076.

The bill is demurred to upon the ground of multifariousness, and we think the objection must prevail. The statute does not impose a joint but a several liability upon the defendants, and they have no common interest in the decree asked for by the bill. The plaintiff seeks to support the action upon the ground that such a proceeding will prevent a multiplicity of suits, but this is a reason in form rather than in substance; for, while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant. The liability is legal, and not equitable. It is based upon the stockholder's contract of subscription, an implied term of that contract being the declaration of the statute that a certain contingent liability should follow the subscription. Each contract is a separate obligation, and should be separately enforced. As was pointed out upon the argument by the learned counsel for the defendants, this is not a proceeding to determine how large the assessment should be. For obvious reasons, such an inquiry should be made in equity, and all the stockholders should be parties. But after the rate of assessment has been fixed, and the individual liability of each stockholder has thus been ascertained, the enforcement of such liability is the proper subject of a suit at law, in which the separate rights of the defendant stockholder are distinctively to be considered. *Flash v. Conn*, 109 U. S. 380, 3 Sup. Ct. 263.

It is plain, also, that each defendant may desire to set up a different defense. One stockholder may have paid his assessment in whole or in part; another may seek to raise the question whether the Iowa court had jurisdiction to make the levy; a third may wish to attack the amount of the assessment; another may aver that his subscription was void from the beginning; and still other defenses, which need not be specified, are readily conceivable. We say nothing about the validity of these defenses. Some of them may not be available, and others may not be successful; but each defendant has the right to make whatever objection he may see fit to raise, in order that it may be passed upon by the court. If the defendants are numerous, as they are in the pending suit, it would be almost, perhaps wholly, impossible to apportion fairly the costs of hearing and of determining many unrelated issues.

The analogy of similar proceedings is also against the method adopted by the bill in controversy. An assessment by the comptroller of the currency upon stockholders of a national bank closely resembles the levy now before the court. So, also, does an assessment upon the stockholders, or the members, of an insolvent insurance com-

pany, under the Pennsylvania statutes. But, so far as we know, such assessments are always recovered by actions at law, brought separately against each member or stockholder, and we see no good reason why the assessments now in dispute should not be sued for in the same way.

The objection of multifariousness is supported by the further consideration that the plaintiff is seeking to recover, not only the assessments already referred to, but also the amount of several promissory notes, averred to be due by one of the defendants for money borrowed from the bank. Clearly, the other defendants have no connection with this transaction, and may properly object to the bill upon this ground alone.

It may not be amiss to add that the question whether the Iowa statute imposes an obligation that can be enforced by a receiver is not raised by the demurrer, and has not been considered. In view of the rulings in *Flash v. Conn*, *supra*, referred to in *Mechanics' Sav. Bank v. Fidelity Insurance, Trust & Safe-Deposit Co.*, 87 Fed. 113, there may perhaps be some conflict of opinion between the courts of Iowa and the federal courts on this subject, but, even if the conflict exists, it need not now be decided which judgment should prevail.

The demurrer to the bill must be sustained.

KENT v. BAY STATE GAS CO.

(Circuit Court, D. Delaware. May 11, 1899.)

1. PLEADING—DECLARATION IN ASSUMPSIT—SPECIALTY.

A declaration in assumpsit against a corporation, containing a special count on a written instrument executed by defendant, is not subject to demurrer because the copy of the instrument set out discloses that the attesting clause is, "Witness our hands and seals," and the word "Seal" follows the signature; there being no allegation that it is a sealed instrument. Whether it is in fact a specialty under the seal of the corporation is a matter of evidence.

2. PRACTICE IN FEDERAL COURTS—FOLLOWING STATE PRACTICE.

Rev. St. § 914, which provides that the courts of the United States shall conform their practice, pleadings, and forms, and modes of proceeding, as near as may be, to state practice in civil cases at common law, does not bind the federal courts to rigidly follow all subordinate requirements of a state practice, nor abridge their right and duty, under section 954, to permit amendments, or to disregard niceties of form which, in their judgment, would unwisely incur the administration of the law; and, although a state practice requires a court to decide on demurrer all questions which may be so raised, a federal court is not required to adopt such practice where no substantial right of the demurrant will be denied by a postponement of their determination until the trial.

On Demurrer to Declaration.

Leonard E. Wales, Jr., and Read & Petit, for plaintiff.
Herbert H. Ward, for defendant.

DALLAS, Circuit Judge. The declaration in this case comprises six special counts and the common counts. The special counts have been demurred to. The several causes of demurrer assigned need

not be considered in detail. It will suffice to deal with the points presented in the defendant's brief.

It is objected that the first three counts are bad in law, because, as is averred, "the form of action is wrong. The action is assumpsit, yet the counts show on their face that the foundation of the action is a sealed instrument." In my opinion, this objection is not well taken. The declaration does not, in terms, allege the instrument to be under the corporate seal of the defendant; nor is it to be inferred, as a conclusion of law, that it is so sealed, merely because the copy of the writing which is embodied in each of the counts discloses that the attesting clause is, "Witness our hands and seals this day," and that the word "Seal" occurs in connection with the signature, thus:

"Bay State Gas Company (Delaware) [Seal],
"By J. Edward Addicks, President."

In the case of *Navigation Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, the question which is here raised was conversely presented. The action was in covenant, and the final clause of the contract sued on was as follows:

"In witness whereof, the parties hereto have hereunto set their hands and seals this, the day above written.

"Jacksonville, Mayport, Pablo Railway and Navigation Company [Seal],
"By Alexander Wallace, President."

The defendant demurred upon the ground, *inter alia*, that the declaration was in covenant, "and yet the same contains, on the face thereof, and the face of the paper made part thereof, that the said cause of action will not lie, because the said paper is not under seal; that there is no seal of the defendant company to said paper." The supreme court assumed the theory of this demurrer to be that there should have been an averment on the face of the instrument that the seal attached on behalf of the company was its common or corporate seal, and held that the averment that the parties had set their hands and seals to the paper, in connection with the fact that the attesting clause alleged that the corporation had signed, sealed, and delivered in the presence of two witnesses, who signed their names thereto, was, on demurrer, plainly sufficient; that, "in the absence of evidence to the contrary, the scroll or rectangle containing the word 'Seal' will be deemed to be the proper and common seal of the company"; that "a seal is not essentially of any particular form or figure"; and that the presumption from a copy purporting any form of seal would be that the original was duly sealed, and from the original, if exhibiting a scroll merely, "that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question." What was decided is that the declaration in that case, which counted in covenant, was good on demurrer; but it does not follow that a declaration in assumpsit, although based upon a contract similarly attested and executed, should, on demurrer, be held to be bad. The point is one, not of pleading, but of evidence. "In the absence of evidence to the contrary," it must, it is true, be presumed that the word "Seal," as it is here written, was adopted and used by the Bay State Gas Company as its

seal; but it cannot now be assumed that proof in rebuttal of that presumption will not be made. The burden will be upon the plaintiff. If he shall sustain it successfully, it will appear that the form of action which he has adopted was well chosen. If he shall not, he must then abide the consequence. But until the trial the question does not arise, and cannot be determined.

It is further objected that the first three counts are fatally defective, because, as is averred, they allege "no consideration of any legal effect," and "do not sufficiently connect the plaintiff with the contract," and that the fourth, fifth, and sixth counts are bad "for want of legal consideration, uncertainty, ambiguity, and insensibility." These propositions have been ably argued, and in much detail, but I do not deem it necessary to discuss them with particularity. The several counts which are said to be bad for "insensibility" are certain to a common intent,—their substantial meaning is manifest; and I do not think that on demurrer any of them should be held defective, as being founded upon a contract lacking consideration, or with which the plaintiff is not sufficiently connected. Such matters may well be reserved for future consideration, and the defendant will not by the present action of the court be precluded from hereafter maintaining its position respecting them as it may be advised. The extent of the conclusion now reached is that the counts do not present defects so clearly substantial and fatal as to demand a present ruling that, taking all the facts to be admitted, they disclose no cause of action.

The learned counsel of the defendant has called attention to section 914 of the Revised Statutes, which provides that in the courts of the United States the practice, pleading, and forms and modes of proceeding in civil cases at common law shall conform as near as may be to those of the courts of the state within which the federal court is held, and he has assumed that, inasmuch as the courts of the state of Delaware still adhere to the common-law system of pleading, the old practice under that system should be rigidly applied in disposing of this demurrer. But this assumption cannot be unqualifiedly accepted. The legislatures and the courts of many of the states have exhibited a determination to relieve the administration of justice from the subtleties of ancient pleading, and by the first judiciary act of the United States (Rev. St. § 954) it was provided that any court of the United States "* * *" may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules prescribe"; and "the power and duty of the courts to allow amendments most liberally has been long established, and no practice is more generous in that regard than that of our federal courts." *Davis v. Railroad Co.*, 32 Fed. 863. It is their duty to disregard niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them; and, to this end, even a verdict may be amended. *Parks v. Turner*, 12 How. 46. "The result is that the federal courts will conform the practice, pleadings, and forms, and modes of proceeding, in civil causes in the circuit courts, as near as may be, to

the statutes of the states in which they are held, and to the practice of the courts in those states; but it is their right and duty to reject any subordinate provision of the state statutes, and any rule of practice of the state courts, which, in their judgment, will 'unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals.' " *O'Connell v. Reed*, 5 C. C. A. 594, 56 Fed. 538. If the practice of the Delaware courts be to decide on demurrer all questions which may be so raised, although no substantial right of the demurrant would be denied by postponing their determination until the trial, I can only say that it is a practice which this court, in my opinion, is not required to follow, and which, for the avoidance of needless incumbrance in the administration of the law, it should decline to adopt. The demurrer is overruled.

BULLION & EXCHANGE BANK v. HEGLER.

(Circuit Court, N. D. California. April 18, 1899.)

No. 12,315.

1. FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—CONSTRUCTION.

State statutes of limitation are uniformly recognized by federal courts and given effect to as rules of decision, under Rev. St. § 721; and, in construing and applying them, such courts follow the decisions of the highest court of the state.

2. LIMITATION OF ACTIONS—CONSTRUCTION OF STATUTES—NEW PROMISE.

Statutes of limitation are regarded favorably as statutes of repose, and a writing to give a new cause of action or stay the bar of the statute for a renewed period must contain an express promise to pay a pre-existing debt or an acknowledgment of a present debt under such circumstances that a promise to pay may be inferred. A mere acknowledgment of the debt is insufficient.

3. SAME—INFERENCE OF PROMISE TO PAY FROM ACKNOWLEDGMENT OF DEBT.

A written acknowledgment of a debt before it has become barred by limitation, coupled with a statement by the debtor that he cannot pay, or that he does not see any chance to pay, unless he can sell some property, is not one from which a promise to pay can be inferred; unless it is shown that the stipulated condition has been reached.

On Motion of Defendant for a New Trial.

J. W. Dorsey and R. M. F. Soto, for plaintiff.

H. C. Firebaugh, for defendant.

MORROW, Circuit Judge. This is an action upon two promissory notes executed by the defendant in favor of the plaintiff at Carson City, Nev., on July 24, 1893, for \$4,125 each. One of these notes was due and payable one year after date, and the other two years after date. With respect to the first of these notes declared upon, in the complaint it is alleged that afterwards, on the 25th day of October, 1895, the defendant, in and by an instrument in writing signed by him bearing date on that day, and afterwards, on the 10th day of December, 1896, in and by another instrument in writing signed by him bearing date on that day, acknowledged his liability

and signified his willingness, and therein and thereby did promise to pay the principal of said note, with the interest thereon. The complaint was filed February 4, 1897. To the cause of action based upon the first note, the defendant pleaded the statute of limitations, but made no defense to the cause of action based upon the second note. When the complaint was filed, the first of these notes, due and payable one year from date, had been due and payable more than two years. The second note, due and payable two years after date, had been due and payable a little over eighteen months. The statute of limitations set up as a defense to the first note, provided for in the Code of Civil Procedure of California, is as follows:

"Sec. 335. The periods for the commencement of actions other than for the recovery of real property, are as follows: * * *."

"Sec. 339. Within two years: An action upon a contract, obligation, or liability not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state."

Section 360 of the Code of Civil Procedure provides as follows:

"No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this title, unless the same is contained in some writing signed by the party to be charged thereby."

The writing upon which the plaintiff relies as taking the first note out of the statute of limitations is contained in the following correspondence:

T. R. Hofer, cashier of the plaintiff, wrote to the defendant the following letter on August 9, 1895:

"J. H. Hegler, Esq., San Francisco—Dear Sir: Attention is called to your two notes of \$4,125.00 each to this bank,—one due July 24, '94, and one due July 24, '95. The interest on these notes to July 24, '95, is \$1,320.00. If you cannot pay the principal, we should be very glad to have you pay the interest."

"Yours, truly,

T. R. Hofer, Cashier."

This letter was received by defendant at San Francisco, and replied to as follows:

"San Francisco, Oct. 25th, '95.

"T. R. Hofer, Esq., Cashier Bullion & Exchange Bank—My Dear Sir: Have neglected answering your letter calling my attention to note and interest due for the reason that I expected to see Mr. Williams and talk with him about it. But have not seen him. Beg to say that I cannot pay the note or interest time, nor until I can turn some realty or other property into cash, which seems impossible to do at present.

"I am very truly yours,

John H. Hegler."

Later, on November 11, 1896, Trenmor Coffin, acting as attorney for plaintiff, wrote to the defendant with regard to the notes as follows:

"Carson City, Nov. 11, 1896.

"J. H. Hegler, Esq., 222 Haight St., San Francisco, Cal.—Dear Sir: I still have your two notes, for collection, given by you to the Bullion & Exchange Bank on July 24th, 1893, for \$4,125.00 each, due, respectively, in one and two years from their dates, with interest at eight per cent (8%) per annum from date of notes. Please be kind enough to inform me by return mail when you can make a payment upon these notes.

"Yours, respectfully,

Trenmor Coffin,

"Atty. for B. & Ex. Bank."

Receiving no reply, he wrote again as follows:

"Law Office of Trenmor Coffin.

"Carson City, Nev., Nov. 30, 1896.

"J. H. Hegler, Esq., 222 Haight St., San Francisco, Cal.—Dear Sir: On Nov. 11th last I wrote you concerning your two notes given by you to the Bullion & Exchange Bank on July 24th, 1893, for \$4,125.00 each, and due in one and two years, respectively, after their dates, with interest at eight per cent (8%) per annum from date of notes, but have as yet heard nothing from you. Please be kind enough to advise me when you can make a payment upon these notes, and oblige

"Yours, respectfully,

Trenmor Coffin,

"Atty. for B. & Ex. Bank."

To this the defendant replied:

"San Francisco, Cal., Dec. 10th, 1896.

"Trenmor Coffin, Esq., Carson, Nev.—My Dear Sir: Yours of the 11th and 30th ult. reached me nearly at the same time, the former having followed me to the North and return. I penciled you a few lines on receipt just as I was leaving the city. Referring to the notes, I don't see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this, I can pay you at least a part. You may remember our talk on this matter on a former occasion. I saw Mr. Williams not long ago. Had quite a talk with him then. But he kindly did not remind me of my notes.

"Truly yours,

J. H. Hegler."

Upon this evidence, judgment was ordered entered in favor of the plaintiff on both notes. Defendant moves for a new trial on the ground of error in entering a judgment in favor of the plaintiff on the first note, for the reason that the statute of limitations had run and constituted a complete bar at the time the action was commenced; and, in support of the motion, it is contended—First, that the letters in evidence are too equivocal, vague, and indeterminate to constitute an acknowledgment from which a promise may be inferred, as required by law; and, second, if it amounts to a promise at all, it is conditional, and it is not claimed that the condition has been complied with.

It is provided in section 721 of the Revised Statutes of the United States:

"The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

No laws of the several states have been more steadfastly or more often recognized by the courts of the United States as rules of decision than statutes of limitation of actions, as enacted by the legislatures of the states and as construed by their highest courts. *Bauserman v. Blunt*, 147 U. S. 647, 652, 13 Sup. Ct. 466; *Metcalf v. Watertown*, 153 U. S. 671, 14 Sup. Ct. 947; *Campbell v. City of Haverhill*, 155 U. S. 610, 614, 15 Sup. Ct. 217. For the determination of the question at issue in this case we must therefore look to the decisions of the supreme court of California.

The plaintiff relies upon the recent case of *Southern Pac. Co. v. Prosser*, in the supreme court (52 Pac. 836, in department, and 55 Pac. 145, in bank), as establishing a doctrine in this state under

which the letters in the present case must be held as containing a sufficient acknowledgment and promise to interrupt the running of the statute of limitations. In that case the letter was as follows:

"Dear Sir: Referring to that traction engine at Auburn, owned by me, and mortgaged to S. P. Co., I have not been able to sell it. * * * Now, sir, can't you give me a chance to pay you in work? The Co. employs many men, and, if you choose, you can procure some employment for me. I have a sick family, and am hard up personally, and need work, and want to pay you, besides. * * *

W. S. Prosser."

With respect to the sufficiency of the acknowledgment contained in this letter to give the debt a new life, the court declared the law to be as follows:

"The distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same. From such an acknowledgment the law implies a promise to pay. Code Civ. Proc. § 360; McCormick v. Brown, 36 Cal. 180, 184, 185; Biddel v. Brizzolara, 56 Cal. 374; Tuggle v. Minor, 76 Cal. 96, 18 Pac. 131; Wood, Lim. Act. §§ 68, 85."

The court held that the letter in question was an unqualified admission of an existing debt which defendant desired to pay, and also a request for leave to pay in a manner more convenient to the writer than that provided in the original contract; and that the suggestion of a peculiar mode of payment, not being proposed as a condition of the acknowledgment, did not impair the effect of the admission.

A second question in this case was whether, assuming that the written acknowledgment of the debt was sufficient to prevent the bar of the statute as to the personal obligation, it was such an instrument as is essential to create, renew, or extend a mortgage. The court was of the opinion that the question whether the lien of the mortgage was extinguished depended upon the further question whether the action was based upon the original obligation, or upon a new promise implied from the written acknowledgment of the debt. The court, speaking through the chief justice, says:

"A wide diversity of opinion upon this point may be discovered in the reported decisions of this court; but it is to be observed that these expressions of opinion were generally unnecessary, and have generally ignored the distinction between a new promise made before, and one made after, the statute has run. This distinction is very clearly stated in section 81, Wood, Lim. Act., as follows: 'The distinction between the acknowledgment of a debt before, and one after, the statute has run, consists merely in its effect upon the debt and the remedy. An acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period, dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action, for which the old debt is a consideration.' This distinction seems to be recognized in the phrase, 'new or continuing contract,' in section 360, Code Civ. Proc., and is clearly stated by Mr. Justice Rhodes in his opinion in McCormick v. Brown, 36 Cal. 184, as follows: 'There are two ultimate facts that may be proved in the mode prescribed,—a continuing contract, and a new contract. The acknowledgment or promise made while the contract is a subsisting liability establishes a con-

tinuing contract, and, when made after the bar of the statute, a new contract is created.' "

The distinction here drawn between an acknowledgment or implied promise with respect to an existing debt sufficient to continue it for another statutory period of limitation and an express promise made after the statute has run, sufficient to create a new contract, was for the purpose of determining whether the lien of the chattel mortgage remained as security for the payment of the debt. If the original debt had been merely continued, then the mortgage lien remained as security for its payment; but if, on the other hand, the remedy for the enforcement of its payment had terminated and there was a new promise to pay the debt, then it followed that, as the mortgage had not been given as security for the new contract, there could be no foreclosure of the lien. It was accordingly held that, as the original debt had been continued while the statute was still running, the mortgage lien remained as security for its payment. This distinction was also necessarily involved in the question whether the acknowledgment or promise was sufficient to take the case out of the operation of the statute; and, as that is the question at issue in the present case, the distinction is to be observed, and the law upon the subject followed, as far as it may be applicable to the facts of the case. But this is not the only rule of construction resorted to by the courts in determining the character of the acknowledgment or promise that will continue an existing debt for another period of limitation. It is now well established by the authorities that the statute of limitations is to be upheld and enforced, not as arising merely upon the presumption that from the lapse of time the debt has been paid or released, but upon the broad ground that it is a statute of repose, for the peace and welfare of society, and is therefore to be regarded favorably. *Bell v. Morrison*, 1 Pet. 351, 360; *McCluny v. Silliman*, 3 Pet. 270, 279; *Shepherd v. Thompson*, 122 U. S. 231, 234, 7 Sup. Ct. 1229; *Campbell v. City of Haverhill*, 155 U. S. 610, 617, 15 Sup. Ct. 217; *Spring v. Gray*, 5 Mason, 305, 22 Fed. Cas. 978, 984; *McCormick v. Brown*, 36 Cal. 180, 184. If the statute were to be enforced upon the theory that it merely fixes a period of time, the running of which establishes a presumption of payment, then any promise or acknowledgment in writing that would justify the inference that the debt had not been paid would be sufficient to remove the presumption of payment and fix a new period for the running of the statute, whether the contract is a subsisting liability or not. But if, on the other hand, the statute is one of repose, then it is clear that the writing that will bar the statute should contain an express promise to pay a pre-existing debt, or acknowledge the existence of a present debt under such circumstances that a promise to pay it can be inferred. Moreover, the statute requiring that the acknowledgment or promise to be sufficient evidence of a new or continuing contract should be in writing did not originate in Lord Tenderden's act (9 Geo. IV. c. 14) in a purpose to establish a new rule with respect to the character of the acknowledgment or promise, but to provide the kind of evidence by which the acknowledgment or promise should be proved; and it was never understood by the English courts that this act established the proposition

that a mere acknowledgment of a debt was sufficient to interrupt the running of the statute of limitation. *Shepherd v. Thompson*, 122 U. S. 231, 238, 7 Sup. Ct. 1229; *Biddel v. Brizzolara*, 56 Cal. 374, 380.

In this last case the plaintiff relied upon a written acknowledgment made by the defendant before the statute had run upon the original debt. The acknowledgment of the debt was contained in an agreement with another person wherein the payment of the debt was to be made by the latter. The court held that this acknowledgment was not sufficient; that the writing must contain an express promise or acknowledgment of the debt as an existing debt from which a promise may be inferred,—citing *McCormick v. Brown*, 36 Cal. 180; *Farrell v. Palmer*, Id. 187; *Bell v. Morrison*, 1 Pet. 362.

In the present case the defendant in his first letter says: "Beg to say that I cannot pay the note or interest time, nor until I can turn some realty or other property into cash, which seems impossible to do at present;" and in the second: "I don't see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this, I can pay you at least a part." There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff; but in neither case is it an acknowledgment from which a promise to pay the debt can be inferred. In other words, it is not an unqualified acknowledgment, since it is accompanied with the condition that he cannot pay, or he does not see any chance to pay, unless he can turn some realty or other property into cash; and there is no evidence that this condition has been reached.

It is clear that upon this evidence the court was in error in awarding a judgment in favor of the plaintiff on both notes. The defendant is entitled to a new trial.

HANCHETT v. HUMPHREY et al.

(Circuit Court, D. Nevada. April 11, 1899.)

No. 660.

1. COSTS—FEES OF WITNESSES—VOLUNTARY ATTENDANCE.

A witness who in good faith attends the court, whether in obedience to a subpoena or at the request of a party, is to be considered as attending "pursuant to law," within the meaning of Rev. St. § 848; and a successful party is entitled to recover as costs the legal amount paid a witness who attends voluntarily, the same as though he had been legally subpoenaed.

2. SAME—MILEAGE OF WITNESSES—LIMITATION AS TO DISTANCE.

Mileage is taxable for a witness in a federal court from any point or for any distance that could be reached by a subpoena, viz. from any point within the district, and for a distance of 100 miles if the witness comes from a point at a greater distance and without the district.

On Appeal from Taxation of Costs.

Reddy, Campbell & Metson and Torreyson & Summerfield, for plaintiff.

M. A. Murphy, for defendants.

HAWLEY, District Judge (orally). The memorandum of costs in this case contained charges for three witnesses "100 miles and re-

turn." Two of them resided without the state at a greater distance than 100 miles, and one within the state at a distance of 100 miles. Neither of these witnesses were served with subpoena, but came voluntarily, at the request of the plaintiff. The clerk, following the ruling of Sawyer, Circuit Judge, in *Spaulding v. Tucker*, 2 Sawy. 50, Fed. Cas. No. 13,221, and *Haines v. McLaughlin*, 29 Fed. 70, disallowed these charges. When my attention was first called to this matter, several years ago, I informed the clerk that I entertained a different opinion; but, inasmuch as the circuit judge had announced the rule, it was, perhaps, better to follow it, and it has been ever since, pro forma, adhered to. Judge Ross, without regard to his own views upon the subject, pursued this course in *Lillienthal v. Railway Co.*, 61 Fed. 622. The question, however, has often presented itself to my mind whether such rulings were fair to litigants and in conformity with sound reason, equity, or justice. These questions I have, in my own mind, always answered in the negative. My individual views were expressed in *Meagher v. Van Zandt*, 18 Nev. 236, 2 Pac. 60, and have never been changed. I am of opinion that witnesses may be required to attend court by agreement, or by the request of a party, without the service of a subpoena; and, if they do so attend, they can collect their fees for mileage and attendance from the party at whose request they were required to attend. Fees thus paid would, it seems to me, be a necessary disbursement in the action, which could, under the provisions of the Revised Statutes, be taxed as disbursement costs against the defeated party. Such attendance would be as "pursuant to law" as if the witnesses had been regularly subpoenaed. It is, of course, true that the statutory means of compelling the attendance of witnesses is by subpoena. But what right has the defeated party to complain because the other party caused his witnesses to come without a subpoena, and thereby saved expense? If a subpoena was served, the winning party could recover, not only the mileage of the witnesses, but the costs and expenses incurred in subpoenaing them; and these costs might, in many cases, be much greater than the mileage of the witnesses allowed by the United States statute. The objection to allowance of mileage because no subpoena is served, ground down to the common sense of the question, is that the winning party ought not to collect any disbursements he necessarily incurred by paying the legal fees of the witnesses because he did not go to the further expense of having them subpoenaed. Such reason does not appear to me to be sound. Its tone is not judicial, and its logic is certainly faulty, and the result, if continued, would lead to unnecessary expense to litigants, and ought not to be adhered to any longer. It is time to call a halt. If a mistake has been made, why not correct it, without waiting for an authoritative decision from the circuit court of appeals or from the supreme court? The question may never reach either of said courts. Is it not, therefore, better to follow a well-recognized and sound principle of law, than to blindly adhere to a precedent simply because it was made in your own circuit?

Upon a careful review of all the decisions in the national courts, it is manifest that the great weight of authority and of reason is

opposed to the conclusions heretofore followed in this circuit. Notwithstanding some conflict in the earlier cases, the law is now well settled that a witness who in good faith attends the court, whether he comes in obedience to a subpoena or at the mere request of a party, plaintiff or defendant, is to be considered as attending "pursuant to law," within the meaning of those words as used in section 848, Rev. St., and is entitled to his fees and mileage; and the party for whom he attends is entitled to recover costs for the legal amounts paid such witness, the same as if he had been legally subpoenaed. *Anderson v. Moe*, 1 Abb. (U. S.) 299, Fed. Cas. No. 359; *Cummings v. Plaster Co.*, 6 Blatchf. 509, Fed. Cas. No. 3,473; *Dennis v. Eddy*, 12 Blatchf. 195, Fed. Cas. No. 3,793; *U. S. v. Sanborn*, 28 Fed. 299, 304; *The Vernon*, 36 Fed. 113, 116; *The Syracuse*, Id. 830; *In re Williams*, 37 Fed. 325; *Eastman v. Sherry*, Id. 845; *Burrow v. Railroad Co.*, 54 Fed. 278; *Pinson v. Railroad Co.*, Id. 464; *Sloss Iron & Steel Co. v. South Carolina G. R. Co.*, 75 Fed. 106.

In *Eastman v. Sherry*, Jenkins, Circuit Judge, after referring to the conflict in the authorities as to whether the mileage of witnesses who attended the trial voluntarily without subpoena could be charged for, said:

"It needs only to state the conclusions to which my mind is constrained upon a careful consideration of the questions. The conclusion that a witness attends 'pursuant to law' only when present in obedience to a subpoena is, to my thinking, quite too narrow a construction of the statute. The object of the law is to reimburse the prevailing party for the necessary expenses of his evidence. The only purpose of the writ is to compel attendance. But, voluntarily attending, the witness is clothed with all the immunities of a witness served with process. He subjects himself to the jurisdiction of the court, and, when sworn, is subject to like penalties and protection as one attending in obedience to a writ. He attends pursuant to law when he subjects himself to the law. He waives the formal service of the writ. That is a matter personal to himself and to the party who calls him."

In *Sloss Iron & Steel Co. v. South Carolina G. R. Co.*, Simonton, Circuit Judge, referring to *Spaulding v. Tucker*, and the other cases that hold that the subpoena is necessary in order to authorize the taxation of costs, said:

"With deference, I cannot concur in this view. The costs of witnesses are a part of his disbursements, to which the successful party is entitled. The purpose of the subpoena is to enforce attendance. If it be disobeyed, the party summoned can be attached; but, if he attend without compulsion, he is entitled to compensation. This is the conclusion reached by Mr. Justice Gray, on circuit, in *U. S. v. Sanborn*, 28 Fed. 302, and was concurred in by Mr. Justice Brown (then district judge) in *The Vernon*, 36 Fed. 116. In the conflict of persuasive authority, the two cases just cited will be followed."

There is some conflict of authority as to whether witnesses who live within the district, but over 100 miles distant from the place where the court is held, can charge mileage for a distance of over 100 miles. Some of the courts have held that the mileage ought to be confined to 100 miles, for the reason that section 863, Rev. St., provides for the taking of the testimony of any witness by deposition *de bene esse* when the witness lives at a greater distance from the place of trial than 100 miles. The true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the acts of congress were intended to, and do, allow mileage to witnesses to

the full extent of the distance that could be legally reached by subpoena, viz. at any place within the district, or at any point without the district to the extent of 100 miles from the place where the court is held. *Anon*, 5 Blatchf. 134, Fed. Cas. No. 432; *Beckwith v. Easton*, 4 Ben. 357, Fed. Cas. No. 1,212; *Dreskill v. Parish*, 5 McLean, 241, Fed. Cas. No. 4,076; *The Leo*, 5 Ben. 486, Fed. Cas. No. 8,252; *Spaulding v. Tucker*, 2 Sawy. 50, Fed. Cas. No. 13,221; *Buffalo Ins. Co. v. Providence & Stonington S. S. Co.*, 29 Fed. 237; *The Vernon*, 36 Fed. 113; *Eastman v. Sherry*, 37 Fed. 844; *Burrow v. Railroad Co.*, 54 Fed. 278, 282; *Pinson v. Railroad Co.*, Id. 464; *Hunter v. Russell*, 59 Fed. 964, 966.

In *Hunter v. Russell*, District Judge Knowles, with reference to the right of a party to collect mileage for his witnesses residing within the district over 100 miles from the place where the court is held, said:

"In the case of *Prouty v. Draper*, 2 Story, 199, Fed. Cas. No. 11,447, this section [863] came up for consideration. * * * In this the distinguished Justice Story held that the taking of a deposition under that section was a privilege to be exercised at the option of the party desiring the evidence of a witness living more than 100 miles from the place of trial, and that the opposite party had no right to demand that, under such circumstances, a deposition should be taken. Having, then, the right to compel the attendance of a witness from any point within the district, and having the option to take a deposition if living at the distance named, it does not seem to me to be going too far to hold that, if the litigant does not exercise the option to take the evidence of his witness by deposition, he can recover for what he is compelled to pay his witness by law as travelling fees."

In *Pinson v. Railroad Co.*, Philips, District Judge, with respect to the question raised as to the right of witnesses to mileage when they come from without the state a greater distance than 100 miles, after quoting the provisions of section 876, Rev. St., said:

"This question was thoroughly considered in the case of *The Vernon*, supra, by Judge Brown, now one of the associate justices of the supreme court, who maintains that, where the witness comes from without the state, at a greater distance than 100 miles, he is entitled to claim for mileage for the distance of 100 miles, and no more, and, of consequence, his per diems. On consideration, I am of the opinion that this is a proper and equitable construction of the statute. While it is true the party calling the witness has the right, under section 863 of the statute, to take his deposition *de bene esse*, he ought not, in justice, in every case to be held to that course, at the risk of paying the entire cost of the witnesses for personal attendance. Every lawyer and court knows, from observation and experience, the importance and advantage, and sometimes the necessity, of the personal presence of the witness at the trial. It is sometimes difficult and impossible to get so full, explicit, and perspicuous a statement of facts from the witness through a deposition as it is by his examination before court and jury. Questions and incidents of facts may arise on the trial, which could not be reasonably anticipated by the party taking the deposition in advance, which could be successfully and truthfully met by the witness when present in court. The party ought, as a matter of right, if he prefers to have the personal attendance of the witness, to be permitted to bring him at his own expense to the point of 100 miles distant from the court, and have the cost of mileage therefrom to the court taxed the same as if the witness resided within the 100 miles."

The clerk is authorized to tax the mileage for the three witnesses as costs herein. In all other respects the action of the clerk is approved.

SMYTH v. NEW ORLEANS CANAL & BANKING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1899.)

No. 676.

1. EVIDENCE—ANCIENT RECORDS—SUFFICIENCY OF AUTHENTICATION.

To prove a French grant of land in Louisiana, claimed to have been made in 1757, and by a second confirmatory grant in 1764, there were offered in evidence from the proper custody a number of sheets from a record book, of ancient appearance, whose edges and corners had been burned, bearing watermarks and stains, and containing, in a more or less legible French writing, what purported to be the proceedings relating to such grants, including the formal grants themselves. It was shown historically that there existed as a part of the Spanish archives of the province of Louisiana a series of books, called "registers of grants," containing records of grants or concessions of lands in the province by both the Spanish and French authorities, and that such books, on the cession of the territory, were transferred to the authorities of the United States, and subsequently became, and were made by law, a part of the records of the land office at New Orleans, and that there was a fire in such land office in 1865, in which the greater part of the records were destroyed, and the remainder damaged by fire and water. The sheets offered were identified as a part of one of the books rescued from such fire in a damaged condition. There was further offered in evidence a certified copy of each of said grants, made by the register of the land office at New Orleans in 1854 and 1855, respectively, and a certified copy of the original grant of 1757, made by the secretary of the Spanish colonial governor in 1795. These copies corresponded with each other as to the pages of the record from which they purported to have been made, and in their contents with each other and with the sheets offered in evidence. *Held*, that such sheets were sufficiently authenticated to render them admissible in evidence.

2. SAME—FRENCH GRANT OF LANDS—SUFFICIENCY OF PROOF.

Such sheets, together with the certified copies, constituted sufficient evidence that the grants therein referred to were made.

3. SAME—ANCIENT DOCUMENTS—PROOF OF OFFICER'S SIGNATURE.

The signature to a certificate, purporting to have been made in 1795, which recites that the signer is the secretary of the Spanish government of the Louisiana colony, and that the paper to which it is attached is a copy of a public record in his custody as such secretary, will be presumed genuine, where it is historically known that the person whose name is signed was such secretary at the time, and is fully authenticated by the testimony of experts, showing its genuineness by comparison with the signatures to other documents executed by such officer before a notary public.

4. SAME—RECORD OF FRENCH GRANT IN LOUISIANA.

The fact that a French grant of lands in Louisiana was dated in 1764, after the cession of the territory to Spain, does not render the record of such grant inadmissible as an evidence of title, as it may be shown to have been ratified or recognized by Spain, or by France after again acquiring possession.

5. EJECTMENT—ISSUES—MATERIALITY OF EVIDENCE.

In ejectment, where proof of a prior grant, pleaded by defendant, would of itself render plaintiff's claim of title invalid, the failure of defendant to connect his own title with such grant is immaterial; and the admission of incompetent evidence offered for that purpose by defendant is not prejudicial to plaintiff, who can only recover upon his own title.

6. EVIDENCE—SURVEY—OFFICIAL RECOGNITION.

The Trudeau survey of a tract of land near New Orleans, made in 1791, if not originally of an official character, has become so by its repeated recognition by the authorities of the United States in dealing with lands affected thereby, and, being among the records of the land office at New

Orleans, when produced by the officers having it in custody, is admissible in evidence, together with the procès verbal thereof.

7. FRENCH AND SPANISH LAND GRANTS IN LOUISIANA — NECESSITY OF CONFIRMATION.

Grants of lands in Louisiana, made by the former sovereigns, which were perfect and complete at the time of the cession of the territory to the United States, did not require confirmation by this government to give them validity or entitle them to recognition by the courts of the United States. The various acts of congress relating to the confirmation of such grants applied only to those which were inchoate or had not been perfected.

8. EVIDENCE—ANCIENT WILL—PROOF OF PROBATE.

A will under which possession of valuable lands has been held, improvements made, and other acts of ownership exercised for a hundred years, will be presumed to have been duly probated, and is admissible in evidence as a muniment of title without proof of such fact.

9. PUBLIC LANDS—SURVEYS OF FOREIGN GRANTS.

The secretary of the interior, on a final determination in favor of the validity of a French or Spanish grant of lands in Louisiana prior to its cession to the United States, has authority to set aside former surveys of the land made by the land department, and to cause a new survey of the grant to be made; and this action is conclusive on the courts, so far as relates to the location and boundaries of the grant fixed by the survey, though not as to its validity or its binding effect under the treaty of cession.

10. EJECTMENT—DEFENSE—RIGHT TO ATTACK VALIDITY OF PATENT.

It is open to a defendant in ejectment in a federal court to defeat the plaintiff's title, derived through a patent or grant from a state, by proving that the state was without jurisdiction to make such conveyance or grant, as that it had no title or right to the lands; and where plaintiff claimed under the state of Louisiana, which in turn claimed title through the swamp-land grants of congress, proof that the lands had been the subject of a valid and completed grant by the French authorities, while the sovereigns of the country, and had been claimed and held under such grant ever since, and hence never became public lands of the United States, constitutes a complete defense to the action.

11. TRIAL—DIRECTION OF VERDICT.

When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to sustain a verdict for plaintiff, the court may properly direct a verdict for defendant.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

J. R. Beckwith, J. Ward Gurley, and D. C. Mellen, for plaintiff in error.

J. L. Bradford and Branch K. Miller, for defendant in error New Orleans & Canal Banking Co.

J. P. Blair and Geo. Denegre, for defendant in error New Orleans City & Lake Ry. Co.

Girault Farrar and Gustave Lemle, for defendants in error Illinois Cent. R. Co. and Yazoo & M. V. R. Co.

Before PARDEE, Circuit Judge, and BOARMAN and SWAYNE, District Judges.

SWAYNE, District Judge. The plaintiff in error, Andrew W. Smyth, who was the plaintiff below, brings this cause here upon a writ of error from the circuit court of the United States for the Eastern district of Louisiana, to recover certain real estate situate in said district.

The petition avers that said plaintiff is the lawful owner of lands in township 12 S., range 11 E., Southeastern land district of Louisiana, east of the Mississippi river, describing it as follows: Sections 8, 15, and 17; lots, 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in section 20; sections 22, 25, and 28; lots 6, 7, 8, 9, 10, and 11, in section 29; and sections 30, 31, 32, and 33,—alleged to contain in the aggregate 2,295 acres; also lots 11 and 12, in section 20, and lots 1, 2, 3, and 4, in section 29, alleged to contain 19,659 acres more; the total amount being 2,357.87 acres. And the petition further avers that the New Orleans Canal & Banking Company (now the Canal Bank) claims to have had title to nearly all of said lands under pretended copies of alleged concessions made by French authority to Louis C. Le Breton on October 6, 1757, and on February 15, 1764, and has from time to time sold the certain designated portions to the other defendants named in the petition,—the Metairie Cemetery Association, the New Orleans City & Lake Railroad Company, the Illinois Central Railroad Company, the Louisville, New Orleans & Texas Railroad Company, and George L. Bright, who are wrongfully in possession, and claiming the designated respective portions of said land under and by virtue of purchases made by them from the New Orleans Canal & Banking Company, which last-named company is wrongfully in possession of most, if not all, of the other portions of said land. And the petition proceeds to aver that these lands are within and a part of the province of the territory of Louisiana which passed to the United States of America under and by virtue of the treaty of Paris on the 30th day of April, 1803, between the French republic and the United States of America; that by the acts of congress approved March 2, 1849, and September 28, 1850, said lands were granted, selected, and duly listed to the state of Louisiana; that on the 22d day of June, 1872, an official survey of the said lands was approved by the surveyor general of the United States, and the said lands were subsequently listed as swamp lands, inuring to the state of Louisiana in accordance with the said acts of congress; that on the 11th day of July, 1873, the plaintiff acquired the said lands by purchase from the state of Louisiana, and subsequently, on the 5th day of January, 1882, plaintiff located, under act of congress of May 20, 1826, indemnity school warrant No. 3,778, N. S. D., on lots 11 and 12 of section 20, and lots 1, 2, 3, and 4 of section 29, and received certificate of purchase No. 1,230, N. S. D., and patents Nos. 1,873, 1,889, and 1,890, issued by the state of Louisiana, and also state warrant and certificate of location, dated January 5, 1882, from the United States land office at New Orleans; that the patents so issued to the plaintiff covered 1,494.85 acres of said lands, and the patents for the remainder of said lands were withheld by decision of the land department of the United States on the 9th day of November, 1887, until the validity of said alleged French grants set up by the defendants should be determined. The petition then proceeds to aver that if the said pretended French grants ever existed, which is denied, they were incomplete, invalid, and of no force or effect under and by virtue of the treaties made between this and the French government, and that the defendants have no rights under said alleged grants, nor any title emanating therefrom. The instant

suit, as set forth in the petition, is against the following defendants, and for the following lands: (1) The Canal Bank, for sections 8, 15, 17, and lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of section 20; sections 22, 25, and 28, and lots 6, 7, 8, 9, 10, and 11 of section 29; sections 30, 31, 32, and 33; or for such portions thereof as were not alleged to be in the possession of the other defendants, viz.: (2) The Metairie Cemetery Association, for "a portion of sections 20 and 29." (3) The New Orleans City & Lake Railroad Company, for "portions of sections 8, 17, and 20." (4) The Illinois Central Railroad Company, for "lot 2 of section 33, and portions of sections 29, 30, and 32." (5) The Louisville, New Orleans & Texas Railroad Company, for "portions of sections 31 and 32." (6) George L. Bright, for "portions of lots 1, 2, 3, and 4 of section 29." The petition further avers that the dispute between the plaintiff and defendants, relative to the validity of plaintiff's title to said land, arises under the constitution and laws of the United States and the French republic, and the interpretation of the laws of the United States and the treaties made under authority thereof, and the plaintiff's title to the said lands is necessarily involved in the determination of the issues in the case; that the defendants are without title to said lands, or any part thereof; that all claims set up thereto by them are illegal, null, and void, and operate as a cloud on petitioner's title, and cause him great damage, loss, and injury; and the plaintiff prays for a judgment, recognizing the validity of his title, and canceling all the alleged claims of defendants, and condemning them to deliver possession of the lands to the plaintiff.

The answer of the New Orleans Canal & Banking Company, after pleading the general issue, set up the validity of the two grants of the French government attacked by the plaintiff. In detail it set out the history of its title. It declared that in the year 1732, one De La Freniere petitioned Bienville and Salmon, then respective governor and commissary director of the province of Louisiana, and the proper authorities of the king of France in the colony, for the grant of a "vacherie," or large extent of land along Bayou De La Metairie, having about 53 or 54 arpents thereon, and extending in depth about 50 arpents to the shore of Lake Pontchartrain; that this petition was granted on or about October 25, 1738, on condition that part of the land petitioned for, being that towards the west, having 12 arpents front on the bayou, should belong to the succession of one Beaulieu; that the applicant, De La Freniere, then owned a plantation on the Mississippi river of the usual depth of 40 arpents, and that the object of his application was manifestly to obtain land in its rear for the purpose of pasturing; that it originally had acquired and held in good faith nearly all the land in controversy, under two complete, valid French grants, made to Louis C. Le Breton, one October 6, 1757, the other February 15, 1764; that the grant of 1764 was a confirmation of a grant of the same land, made in 1738, to one De La Freniere, of the Vacherie tract proper, having 53 or 54 arpents in width east and west, and 60 arpents in depth north and south, extending to Lake Pontchartrain; that the grant of 1764 was also a regrant or confirmation of the grant of 1757, which included the triangular tract in the rear of the plantations on the river, and extending in depth to the

southern limits of the Vacherie tract; that these were public, notorious grants, duly severed from the domain of France and Spain, respected by the public colonial authorities of both those governments, and made the bases of many sales and transfers by or before some of them, the chief of which sales, etc., constituting the chain of title in the bank, are minutely set forth; that the survey of such lands by Sulakowski as public lands of the United States was "utterly erroneous and illegal ab initio," and had been, in appropriate proceedings, taken contradictorily with the state of Louisiana and plaintiff, so held by the interior department of the United States, and said survey annulled and set aside, and said grants by said authority duly surveyed and located; that said lands were not swamp and overflowed, but chiefly high and fit for cultivation; that canals, shell roads, race-tracks, cemeteries, riding parks, etc., covered much of them; that said lands were not lands of the United States, swamp or high, when the swamp-land grants to the state were made in 1849 and 1850, and hence did not pass to the state under said grants; that if they did so pass, or any part thereof, the alleged sales to plaintiff of the same as tidal overflow lands, at 25 cents per acre, were null and void; that the selection of said lands as swamp land, inuring to the state under said grants of 1849 and 1850, had all been canceled and annulled by the secretary of the interior; that as to lots 11 and 12 of section 20, and lots 1, 2, 3, and 4 of section 29 (the Metairie racecourse and cemetery tract, containing 196.59 acres), the pretended location thereon of a school warrant was void, and had been so declared by the secretary on valid grounds, etc. Finally, the answer pleaded the prescriptions of 10 and 30 years, supported by 150 years' peaceable possession under just titles, etc., by the bank and its authors and vendees.

The bank, by first supplemental answer, filed April 17, 1895, pleaded the federal survey of the grants of 1757 and 1764, made by the United States in 1884. It also pleaded title to part of the land sued for under a grant made by Spain to J. B. Macarty, December 22, 1795, with confirmation by the United States, setting forth its deraignment of title thereunder; also under a grant or sale of the Jesuits' property, made by France, August 18, 1763, and likewise setting forth its deraignment of title under the same; alleged that all these grants—to Le Breton in 1757 and 1764, to Macarty in 1795, and of the Jesuits' lands in 1763—"were perfect grants, accompanied by surveys and possession under all the governments of the province prior to the cession of Louisiana to the United States, and were in full force of recognition by all at and prior to said cession, and fully protected by the treaty between the United States and France, and said land has been owned and possessed in good faith by this defendant and the authors of its title, based on said original grants and titles, for more than a century." It concluded with the plea of 10 and 30 years' prescription under Rev. Civ. Code, arts. 3478, 3499.

The second supplemental answer of the bank, filed March 7, 1896, alleges that it built the new basin canal and shell road through the lands in controversy, under the act of the Louisiana legislature of March 5, 1831, and used and enjoyed the same for 35 years, when

they reverted to the state in 1866, and have since been in the possession and enjoyment of the same, which state has treated the petitions of plaintiff to be the same as void, and that it never advanced the same against the state; that the property along said canal has for 50 years been in the possession in good faith of the bank's vendees, who have built barrooms, hotels, clubhouses, race-tracks, cemeteries, etc.; that other portions of the land, sued for and described under the illegal and void Sulakowski survey as sections, lots, townships, etc., form the squares and the streets of the town of Carrollton, and have been inclosed, improved, and built upon by the bank's vendees, and in their undisturbed possession for 50 years; that the Metairie Cemetery tract was sold by the bank over 50 years since, and has ever since been in the possession of the Metairie Association and its authors in title, as the principal place of burial for the city of New Orleans; that the Oakland Riding Park tract, acquired by the bank under the grants aforesaid, had been, 30 years before, sold to George L. Bright and Jacob Williams, and used by them since as a racetrack, having been, for 60 years before the treaty of cession, in the continuous actual possession of the bank's authors in title; that all the lands sued for by plaintiff have been sold by the bank from time to time, and that, in addition to the 70 years' possession of same by the original grantees and those holding under them, the bank and its own vendees had been in possession for over 60 years; that the nature and use to which the land had been put showed that it was never swamp or overflowed land, and the foreign grants of same, and possession under them, showed that no portion of it was legally subject to the surveys, selections, locations, and entries set up by plaintiff; and that all such were utterly unfounded and void. This answer, like the two preceding ones, concludes with averring the ancient possession and enjoyment of the lands by its authors in title, by the bank and its own vendees, and concludes with the plea of 10 and 30 years' prescription under the Code.

To the intervention of the Howcott Company the bank filed an answer and exception April 17, 1895. The answer set forth the title and possession of the bank to the particular tract patented by the state to Howcott,—part under the grant by Spain to Macarty of 1795, and a part also under the sale or grant in 1763 to Joseph Petit of the Jesuit land, stating its derivative chains of title under both. The plea was that of 10 and 30 years' prescription; also that, if intervener had any title, he should enforce it by suit against plaintiff or defendant, and not both. Plaintiff likewise excepted to the intervention, and by order of the court, December 22, 1896, the two exceptions were referred to the merits.

June 29, 1896, the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company also filed their joint answer to the intervention, setting up the same matters of defense pleaded by them to the petition of plaintiff. These and the bank were the only defendants who thought the claims of the Howcott Company affected them. The other defendants, therefore, did not answer it.

George L. Bright answered November 5, 1894, denying the allegations of plaintiff, alleging that he purchased the land claimed of him from the bank, which was bound to warrant his title, and concluded by adopting the answer filed by the bank.

The Yazoo & Mississippi Valley Railroad Company, November 24, 1894, answered, pleading the general issue, and likewise adopting the answer of the bank.

The Illinois Central Railroad Company, November 24, 1894, filed a plea of prescription of 10 years, under Rev. Civ. Code, art. 3478, averring that it was in possession of the land it was sued for, and with its authors in title had been since March 17, 1877, paying taxes, etc., on the same; that the same was sold at marshal's sale on that day in the suit of J. B. Alexander and others against the New Orleans, Jackson & Great Northern Railroad Company, No. 7,789 of the docket of the United States circuit court, Eastern district of Louisiana, which sale was duly confirmed, etc.; that the purchaser at said sale transferred, through mesne conveyances, the said land to the Chicago, St. Louis & New Orleans Railroad Company, who leased the same to the Illinois Central Railroad Company for 400 years; and that it was in possession under said lease, etc. This plea was referred to the merits May 19, 1896.

The Metairie Cemetery Association filed answer November 30, 1894, pleaded the general issue, admitting it was the owner and in possession of certain lands acquired by an act of sale of July 23, 1872, filed as part of the answer, and averring that it held the same by derivative titles under the Canal Bank, and finally pleaded the defenses set up by the same in its answers.

George L. Bright, March 9, 1897, filed his supplemental answer, pleading the prescription of 10, 20, and 30 years, and adopting the supplemental answer of the bank filed March 7, 1896. This was afterwards changed to read 10 and 30 years' prescription, instead of 10, 20, and 30 years'.

The Metairie Cemetery Association filed its amended answer March 11, 1896, adopting the supplemental answer of the bank of March 7, 1896, deraigning title under the sale made by the bank, April 15, 1851, to Richard Ten Broeck, and averring it to be a part of the foreign grants under which the bank claimed title, and that it had long been in the continuous and undisturbed possession and enjoyment of the bank, its authors in title, and its vendees, and pleading the prescription of 10 and 30 years.

December 30, 1895, the Canal Bank was substituted as defendant in the place and stead of the New Orleans Canal & Banking Company.

May 16, 1896, the Illinois Central Railroad Company filed an amendment to its plea of prescription of 10 years, setting up matters of fact in support, viz. that it was in possession of lot 2 of section 33, and portions of sections 29, 30, and 32, as lessee of the Chicago, St. Louis & New Orleans Railroad Company, and that said lot 2 of section 33 composed squares and parts of squares 533, 542, 543, 562, and 563 of the city of New Orleans. The plea then showed how the lessor company became the owner of said squares, and

averred that ever since 1852 and 1857 said lessor and its transferees had been in the exclusive public and peaceable possession of the same, paying taxes, etc.; that the New Orleans, Jackson & Great Northern Railroad Company had been incorporated in 1853 by an act which gave them the right of way over and through the lands of the state to the extent of 150 feet wide on each side of its roadbed, and that said company, in building its roadbed in 1853, had laid it on portions of said sections 29, 30, 32, and lot 2 of section 33; that later the lessor company became the purchaser of all the said property and rights of the said New Orleans, Jackson & Great Northern Railroad Company by mesne conveyances, derived from and under the marshal's sale, etc., set forth in its former plea, and thereafter leased same to the Illinois Central Railroad Company for 400 years; that the only portions of said sections 29, 30, and 32 it was in possession of was said right of way over the same; that, having been in possession of all of said lands under deeds translativ^e of title, it was protected by the prescription of 10 years specially pleaded.

The New Orleans City & Lake Railroad Company answered May 10, 1896, pleading the general issue, and averring that it was owner and possessor in good faith of certain lands on the shore of Lake Pontchartrain, bought by it from its predecessor, the New Orleans City Railroad Company, June 9, 1883, and that its vendor had bought from the New Orleans Canal & Banking Company March 9, 1881; that by itself and authors it had been in noninterrupted possession for upward of 30 years, and in possession in good faith and under title translativ^e of property for 10 years; that it held the property under the banking company, which was bound to warrant the title; and the answer concluded with a call in warranty of the bank, and by pleading all the answers pleaded by it.

The banking company, August 21, 1896, filed its answer to this call in warranty, averring that its sale to the New Orleans City Railroad Company was quitclaim only, without warranty, express or implied, being only a transfer of its rights and claims, such as they were, and prayed that the call be rejected and dismissed. As final judgment was for the railroad company, the call in warranty became immaterial to the case.

The Illinois Central Railroad Company filed its answer June 29, 1896, pleading the general issue and the following special defenses: That it is in possession as lessee of the Chicago, St. Louis & New Orleans Railroad Company of certain squares in lot 2 of section 33, and sections 29, 30, and 32,—the only part in sections 29, 30, and 32 being its right of way, acquired, as stated in its plea of prescription, through the New Orleans, Jackson & Great Northern Railroad Company, to whom the same was granted by section 4 of the act of the Louisiana legislature of 1853; that if said sections were really granted to the state, as alleged by plaintiff, as swamp lands, by the United States, in 1849 and 1850, then the aforesaid grant to the railroad company, and its building its roadbed on said right of way, vested the same in said company, and that said right passed to respondent under its aforesaid lease; that said acquisition from the state, being long prior to the plaintiff's alleged acquisition, defeated

it to the extent of respondent's said right in said sections; that the state, having disposed of said interest in 1853, was estopped from granting the same to plaintiff in 1873; that lot 2 of section 33 composes squares and portions of squares 533, 542, 543, 562, and 563 (old Nos. 500, 501, 490, 491, and 470); that on August 18, 1763, France confiscated the Jesuits' plantation in the then suburbs of New Orleans, and granted and sold part of it to Joseph Petit, who, August 20, 1763, sold to Thomas Saulet; that the Jesuits and Saulet had full possession under patent, survey, and sale; that later France sold and granted to Saulet a back concession to the former tract, of which he had full possession under survey and patent; that said land passed by mesne valid conveyances to the Canal & Banking Company, under and through which company respondent acquired the same by title minutely set forth. The answer concludes with the defense of 1, 3, and 10 years' prescription under the Code.

The Yazoo & Mississippi Valley Railroad Company filed supplemental answer June 29, 1896, averring that all land claimed by plaintiff, as against said company, was acquired by it under deeds from the Canal & Banking Company, Samuel L. Cohn, L. Milaudon, and John Slidell, who acquired it as set forth in the answers of said banking company, which answers respondent adopts and pleads as its own; that since 1882 its right of way has been over a portion of the land claimed by plaintiff, and it therefore pleads specially the prescription of 1 and 2 years under articles 2630 and 3536 of the Revised Civil Code; finally, pleads the prescription of 10 years under articles 3478, 765, and 3544, *Id.*

George L. Bright, November 2, 1896, filed his demurrer, averring the only land owned by him and claimed by plaintiff consisted of portions of lots 1, 2, 3, and 4 of section 29; that plaintiff's petition showed that he did not claim title to them from the state of Louisiana, but did show he derived title to them by location of a school warrant, subject to approval of the commissioner of the general land office, and failed to allege that said officer approved the same, but did show and aver that he had refused to approve the same, on the ground that said land was not the property of the United States, but that of individuals, who held same under certain French grants.

The Metairie Cemetery Association, November 16, 1896, likewise demurred, averring that the only land claimed by plaintiff, and also by the association, was portions of lots 11 and 12, section 20, and lots 1 and 2, section 29, etc., and further setting forth the same matter as to said lots, and the title thereto under plaintiff's school warrant location, as averred by George L. Bright in his demurrer.

Under these pleadings the case went to trial before a jury November 16, 1896. December 22, 1896, there was judgment, sustaining the demurrers of George L. Bright and the Metairie Cemetery Association, and dismissing the suit as to them. Verdict went for the rest of the defendants, and judgment thereon was signed February 4, 1897. Plaintiff took a writ of error to this court July 13, 1897, on an order of appeal granted the same day, which, being more than six months from the judgment on the demurrer, was held fatal, and the writ of error was dismissed here April 25, 1898. Thus,

these two defendants are eliminated from the case as it now stands. The Howcott Land Company took no writ of error, and hence it, too, is out of the case. The remaining defendants, therefore, are (1) the Canal Bank, as successor of the New Orleans Canal & Banking Company; (2) the New Orleans City & Lake Railroad Company; (3) the Illinois Central Railroad Company; (4) the Louisville, New Orleans & Texas Railroad Company. On December 30, 1896, the New Orleans City & Lake Railroad Company filed a supplemental answer, pleading, in addition to its other defenses, the prescription of 2 years under Rev. Civ. Code, arts. 3536 and 2630, and 10 years under articles 765 and 3544. A mass of documentary proof and oral testimony of many witnesses was adduced on the part of the plaintiff and of all the defendants then before the court, when the court took the case from the jury January 14, 1897, and instructed them to find against plaintiff, and for the Canal Bank, on the ground that it had been proved it had sold, before suit, all the land for which it had been sued, and was not then in possession of any of it, and for the Illinois Central Railroad Company, the Yazoo & Mississippi Valley Railroad Company, and the New Orleans City & Lake Railroad Company, and against the intervener, the Howcott Land Company. Under these instructions the jury brought in their verdict accordingly, and judgment followed, and was signed February 4, 1897. The case is now before this court upon the bill of exceptions and the assignment of errors, which is as follows:

"(1) The court erred in sustaining the exceptions or demurrers of no cause of action, filed herein by defendants George L. Bright, the Metairie Cemetery Association, and the Canal Bank, and other defendants, and in holding that plaintiff did not acquire title under and by virtue of indemnity school warrant No. 3,778, N. S. D., located on lots Nos. 11 and 12, in section 20, and on lots 1, 2, 3, and 4, in section No. 29, township 12 S., range 11 E., S. E. district of Louisiana, east of Mississippi river, containing 196.59 acres.

"(2) The court erred in giving effect to the refusal of the commissioner of the general land office to approve the said location of the said indemnity school warrants, because the land was claimed under alleged grants which were incomplete and had never been recognized by the United States, or any authority thereunder, prior to the acquisition of title by plaintiff; and the court erred in refusing to recognize plaintiff's right and title to said lands under said indemnity school warrant and the location thereof.

"(3) The court erred in sustaining the objections made by defendants to the introduction in evidence on the part of plaintiff of the said indemnity school warrant and location thereof upon the said lands, because the said location had not been approved in consequence of the claim made by defendants that the property was covered by alleged unrecognized French grants; and the court erred in refusing to recognize and allow to be filed in evidence on behalf of plaintiff the said indemnity school warrant, and erred in allowing an alleged and established claim of defendants under alleged, unrecognized, and unestablished French grants to be interposed against plaintiff's rights under said indemnity school warrant and the location thereof upon said lands.

"(4) The court erred in admitting in evidence on behalf of defendants, over and against the objections and exceptions of plaintiff, the burnt and charred portions of alleged leaves of an alleged book of French and Spanish concessions, and in admitting testimony of witnesses relative thereto, and concerning the alleged French grants under which defendants claim title to the lands described in plaintiff's petition; there being no evidence or proof that the alleged French grants ever existed, or that the alleged burnt and charred portions of leaves of the alleged book of French and Spanish concessions were copies from any original, authentic, and lawful grant or concession.

"(5) The court erred in admitting defendants to offer and file in evidence, over and against plaintiff's objections and exceptions, the alleged copy of the alleged French grant of 1757, purporting to contain the certificate of Louis Palms, register of the land office, under date of January 22, 1855.

"(6) The court erred in permitting witnesses produced by defendants to explain and interpret the meaning, purport, and effect of the said burnt and charred portions of leaves of the alleged book of concessions, over and against the objections and exceptions of plaintiff, and in allowing said explanations and interpretations to be given in evidence.

"(7) The court erred in admitting to be offered and filed in evidence by defendants, over and against the objections and exceptions of plaintiff, the document marked 'W,' being an alleged copy of an alleged grant or concession from the government of France by Jean Jacques and Blois de Abadie, and purporting to have been executed under date of the 15th of February, 1764, a date subsequent to the cession of the territory of Louisiana by the government of France to the government of Spain, and at a time while the territory of Louisiana was under the legal dominion of the government of Spain.

"(8) The court erred in admitting to be offered and filed in evidence by defendants, over and against the objections and exceptions of plaintiff, the alleged conveyance from one Louis C. Le Breton, without evidence or proof of any kind of his identity or connection with the alleged Le Breton to whom defendants contended the alleged grants or concessions were made.

"(9) The court erred in giving force and effect to the alleged copies of the said alleged unestablished, incomplete, and unrecognized grants, and in giving force and effect to the testimony which it admitted concerning the same.

"(10) The court erred in refusing to give force and effect to the decision of N. C. McFarland, commissioner of the general land office, dated November 21, 1881, and offered in evidence by plaintiff, and in refusing to recognize the said decision as binding and conclusive against the defendants, and against the validity of the alleged grants set up by them, and as the final termination of the jurisdiction of the land department of the United States, subject to no appeal or review except by the courts in a proper action.

"(11) The court erred in admitting to be offered and filed in evidence by the defendants, over and against the objections and exceptions of the plaintiff, the alleged copy of and the evidence concerning the alleged survey of Don Carlos Trudeau, appearing on its face to be a private survey made in 1791; there being no evidence or proof whatever tending to show that said survey was either authorized or ever recognized by any competent authority.

"(12) The court erred in giving force and effect to the said alleged Trudeau survey and the alleged claim of the defendants based thereon.

"(13) The court erred in refusing to hold that all right, title, and claim in and to the lands described in plaintiff's petition under and by virtue of the said alleged grants, if they ever existed as valid grants, were barred, and the defendants and all persons claiming thereunder are estopped from asserting any claim or title by virtue thereof in and to said lands, because said alleged grants were not reported to the land-office authorities of the United States, or any action taken concerning the same under and in accordance with the requirements of the acts of congress of March 2, 1805, April 21, 1806, and March 3, 1806, and subsequent acts of congress relative thereto.

"(14) The court erred in not giving force and effect to the requirements of the act of congress entitled "An act for ascertaining and adjusting the titles and claims to lands in the territory of Orleans and the district of Louisiana," approved March 2, 1805, the act supplementary thereto, approved April 21, 1806, and the subsequent acts of congress relative thereto, and in allowing evidence of transfers and acts and transactions tending to prove ownership to be introduced in evidence on the part of the defendants by those claiming from and under said alleged grants, to the prejudice of plaintiff's claim and title, and over and against his objections and exceptions.

"(15) The court erred in admitting to be offered and filed on the part of the defendants the alleged last will and testament of Maurice Conway, by act before Brutin, notary public, May 17, 1792, over and against the objections and exceptions of plaintiff, and without proof of the said will ever having been probated or executed, or any action taken thereunder, or of the proof of said will having any reference to the lands claimed in this suit.

"(16) The court erred in permitting defendants to offer and file in evidence, over and against the objections and exceptions of plaintiff, the alleged survey and map, called the 'Grandjean and Pille Survey and Map,' of —, 18—, and in giving force and effect thereto, and the evidence allowed to be produced in connection therewith.

"(17) The court erred in not giving force and effect to, and recognizing and receiving as valid, binding, and conclusive, the Sulakowski survey and map, made under the directions of the land-office department of the United States, after full and public notice given to all claimants to lands within the territory surveyed, including the lands described in plaintiff's petition, which survey and map was approved by surveyor general of Louisiana June 22, 1872.

"(18) The court erred in not holding the action of the land department of the United States in making and approving the said Sulakowski's survey and map as a final termination of its powers of survey, hearing, consideration, and action on the claims to lands within the territory so surveyed.

"(19) The court erred in permitting the defendants to offer and file evidence of any surveys or other action by, on the part of, or under the authority of the land-office department of the United States, or any of the officers thereof, and in conflict or at variance with the said Sulakowski survey, or concerning the lands within the territory of said survey, and concerning the lands described in plaintiff's petition, subsequent to the date of said Sulakowski survey, and the action and decision of N. C. McFarland, commissioner of the general land office, under date of November 21, 1881.

"(20) The court erred in taking from the jury the findings of the facts in the case, and in directing the jury to find and render a verdict in favor of the defendants and against plaintiff.

"(21) The court erred in directing that the New Orleans Canal & Banking Company be dismissed from the case, on the ground that it had been proved that the said Canal & Banking Company had sold, prior to the institution of this suit, all the property for which it had been sued, and that it was not in possession of any of the said property at the time of the institution of the suit."

In our view, the issues presented by the pleadings in this case set forth one general question, namely, was the mass of the lands claimed by the plaintiff public lands of the United States at the time of the passage of the swamp-land grants by congress in 1849 and 1850, or were they at that time so affected by foreign grants that the United States could not convey them to the state of Louisiana under their laws? We have not considered, in the examination of this controlling question, the lands claimed by plaintiff as acquired by him directly from the United States under his school-warrant location, otherwise known as the "Cemetery Tract," and "Bright's Riding Tract," and described by him as lots 11 and 12 of section 20, and lots 1, 2, 3, and 4 of section 29, aggregating 196.59 acres, because, as heretofore stated, they have, by the dismissal of the writ of error as to the Metairie Cemetery Association and George L. Bright, been eliminated from the case as it now stands before us. After this elimination, the right of plaintiff as set forth in the petition to the residue of the lands is derived from alleged sales and patents from the state of Louisiana, and her right is alleged to have accrued under the two laws aforesaid. But it is a fair deduction from the defenses of the remaining defendants, as established by the voluminous documentary proof introduced by them, that such residue of the lands sued for are within the established limits of the alleged French grant of October 6, 1757, and of February 15, 1764, to Le Breton; of the French grants or sales of the 18th of August, 1763, to Joseph Petit, and of the 18th of June, 1766, to Thomas Saulet; of portions of the

old Jesuit grant; of the Spanish grant of 1795 to Jean Baptiste McCarthy; and of the congressional confirmation of the 28th of February, 1823, in favor of J. F. E. Livaudais, which also on its face purports to be a confirmation of a French grant. If, therefore, these alleged grants existed under the conditions and in the status contended for by the respective defendants, and had been lawfully surveyed and located by competent authority anterior to the investiture of title in the state of Louisiana as contended for by the plaintiff, or if their descriptive terms and possession under them in good faith, in the absence of such survey and location, operated a severance from the domain, it follows, as a matter of law, that it was not the intention of congress to grant them as a gratuity to a third party. The provisos and exceptions in the swamp-land grants, clearly manifest the purpose of congress not to impair previously existing rights. If, therefore, the court should be of opinion that the defendants fairly made out the existence and validity of such grants, and that they embraced the lands claimed by plaintiff, it would result that his title failed him in its incipency, without regard to the other and perhaps more difficult questions relating to the title under the grants, possession, good faith, etc. The conclusions we have arrived at on those matters will appear in the consideration of the assignment of errors.

The assignments of error are 21 in number. The first, second, and third assignments need no examination now, as they relate exclusively to the alleged errors committed with reference to that part of the evidence and proceedings affecting plaintiff's right to the cemetery tract and riding park, claimed under and through the alleged school-warrant location.

The fourth, fifth, sixth, and seventh assignments of error may be considered together. They relate to the modes allowed the defendants by the circuit court in establishing the existence, boundaries, and contents of the French grants of 1757 and 1764. It would far exceed the limits of this opinion to do more than review the chief of the modes by which this seems to have been done. We take, first, the grant of October 6, 1757. It was proved by producing in court, from the proper custody, a number of sheets of a record book of ancient appearance, whose edges and corners had been burned, bearing watermarks and stains, containing, in a more or less legible French writing, what purported to be proceedings before the director general of the king of France in the colonies, Jean Jacques Blaise D'Abbadie, including the petition of one Le Breton for a grant of land, and concluding with the formal grant of what had been asked for by the director general, under date of October 6, 1757. This grant was again proved by producing a duly-certified copy, made in 1855 by Louis Palms, then register of the United States land office in New Orleans, taken from a "Register of French and Spanish Concessions" in his office, from pages 54, 55, 56, and 57, inclusive. It was also proved a third time by producing in court the original copy in French, made in 1795, by Armesto, then secretary of the Spanish colonial governor, as taken from the "Book of Concessions" of lands in his charge. The mode of proof of the grant of 1764 was similar.

The defendants produced a copy, duly certified by Louis Palms, register as aforesaid, made by him in 1854, and certified by him as taken from "Book A, No. 1, of French and Spanish Concessions, page 137 of the record" in his office. This grant of 1764 was further proved by producing in court the burned fragments of the record book, etc., as more particularly described in reference to the grant of 1757.

It is thus shown that the mode of proof by the burned fragments of the record book taken from the land office included both grants,—that of 1757 and 1764; that each was likewise proved by the copies certified by Mr. Palms as register; and that the grant of 1757 was further proved, as we have shown, by a copy certified in 1795 by the secretary of the Spanish governor. As the basis for the proof thus afforded, the court ascertained historically that there was, as a part of the Spanish archives of the province of Louisiana, a book, or series of books, called "Registers of Grants," in which memorials and other documents relating to the granting of lands by the Spanish and French authorities had been recorded prior to the delivery of the province, in 1803, to the United States. A reference to White's *Recopilacion* (volume 2, pp. 482-484) shows that such a book or books were so kept, and formed the subject of a correspondence between the Spanish governor, De Lomos, in 1799, and the Spanish intendant, J. V. Morales, when the faculty of granting lands in the province was taken from the governor and restored to the intendant. In the case of *Millaudon v. McDonough*, 18 La. 108, we find a reference to a book of record of French grants, then kept in the land office at New Orleans, and in that case a certified copy of a French grant, made in 1769, was introduced in evidence from the book in question. In the case of *Lavergne's Heirs v. Elkins' Heirs*, 17 La. 227, the language of the supreme court of Louisiana makes direct reference to such a book, saying:

"We have produced before us the original record of complete grants made by the Spanish government, in charge of the proper officer of the United States who is by law the keeper of that description of the archives, obtained from the former sovereign of the country, in which we find a page bearing evident marks of antiquity, and on it, registered in form, a grant to a person bearing the name of the ancestor of the plaintiff; * * * and not the least suspicion of fraud attached to it."

It was further said in that case:

"There has been produced to us a book purporting to be a register of complete grants of land made by the French and Spanish governments in Louisiana, which book is in the keeping of the register of the land office in the city of New Orleans, and is proved to be a part of the archives thereof. As to its authenticity, we have the external evidence which the book itself contains. History and tradition inform us that such a record was kept, and, although it may not contain a complete register of all the grants made by the French and Spanish governments in the province of Louisiana, we are not aware that the genuineness of any recorded in it has been questioned."

Charles H. Dickinson, then United States surveyor general of Louisiana at New Orleans, produced in court an inventory purporting to have been made and certified, May 15, 1861, by Louis Palms, register, of the property then in his office as register, in New Orleans; the first three entries in such inventory showing eight books or reg-

isters of French and Spanish grants as then forming part of the archives of said office. It was then shown by the testimony of several witnesses, without contradiction, that there was a fire in the land office at New Orleans, early in the year 1865, by which the greater part of the records were destroyed; what was left being more or less charred by the fire and damaged by water. One of the witnesses testified that he was a clerk in the office at the time of its destruction, and aided in rescuing a portion of the records, and among them the charred remnants of one of the books or registers, and that he washed and cleaned them; and he identified at the trial the burned sheets containing the record of the grants of 1757 and 1764 as among the papers thus rescued by him. Another witness testified that afterwards, when the land office was reorganized and reopened in the custom house, he saw there, and examined, the burned fragments of the book in question. This testimony, uncontradicted, as it is, entirely satisfies us that there was such a book of record of French and Spanish concessions, kept by the government of Spain, and transferred by that government, with the colonial archives, to the authorities of the United States; that such book went into the custody of the United States land office at New Orleans; that it was partially burned; and that the fragments were properly admitted in evidence as proof of the existence of the grants contained in the leaves referred to.

The fourth assignment of error concludes with the charge that the proof thus made, by the introduction in evidence of the charred portions of the alleged book of French and Spanish concessions, was erroneous, because not preceded by proof that the grant ever existed, or that the leaves of the alleged book were copies from any original, authentic grant. The obvious answer to this is that the proof of the existence of the grants was necessarily involved, and was a part of the evidence as offered, and that the alleged want of authenticity and legality in the grants could only be removed by the grants themselves.

As further grounds for the introduction in evidence of the various copies of the grants of 1757 and 1764, as taken from the archives of the United States land office at New Orleans, it was shown in the arguments before the court that section 4 of the act of March 2, 1805, creating boards of land commissioners in the Eastern and Western districts of the territory of Orleans, made it the duty of such boards of commissioners "to demand and obtain from the proper officer and officers all public records in which grants of lands, warrants or orders of survey, or any other written evidence of claims to land derived from either the French or Spanish governments, may have been recorded." Section 5 of this act requires each board, on its dissolution, to deliver its records to the register of the land office. Such register in each district formed, with the two commissioners proper the board of land commissioners for such district. The land office proper, as now organized in New Orleans, was created by the third section of the act of March 3, 1811, and it was provided that a receiver should be appointed, who, with the register appointed under the aforesaid act of 1805, should constitute the register and receiver

of the land office proper, charged with the sale and administration of the public land. From these statutes we gather that the archives referred to in the act of 1805 were, on the dissolution of the board of commissioners created by that act, delivered to the register under it, and, remaining in his custody, constituted a part of the records of the land office, composed of the register and receiver, as provided for under the act of 1811. This land office continues to this day, with its records in the city of New Orleans, and it was the register of that office, Louis Palms, in 1861, who furnished the inventory of the property in his custody, referred to by us, and which inventory was produced from among the records of the United States surveyor general's office, where it had escaped the fire of 1865, referred to.

From this it would seem that there was ample proof, historical and otherwise, adduced in the circuit court, as the foundation for the secondary proof we have heretofore referred to at large, and under which the defendants established the grants in question. But the proofs contain in themselves much intrinsic evidence of their authenticity. Making due allowance for the errors of translators and copyists, there is a remarkable correspondence between the three sources from which the proof of the grant of 1757 is made. Armesto's copy is certified by him as "taken from the book of concessions of lands that, as secretary of the governor, I have under my charge, from the reverse of folio 54, to the front of folio 57." Palms' copy of the same grant is thus certified: "A true copy of the original record in this office, in the Register of French and Spanish Concessions, in Book No. 1, at pages 54, 55, 56, and 57, inclusive." It is also observable that Register Palms' copy of the grant of 1764 states that it is "taken from Book A, No. 1, of French and Spanish Concessions, page 137, of record in this office." This correspondence, in the paging from which Armesto and Palms took their copies of the grant of 1757, is very suggestive, when we consider that each appears to have had the original book in his lawful custody, that one made his certificate in the year 1795, and the other in the year 1855. It is observed that Register Palms certifies his copy of the grant of 1764 as taken from page 137 of the record, and as we know that the grant and antecedent proceedings of 1757 occupied a good many pages of any ordinary record book, and as we have a right to infer that there were intervening grants made between 1757 and 1764, the imputing of several pages of the record to one and a single page to the other forbids the idea of contrivance or design in these copies. Further: The space between page 57, where the record of the grant of 1757 ceased, and page 137, where that of the other grant began, may fairly be considered as the space which the intervening grants probably occupied in the record.

The proof of the genuineness of the Armesto copy, it seems to the court, was full and satisfactory, and it is difficult to perceive how it could have been better. History informs us that Andres Lopez Armesto was what he certified himself to be in 1795,—the secretary of the Spanish government of the Louisiana colony. The signature to his copy, we think, should be noticed judicially, and it would at least devolve upon the party denying its genuineness the burden of prov-

ing it a forgery. *Hayes v. Berwick*, 2 Mart. (La.) 139; *Davis v. Police Jury*, 19 La. 532; *Choppin v. Michel*, 11 Rob. (La.) 233. But the defendants went a step further, and, considering the great age of the certificate in question, produced the most satisfactory and affirmative proof of its genuineness. They brought into court notarial records of Andrew Hero, among which were a number of original acts purporting to have been executed as authentic acts by the same Armesto, before Brutin, notary public in New Orleans, in 1791, 1793, and 1794; and several witnesses, who testified as experts, proved that the signatures to all these acts were one and the same signature, and signed by the same person who certified the copy of the grant of 1757. This, considering the ancient character of the acts in question, and their public character, was satisfactory proof establishing the genuineness of Armesto's signature to the copy. *Voorhies' Rev. Civ. Code La. arts. 2234, 2236*; *McDonough v. Fost*, 1 Rob. (La.) 295; *Whart. Ev. § 711*; *Greenl. Ev. §§ 21, 570-576*; *Bradner, Ev. 399, 400*.

The seventh error assigned requires special notice. It amounts to an allegation that the grant of 1764 was not properly admissible in evidence because the grantor sovereign, France, had previously transferred "the legal dominion of the government to Spain." We do not understand, if the proof of the grant was otherwise competent, how this objection could do more than go to its effect. But, aside from this, we are of opinion the objection was not well taken, because its allowance by the circuit court would have cut the defendants off from showing, if they could, that Spain subsequently affirmed or recognized the grant, if originally invalid, or that France herself, when she again acquired the province from Spain in 1800, and took actual possession in 1803, had recognized or ratified it. We find that, in another stage of the trial, the clearest proof was administered showing that, in 1791, if not at other times, Spain fully recognized the grant. Allusion is here made to the survey by the Spanish surveyor general, Trudeau, which will be considered hereafter.

In the suit for judicial confirmation of a French grant in Louisiana, dating after the cession to Spain of 1762, and which came before the supreme court in *U. S. v. Pillerin*, 13 How. 9, the objection taken by the United States was the same as that now taken by plaintiff against the grant of 1764,—that the power to grant had previously passed from France by the treaties of 1762 and 1763. In the proof and argument it was sought to be shown that such objection was cured by subsequent acts of recognition and ratification on the part of Spain, and possession and acts of ownership on the part of the grantor and his heirs. Chief Justice Taney, speaking for the court, said:

"But if there has been such a continued possession and acts of ownership over the land as would lay the foundation for presuming a confirmation by Spain of this grant, or either of them, or any portion of them, such confirmation would amount to an absolute title, which, if afterwards recognized by the Spanish authorities, is protected by the treaty, and is independent of any legislation by congress, and requires no proceedings in the United States to give it validity."

This defeated the jurisdiction of the United States district court, and ended the case, because, under the act of the 17th of June, 1844, under which the suit was brought, imperfect grants which needed confirmation alone could be put in suit, while complete ones, which stood protected by the treaty, were not provided for by the act.

As the circuit court and secretary of the interior understood, and as we understand, the grants of 1757 and 1764, it does not materially affect the case of defendants, or at least those of them deriving title under the grant of 1757, whether the grant of 1764 was subsequently validated, or not, by Spain or France, because it is evident, from the translations found in the record (and, if not so, is clearly shown by a mass of competent proof), that the latter grant was in itself only a regrant or confirmation of the prior and larger grant of 1757. These translations, or the best of them, we find on pages 271 and 257 of the printed transcript. The latter grant begins:

"In consideration of the present request, and the certificate of M. Ancelot, engineer of this colony, and by virtue of the authority vested in us by his majesty, we do, by these presents, if not already done, concede to M. Le Breton the land prayed for, to begin from the rear limit of the land occupied by him at the place formerly called the 'Village of the Collipissas Indians,' near the Bayou St. John, bounded on one side by the plantation of M. Desauls-seaux, and on the other side going towards the Tchoupitoulas, adjoining that of M. Chabert, and extending in depth to Lake Pontchartrain, running north and south on its side lines," etc.

The request of Le Breton, on which the patent professes to proceed, has not been produced, nor the certificate of the engineer, M. Ancelot. As we find that the grantee sold and conveyed the land thus regranted or confirmed to him on the 12th of November, 1764, it is a fair inference that he solicited the confirmation to satisfy some objections raised by his intended vendee, Maxent, or for some reason not suspicious and now apparent. These views, in addition to what will be said in treating the eleventh assignment, relating to the Trudeau survey of 1791, are sufficient to dispose of the fourth, fifth, sixth, and seventh assignments of error. We think none of them are well taken.

The eighth in the series finds error in the admission of the conveyance from Le Breton to Maxent of the 12th of November, 1764, without proof that the vendor was the same Le Breton to whom the grants were made. Under the view we have taken of the material issues in this case, we fail to see how the admission of this deed could prejudice the plaintiff, even if we should assume as a fact that the Le Breton of the grant was not the Le Breton of the notarial act. Plaintiff, having brought ejectment for the land alleged to be in the possession of the defendants, could recover only by establishing title in himself, not by showing the want of it in the defendants. *McMaster v. Stewart*, 11 La. Ann. 546. Such is the fundamental rule in the state and federal courts in Louisiana, if not in all the common-law states. Code Prac. La. art. 44; *Buras v. O'Brien*, 42 La. Ann. 527, 7 South. 632; *Thompson v. Meyers*, 34 La. Ann. 617. Tested by this controlling principle, if the defendant succeeded in proving the existence, validity, and location of the grants

of 1757 and 1764, or the former of them, the source of title as set up by plaintiff under the grant in 1849 and 1850 by the United States to Louisiana would fail, whether Le Breton conveyed the land to Maxent or not; that is, his title would fail to the extent it was shown to be in conflict with the prior grant. The assignment seems to overlook this principle and to proceed on the theory that, if the deed to Maxent should fail, as so remote a link in the chain of title connecting the Canal Bank and the New Orleans City & Lake Railroad Company with the grant of 1764, such hiatus would in some way operate to prejudice the foreign grants. We think this an error, and in that view repeat that the admission of the deed did not prejudice the plaintiff.

But the intrinsic proof of the identity of the two persons, furnished by the two grants and the deed, is very strong; at least, sufficiently so to have devolved upon the party who denied it the burden of showing differently. In the first place, it is to be observed that Le Breton was a planter of considerable landed property, fronting on the river and extending northward to the lake, being described in the grant of 1757 as "the counselor, assessor of the superior council of the province." In the next, it is undeniable and undenied that the Le Breton of the grant of 1757 was the Le Breton of 1764. In the next, the sale made shortly after, before the royal notary, Garic, refers to the vendor as "counselor at the court of Paris," and one of the parties to the sale was La Freniere, the attorney general of the king, acting as undertutor for one of the minors Le Breton. The petition on which the grant of 1757 was made had set forth that Le Breton had married Marguerite De La Freniere, daughter of a La Freniere deceased. The sale, further, appears to have been made under a decree of the council, by virtue of a family meeting duly homologated. It is well known and well established that the royal notaries in New Orleans, at that time, required the vendor of lands to produce his title before passing formal and authentic conveyances. The sale, too, was for a large sum for those times, \$10,000, if we may trust the translations, and possession went with it. The assignment assumes that, notwithstanding all these circumstances and environments, the vendor in the deed of the 12th of November, 1764, was not the grantee in the grant made only nine months before. This involves, if we properly understand the objections, a successful imposition, practiced, not only on the vendee, Maxent, but also on the notary, the king's attorney general, the deputy attorney general, and the witnesses. All are said to be of the same residence, the town of New Orleans, then a small place, in which persons of any consequence must have been personally known to each other. In every view we can take of it, this assignment must be considered as not well taken.

The ninth assignment seems to present nothing we can pass upon. The error complained of is to the force and effect given by the circuit court to the grants, and to the testimony affecting them, after such grants and testimony had been admitted in evidence.

The tenth assignment has no force in it. It alleges error in the court's refusing to give controlling effect to the decision made by

the commissioner of the general land office on November 21, 1881, as conclusive against defendants and the grants set up by them, as a final determination by the land department of the United States, subject to no appeal or review except by the judicial tribunals. This doctrine overlooked the fact that the decision was only one of a series of decisions and rulings in the executive tribunals, beginning in 1875 and ending in 1887, progressing by regular appeals from that one, presided over by the register and receiver, in New Orleans, to the higher one in Washington, presided over by the commissioner of the general land office, and by appeal from him to the ultimate appellate one, at the head of which we find the secretary of the interior, the immediate representative of the president. These tribunals, both as to jurisdiction and practice, are created and regulated by statutes and rules of procedure, the fruit of long usage and custom. Rev. St. U. S. tit. 11, cc. 2, 3. The error alleged is, in effect, that these statutes and rules, and the established practice under them, gave to this intermediary decision of the head of the general land office a status of exclusiveness and finality which the circuit court denied. But the objection overlooks the fact that the very court rendering the decision allowed an appeal to the secretary of the interior, and that an appeal was taken in due time, and resulted in the controlling decision of the head of the department, of January 18, 1884, which overruled in toto the former one. Thus these tribunals, which, we presume, understood the law and practice applicable to the question, virtually condemn the position now taken by the plaintiff. We might add that a careful examination shows the decision was not intended to be final, because of its concluding sentence, and from the further reason that the record as then made up did not seem to justify a final adjudication. We think, therefore, that there was no error in the refusal of the court to give the ruling the effect contended for, and that the assignment was not well taken.

The eleventh and twelfth assignments may be considered together, the twelfth necessarily failing if the eleventh was bad. It presents the question whether the court erred in admitting the *procès verbal* of the survey by Trudeau, in 1791, of the lands as granted in 1764, and the evidence of the experts, explanatory of it, without proof that it was authorized or recognized by competent authority; it appearing on its face to be only a private survey. If we can trust the translation of this *procès verbal* of field operations as found in the record, we think it contains within itself proof that, if not begun by public authority, it was continued and finished by the express authority of the civil and military governor. It professes to be an operation carried on along the high and open land fronting the Bayou Metairie, for the purpose of fixing the front and side lines, on that stream or ridge, of the 20, the 5, the 2, and the 2 arpents, respectively sold by Almonaster to Pedro Langliche, Pedro de Mouy, Inez, and Mathew de Veau. Almonaster had bought the Vacherie tract proper, or the grant of 1764, from the Order of the Capuchin Monks, who had bought from Maxent, who, as we have seen, bought from Le Breton in 1764. The sales from Almonaster, in point of date, seem to have begun on the west side of the tract, proceeding

towards the east, the last sale being to Maurice Conway of what was left, estimated in the sale to be from 16 to 21 arpents. After giving to each of the prior vendees his fixed front on the ridge, the surveyor reached the plantation of Conway, and found the residuum to be only 10 arpents and a little over, instead of the 16 to 21 which Conway had bought. This led Conway to oppose further proceedings, and thereupon, on that day, the 21st of February, the work having begun on the 16th, the procès verbal informs us the whole matter was referred to the governor. "I refuse to continue the proceedings until his excellency shall determine them." It further informs us that on the 16th of March a decree or decrees were rendered, under which the survey was completed, and the rival claims of the vendees of Almonaster adjusted. The survey purports to be made by Carlos Trudeau, Esq., "royal and private surveyor of the province of Louisiana," but he signs himself, simply, "Carlos Trudeau, Surveyor"; and, but for the circumstance of the action of the government we have referred to, it would appear obnoxious to the objection made by the plaintiff that it was but a private survey. But it is evident that the survey has been respected and enforced in various ways by the surveying and land authorities of the United States, and was closely adhered to by the officers of the interior department in surveying and establishing the grants of 1757 and 1764, under the decisions of the secretary of the interior of 1884 and 1887, which we will refer to hereafter.

It would far exceed the proper limit of this opinion to advert to all the mass of authorities, direct and indirect, contained in the record and in the reports of land commissioners and acts of congress confirming them, recognizing and enforcing this Trudeau survey. One or two references must suffice. An examination of the Sulakowski survey of 1872, under which the rights of plaintiff are alleged to have arisen, will show that he gives the fronts on the Metairie ridge of the claims of Francois Duville, Angelique Ory, Joseph Beaulin, Narcisse Lasse, Marie Pierre Dumovir, Jean Louis Beaulin, and Hazeur Bros. an aggregate width of about 83 chains, while in Trudeau's survey the same fronts of the same claims were given an aggregate distance of 27 arpents, which in American measure is equal to about 79 chains; while the difference between the fronts of the claims of Dauville Ory and Marie Joseph Beaulien, as given, respectively, by Sulakowski and Trudeau, amounts to the insignificant distance of $\frac{54}{100}$ of an arpent, or about 100 feet. The aforementioned vendees of Almonaster, and others to whom they transferred their rights, or portions of them, obtained confirmations for their respective portions by presenting their pretensions to the boards of land commissioners, and we find in these reports references to this Trudeau survey. In the report of the board, dated September 5, 1833, on the claim of Francois Dauville, which we find on page 676, vol. 6, of American State Papers, we see it stated:

"The said tract of land originally formed part of the tract surveyed in the year 1791 by Don Carlos Trudeau, in favor of Pierre Langliche."

And, on the same page, the board, in passing on the claim of Angelique Ory, No. 26, says:

"The said tract of land is part of a larger tract of 20 arpents, formerly owned by Don Almonaster y Roxas, who conveyed the same to the late Pierre Langliche, a free colored man, on the 1st day of October, 1787, in favor of which latter it was regularly surveyed by Don Carlos Trudeau, surveyor general of the late province of Louisiana, on the 19th day of March, 1791."

In passing on the claim of Jean Louis Beaulien (same page of the State Papers), the board says:

"The said tract of land originally formed the upper moiety of the tract formerly owned by Don Mateo Devo y Inez, in whose favor it was regularly surveyed in the year 1791 by Don Carlos Trudeau, surveyor general of the late province of Louisiana."

All of these claims were confirmed, on the reports of this board, by the acts of congress of March 3, 1835, and July 4, 1836. They were all sustained before the board on the surveys made by Trudeau, either in 1791 or later, as the reports show; and subsequent surveys by Sulakowski of these derivative claims, and later by Grandjean and Pilie, as portions of the grants of 1757 and 1764, the title to each portion tracing back to the sale from Almonaster and others, leave no doubt in our minds that the parent survey by Trudeau, now under consideration, has been in the amplest manner, as stated above, recognized and enforced by the competent authorities of the United States. We think, on the whole, that the survey was properly admitted; and, this being so, it was entirely competent for the court, if not absolutely necessary to its intelligent understanding, that it should be explained, with reference to the adjacent surveys and locations, by the experts, Pilie and others, who were examined as witnesses for that purpose. The survey seems to have been produced from a custody not suspicious, but one from which we would naturally expect such a document to be produced, viz. the United States land office in New Orleans, the successor of the board of commissioners who passed upon the claims which we have referred to as confirmed by the acts of 1835 and 1836. Those reports, referring, as we have seen, in several of the claims, to this survey, it is reasonable to suppose that one or more of the claimants filed it in support of their contention, thus making it a public document, belonging to the records of the office, whence it was produced at the trial by the register of that office, Dr. Brumby, in response to a subpoena duces tecum, requiring him to produce it. Upon the whole, we are well satisfied, considering the ancient character of this instrument, and the difficulty of adducing primary proof of such ancient transactions, that the procès verbal was properly admitted in evidence, with the evidence of the experts explanatory thereof.

We therefore pass to the thirteenth assignment. This thirteenth assignment finds error in the circuit court's refusing to treat the foreign grants pleaded by the defendants, and their rights under the same, as void, on the ground that the grants themselves had never been presented to the authorities of the United States for confirmation, and had never been confirmed in pursuance to the acts of congress of March 2, 1805, of April 21, 1806, of March 3, 1806, and later acts. This objection is broad enough to cover all the foreign grants we have referred to, pleaded by the various defendants, and is so general in its terms that it is difficult to apply it or to consider it intelli-

gently. To illustrate our meaning, we refer to the grant to McCarthy of 1795, and the grant to Livaudais,—or, at least, to the grant under which he claimed,—both of which, we have seen, were confirmed by congress. As the exception and assignment do not distinguish between the grants which have thus received the confirmation of congress and those which have not, we feel warranted in disregarding it. However this may be, it is very clear that it is drawn in disregard of the pleadings and the proofs in the record, which show that all the other grants to which the assignment can possibly refer appear to be complete, perfected grants, emanating from the foreign governments from which the United States acquired the province of Louisiana, and which, under the treaty of cession, were respected as private property without the necessity of congressional or other confirmation on the part of the United States. This doctrine of the binding force and effect of perfect grants is so well established that few authorities are needed in support of it. See *Lavergne's Heirs v. Elkins' Heirs*, 17 La. 227; *Riddle v. Ratliff*, 8 La. Ann. 106; *Murdock v. Gurley*, 5 Rob. (La.) 457; *U. S. v. Percheman*, 7 Pet. 51; *U. S. v. Wiggins*, 14 Pet. 334; *Fremont v. U. S.*, 17 How. 542; *Maguire v. Tyler*, 8 Wall. 650; 4 Op. Attys. Gen. 643–713. We do not find that the special acts of congress, referred to by the assignment, countenance the doctrine contended for. While they required confirmation by congress of incomplete and inchoate titles emanating under the former sovereigns of the province, as a condition precedent to their recognition by the executive officers of the government, and their enforcement in the federal courts when brought in question, they utterly fail to exhibit any intention on the part of congress to subject to this requirement, under the penalty of forfeiture, completed titles like those in question. Such required no action at the hands of the new sovereign to give them validity and standum in *judicio* in the federal tribunals. All that the government of the United States could have done, and all we believe they have ever claimed the right to do, with respect to such grants, was to survey them or resurvey them, under the United States system, to give them designations and connections with other surveys, in order that they might be protected and distinguished from other claims, and from the public lands adjacent to them. It is apparent that, if the grants in question were any grants at all, they were completed and perfected under the governments creating them, and no principle of justice or of expediency required that the parties holding under them should proceed, as the plaintiff suggests, under any laws of congress, with a view to confirmations of rights which were already sacred under the treaty of 1803. We, therefore, are all agreed that this assignment is not well taken.

The fourteenth assignment seems to be the same matter in a somewhat different dress, and means the same thing; and we therefore answer it in the same way. We might say, in conclusion, on this subject, that sections 4 and 5 of the act of March 2, 1805, and sections 2 and 3 of the act of April 21, 1806 (two of the laws referred to in the assignment), so far from manifesting any intention to require claimants under complete grants to have their claims confirmed by congress, bear a contrary construction. We fail to find any law dated

March 3, 1806, referred to in the assignment, on the subject of private land claims.

This brings us to the fifteenth assignment of error, which alleges error on the part of the circuit court in admitting in evidence the copy of the last will and testament of Maurice Conway, executed May 17, 1792, before Brutin, notary, without proof that the will had been probated or action taken under it, or proof that the will has reference to the lands claimed in the suit. We see no force in this objection. If it was wrong to admit the evidence, as we have heretofore shown with reference to the eighth assignment, we do not perceive how it could prejudice the case of the plaintiff. The will and proceedings under it could in no way aid or impair the grants opposed to the plaintiff, and which, if valid and proved to embrace the lands claimed by him, would have the effect of defeating the title of the United States in and to the same, and prevent their conveyance to the state of Louisiana under the swamp-land grants through which the plaintiff claims. But, if it were otherwise, we think, considering the ancient character of the will, and the long line of possession of the property in question under it, it was properly admitted in evidence. It has stood as a muniment of title to lands of great value for at least 100 years; and the deeds adduced in evidence by the defendants, tracing title back to this will, uniformly show extensive improvements on the land, together with acts of possession and ownership, all of which are consistent with the presumption that the will was duly established, and inconsistent with any other presumption.

We pass to the sixteenth assignment. The error here assigned, as we understand the objection, is to the admission on the part of defendants of the survey and maps of the grants of 1757 and 1764, made by Grandjean and Pilie, under the definitive decisions of the land department recognizing those grants and requiring their survey and location. This assignment may properly be considered in connection with the seventeenth, eighteenth, and nineteenth, all of which relate to the same subject-matter, and call in question the validity of the government's action, through its land department, in canceling and annulling thereby the survey of Sulakowski, and establishing in its stead the survey known as that of Pilie and Grandjean. Under these assignments, then, the whole proceedings of the interior department, beginning, as we understand it, with the petition of the Canal Bank, in 1875, for the recognition of the grants under which it held, and ending with the final cancellations, in 1887, of the swamp-land selections in favor of the state of Louisiana, are brought up for review. At the outset it is well to observe that it is not claimed by the defendants—at least, not by the principal defendant, the Canal Bank—that these proceedings have any controlling effect in the federal judicial tribunals, except in so far as they have fixed positions, quantities, and relations to other grants and the public lands, of the grants which have been surveyed under them. As it is expressed in one of the briefs for the bank:

"The proceedings, we contend, are conclusive, and beyond review here, so far as they have fixed the boundaries, connections, and contents of the foreign grants in question, but are subject to such review, so far as they recognize

the existence and validity of said grants, and the rights of defendants under them. In other words, we think the survey of the grants by the appropriate federal executive authority concludes the court, in the absence of fraud or mistake of fact, from going further, and that the action of the executive authority in canceling the entry, selection, and location thereof, and maintaining the rights of the Canal Bank and its vendees under the alleged foreign grants, should control the court only so far as reason and authority will sustain them."

Under the authorities, and from reason and necessity, we think this is a correct view of the law, and, except under particular laws, such as the act of March 3, 1851, relating to California, and the act of the 26th of May, 1824, relating to Missouri and Arkansas, and a few others, the judiciary have never attempted to control, or been thought competent to control, the survey and location of foreign grants of land; and even under these exceptional statutes the surveying department of the government seems to have proceeded, in the survey and location of grants previously confirmed by the courts of commissioners under the acts, with the same discretionary and exclusive authority as to fixing the boundaries, quantities, etc., as they would have done in the case of grants confirmed by acts of congress or by treaty. In the cases of *Magwire v. Tyler*, 1 Black, 195, and *Cragin v. Powell*, 128 U. S. 699, 9 Sup. Ct. 203, these principles were recognized and enforced. But in the later case of *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258, the point came up. The question, or one of the controlling questions, was as to which of two surveys of a private claim to land, having a foreign origin and confirmed under the above California act of 1851, should prevail,—the first one having been approved by the surveyor general of California and by the commissioner of the general land office, and no appeal taken to the head of the department to cancel or reform it; the second and last having been made under the express direction of the secretary of the interior, under his general supervisory authority as the head of the department. The facts of the case bear close relation to the case at bar, so far as the conflicting surveys of *Sulakowski* and of *Grandjean* and *Pilie* are concerned. But the opinion of the supreme court in the strongest language vindicated the authority of the secretary to annul the survey deemed by him erroneous, and to prescribe the mode in which another should be made to supersede it. The report of the case (pages 177–181, 142 U. S., and pages 262–264, 12 Sup. Ct.) reviews at much length all the different authorities, and it is sufficient to say that, in our view, they leave not a doubt that the authority of the secretary to annul the *Sulakowski* survey, and make another in its stead, was ample. In a still later case, involving the federal survey of a French grant in Louisiana, made April 3, 1769, the supreme court refused to control, by injunction, the secretary in changing the survey approved by the commissioner of the general land office, and, by a new survey, throwing out part of the land, as public domain, included in the first one. See *New Orleans v. Paine*, 147 U. S. 264, 13 Sup. Ct. 303. It was stated by the supreme court in the California case, speaking of the rival surveys therein involved:

"We conclude, on this branch of the case, that the secretary of the interior had ample power to set aside the *Stratton* survey, and order a new survey by

Von Leight, and that his action in such matter is unassailable in the courts in a collateral proceeding. The Von Leight survey, therefore, must be held as a correct survey of the pueblo claim, as confirmed by the circuit court."

The instructions and contract, introduced into this record by the industry of counsel, under which Sulakowski made his survey, ignoring the various grants, or portions of them, and returning them as vacant public lands, together with the information, direct or indirect, about those grants, which we know from the record was within his reach, if not in his official custody as a government officer, demonstrated beyond controversy that the survey was grossly erroneous, if nothing worse, and that it should have been canceled quoad its interference with private property. Granted that there did exist the foreign grants in question, and that proof was accessible of their boundaries, locations, etc., it would have been a strange condition of law that would have denied the power in some department of the government to correct the mistake. The correction, or, in other words, the proceedings complained of in the assignment now under review, were not *ex parte*, and without full trial or argument, as we gather was the case in the action of the secretary sustained by the court in the California case we have cited; but, as we learn from the record, they have been fairly and regularly carried on contradictorily with the state and her vendee, Dr. Smyth, the plaintiff, from first to last. Every step seems to have been stubbornly contested upon one side or the other by astute and able counsel, and we are struck by the ability and thoroughness revealed in the various decisions of the executive officers, as well as the research and talent characterizing the briefs of the attorneys who conducted the battle. In this connection we observe from the record (printed transcript, page 391) that, in trying the case as made by the petition of the bank in 1875, the register and receiver had, in 1885, before them, sent from the department in Washington, 79 documents or different items of proof which had been before the secretary when he made his decree of January 18, 1884. If fraud or ill practice, or imposition on the officers of the government had been shown against the good faith and regularity of the proceedings complained of by the plaintiff, the case might be different. Such proof would at least have caused a suspicion against what otherwise seems to have been fair and regular. In the absence of such proof, and even allegations of that nature, the court deems itself powerless to question the surveys by the government of the grants in question. As to the validity of such grants themselves, and their binding effect under the treaty, those are different questions, and are certainly in this proceeding open to review, and the findings of the executive authorities, as shown by the record, on these subjects, can have no other effect here than such as their reason will justify.

Before leaving these assignments (16, 17, 18, and 19), it may be proper to state the view we take of the law involved in the annulment of the state patents under which the plaintiff holds part of the land claimed by him, which must result if the judgment of the circuit court be affirmed. We take it to be well settled that, in an action in ejectment in the federal courts, which is an action at law,

where the plaintiff sets up a patent or any other grant from a state, it is competent for the defendants to defeat the patent or grant by showing, by competent proof, entire want of title in the grantor thereof. In this case the defendant is not required to go to equity to obtain relief, but may meet the case of the plaintiff by showing that the thing granted was not in the grantor, or that the officer pretending to grant had no authority in law to make it, or that the land granted was reserved from sale or any other mode of disposition. The leading, and perhaps earliest, decision on this point is that of the supreme court in *Polk's Lessee v. Wendell*, 5 Wheat. 293. It was said:

"But there are causes in which a grant is absolutely void, as where the state has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law."

A later and more pointed decision, perhaps, is that of the supreme court in the leading California case of *Wright v. Roseberry*, 121 U. S. 519; 7 Sup. Ct. 985. In that case the court annulled and set aside patents of the United States, issued in 1866, 1867, 1868, and 1871, for public lands purchased under the pre-emption laws of the United States, on the ground that, by the swamp-land grant of the 28th September, 1850, the lands had passed to the state of California, beyond the jurisdiction of the officers of the United States, and had ceased, by the mere operation of the swamp-land grant itself, to be United States land, subject to their laws and control. The general law on the subject was thus laid down:

"The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact, which may be established in an action at law as well as in a suit in equity. When we speak of the conclusive presumptions attending a patent for land, we assume that it was issued in a case where the department had jurisdiction to act, and executed it; that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if congress had made no provision for their sale, or had reserved same, the department would have no jurisdiction to transfer them; and it is an admitted consequence that they would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal, not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it is incompetent to act."

And it was added:

"A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed."

The court then cites Polk's Lessee v. Wendell and many other analogous cases not necessary now to be reviewed by us. This case of Wright v. Roseberry determined the fact that the swamp-land grant of 1850 was a grant in præsent, and that it acted upon lands as then affected by law, and that the subsequent change in the legal status of any land would not bring it within the grant. If this is so, as to the swamp-land grant of 1850, it must needs be so as to that of 1849. These authorities amply sustain the jurisdiction of the circuit court in the instant case to disregard and annul the state patents under which plaintiff claims; and, if such power extends to the patents themselves, it needs no argument to show that it likewise extends to the certificates or receipts under which plaintiff holds, and on which patents have not yet issued to him. The authorities, also, we think, necessarily sustain the power of the circuit court to annul "the lists of selections" in favor of the state, even if they had not been stricken with nullity by the secretary of the interior and his subordinates of the land department. We can, therefore, see no force in the assignments under consideration, and proceed to the others.

We take up the twenty-first assignment, and will conclude with the twentieth after disposing of it. The error complained of in the twenty-first is that the court erred in dismissing plaintiff's petition as to the Canal & Banking Company, on the ground that it had been proved the bank had, before the institution of the suit, sold and conveyed all the property involved, and that it was not then in possession of the same. We see no error in this action of the court. If the evidence satisfied the court of such facts, then, under the laws of Louisiana and the practice in an action of ejectment, it was equivalent to finding that a mistake had been made in bringing the action against the bank in the first instance. We refer to what we have previously said as to the action of ejectment in the federal courts, and the laws and practice controlling same. The assignment proceeds on the assumption that it had been proved that the banking company, at the time of the institution of the suit, was not only without title to any of the lands claimed of it, but was not in possession, and, on the contrary, had sold all of said property. Assuming these things to be true, we can see no error in the court's dismissal of the case as to that defendant.

We pass to the last assignment, No. 20, which presents the broad question whether the circuit judge erred in taking the issues of fact from the jury, and directing a verdict in favor of defendants and against the plaintiff. The evidence, documentary and otherwise, administered in the circuit court and presented in the ponderous transcript in this case, on the part of defendants, and the documents, surveys, maps, etc., sent up in the original, so far as we have been able to examine them, seem to be in the main one-sided, and not to have been contradicted or varied by any proof administered on the part of the plaintiff. Considering the remote date at which the transactions took place constituting the titles of all the defendants, the loss of records by conflagrations, and death of ancient witnesses, we are free to say that evidence of the existence, validity, and loca-

tion of all the foreign grants to which any of the defendants have traced title, both documentary and oral, has been, in matters of force and conclusiveness, greater than is usually met with in trials of this nature. The importance of the issues involved, the great value of the properties at stake, the long duration and stubbornness with which the proceedings, both before the land department and in the courts, have been conducted, and the remarkable industry of the respective parties in getting their proof, is accountable for this. We think, with the circuit judge, that if the proceedings in the land department were to be given full force and effect, there was, without going further, little left of the plaintiff's case. It depended, as we have endeavored to point out, upon his ability to show that the lands involved (at least, after the elimination from the case of the cemetery and riding-park lands) were public lands of the United States in 1849 and 1850, and as such passed by the swamp-land grants of those years to the state of Louisiana, under whose patents and inchoate titles he claimed. Failing in this, it is our view that the defendants were entitled to judgment, even without showing title in themselves or possession. We seek in vain through the record for any testimony, documentary or otherwise, administered by the plaintiff, seriously contradicting the material proof as administered by the defendants, the controlling character of which led the circuit judge, who must have given it closer attention than we have been able to bestow upon it, to take the case from the jury and direct the verdict he deemed just. In the absence of such contradictory proof, we fail to see how the circuit judge could have done otherwise. In *Schofield v. Railway Co.*, 114 U. S. 618, 5 Sup. Ct. 1127, the supreme court laid down the general rule on this subject as follows:

"It is a settled law of this court that, when evidence given at a trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for plaintiffs, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant,"—citing the following authorities: *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasants v. Fant*, 22 Wall. 116; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433; *Baylis v. Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. 494.

Some of the proofs administered by the plaintiff, instead of contradicting that of the defendants, on close examination are found rather to make for the defendants. Reference is here made to the copy of the special instructions to Sulakowski, dated June 7, 1871, under which he made his survey, introduced by the plaintiff. These instructions, found on pages 493 and 496 of the printed transcript, show that it was the duty of Sulakowski to have surveyed the grants as such, instead of surveying them as public lands, and that the records of the surveyor general and of the land office, both in New Orleans, and within his reach, contained in large measure evidence of the existence and location of the grants, and that they were situated within his field of operations.

An effort was made by the plaintiff, in his argument before this court, to show that the true situation of the grants to Le Breton

was further up the Mississippi river than the surveys of Pilie and Grandjean represent them to be; and this on the ground that the decretal part of the grant of 1757 states that the plantation of the petitioner, of 32 arpents front on the river, in the immediate rear of which both the grants were to be situated, was about 2 leagues distant above and on the same side with the city of New Orleans. The petition for the grant states the distance at about $2\frac{1}{4}$ leagues. The league here meant was certainly the French league, a lineal measure of use in the province in measuring long distances. From the report of the commissioner of the general land office for the year 1869 (page 406) it appears, from a table of comparative French and American measures there given, that the French league was equal to 84 lineal arpents, or 245 of Gunter's chains. As the arpent was about 64 English yards, the league meant would have been about 5,376 yards, and the 2 or $2\frac{1}{4}$ leagues about 10,752 yards or 12,140 yards, respectively. As the total of these distances amounts to not quite 7 miles, and it was assumed that the present distance by the river was much greater, therefore the contention was that the true position of the grants, as shown by the instruments themselves, should be further up the river. If this argument was worth anything, the very reverse of this proposition would be the case. But the ready reply to all inferences drawn from this assumption is that we do not know whether the straight distance through was meant, or the distance along the bend of the river; nor do we know from what point in the city, nor to what point of the front of the plantation, it was to be taken; nor can we assume that, if the distance by the river was meant, it is the same now, or anything near the same, as it was 140 years ago. The argument, if sound, would upset, not only the survey of Trudeau, made contemporaneously with the grants themselves, and the surveys of Pilie and Grandjean, but also that part of the Sulakowski survey locating the claims of the various persons de-raigning title under Almonaster, whose claims were confirmed, as we have seen, in 1835 and 1836. Thus, the theory, if good, would impeach the very survey under which plaintiff claims. It is doubtful if Spain or France, at that early date, ever made two grants whose calls for boundary were more specific and unmistakable, and in the survey of which there is so little room for discretion and doubt on the part of the surveyor. The triangular-shaped tract, beginning 40 arpents from the river and immediately in the rear of the 32-arpents tract on the river, was to be bounded, above and below, by the extension of its "limits," until they extended to the southern boundary of the Vacherie tract. By "limits" or the "lines of the limits," the side lines were meant, as distinguished from the front and rear lines. The calls for boundary, as to the rectangular tract, also granted by the patent of 1757, and regranted in 1764, were even more specific. The lake was to be the north boundary, the prior surveys of the grants (40 arpents in depth) fronting on the Bayou St. John were to form the east boundary, the southern one was to be 60 arpents from the lake, and the western one to be 53 or 54 arpents from the eastern, and to run north to the lake. The government surveyors and experts, examined as witnesses in the case,

seem never to have entertained any doubt about how to locate these calls. If the subject were open for a review here, we think there would be no difficulty in sustaining the locations as made by the government. But, as we have heretofore stated, the survey executed by competent officers of the interior department, after the fullest investigation and deliberation, unimpeached, as it is, for fraud, mistake, or ill practice, seems to us to be conclusive, so far as it fixes the locations, boundaries, and contents of the grants.

No effort has been made, so far as we can perceive, here or in the circuit court, to defeat or question the McCarthy grant, the Livaudais grant, or the Jesuit grant, or the sales of parts of it, or to question the surveys or locations of any of them. We therefore place them on the same plane of authority and validity, in defeating the swamp-land grant to the state, as we have shown the Le Breton grants are entitled to. While it is the well-established doctrine in all cases of this character that the plaintiff must recover on the strength of his own title, and not on the weakness of that of the defendant, the plaintiff's brief is wonderfully silent on this subject. Throughout the six printed pages of plaintiff's argument we look in vain for some allegation that the plaintiff had a good title, some explanation of how he could have any standing in court, after the entries, patents, and all proceedings under the survey made by the deputy surveyor in 1872 were canceled and set aside by the land department of the United States, thus destroying any and all basis for the maintenance of his suit. But, notwithstanding this, he turns his back on his own title, and proceeds to attack that of the defendants, alleging, *inter alia*, that the French grants of October 6, 1757, and February 15, 1764, are of no validity, are insufficient, and were improperly located, and by assignments of error Nos. 4, 5, 6, and 7 contends that the evidence admitted at the trial to prove same was illegal and inadmissible.

In any view of the case, we fail to see how the plaintiff can recover. If we should go beyond the foreign grants, shown to have appropriated as private property the same land conveyed by the state to the plaintiff, even before the existence of the United States as a nation, we would be constrained to sustain the title of the defendants under the laws of prescription they have all pleaded, and in support of which have administered satisfactory proof of long possession and enjoyment under acts translatif of property. We think it plain that the judgment of the circuit court should be affirmed, and it is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

BACK v. EMPLOYERS' LIABILITY ASSUR. CORP., Limited.

(Circuit Court, D. Oregon. May 6, 1899.)

No. 2,519.

INSURANCE—AGENCY OF SOLICITOR—EFFECT OF NOTICE TO AGENT.

One who, after he had ceased to be the regular agent for an accident insurance company, continued to solicit and procure renewals from patrons of the company whom he had previously insured, taking out a commission from the premiums paid, which renewals were accepted by the company, must be considered an agent of the company in the transactions, and not of the insured; and his knowledge of the usages of the occupation in which a person insured is shown by his application to have been engaged is binding on the company.

Action by Seid Back, as guardian of Go Won, against the Employers' Liability Assurance Corporation, Limited, to recover on a policy of accident insurance.

John H. Hall and W. T. Hume, for plaintiff.

C. E. S. Wood, for defendant.

BELLINGER, District Judge. This is an action upon an accident policy issued by the defendant company, whereby it insured a Chinaman named Go Boo for the sum of \$5,000, covering a period of 12 months from April 14, 1898, against bodily injuries, etc. Go Boo was killed soon after the issuance of the policy, in an accident in the cannery of the Fidalgo Island Canning Company, at Anacortes, in the state of Washington, where he was engaged as a Chinese merchant, and superintendent of Chinese labor employed in said cannery. In the application for the policy, Go Boo described his occupation as that of an importer and dealer in Chinese merchandise, and contractor for Chinese labor. The premium paid upon this policy was \$37.50. The defense is that Go Boo, at the time of the injuries from which his death resulted, was engaged in more hazardous occupation than that described in his application, to wit, the occupation of foreman of Chinese labor employed in the said cannery; and it is alleged that if the defendant had known the true facts and conditions and circumstances as to the occupation and employment of the said Go Boo at the time of the issuance of said policy, or that said Go Boo would thereafter engage in a business other and more hazardous than that described in the application and in said policy, it would not have issued said policy of \$5,000, except upon payment of a much larger premium. The plaintiff meets this defense with the contention that Go Boo at the time of his death was not engaged as foreman of the Chinese laborers employed in said cannery, and that the superintendence, so far as it went, in which he was engaged, was a part of the business described in the application on which the policy was issued, to wit, that of contractor for Chinese labor; and, further, that U. K. Arnold, through whose agency the policy was obtained, was the agent of the company issuing the policy, and knew that it was a part of Go Boo's occupation, and that he intended to act in the capacity of superintendent, foreman, or overseer in the cannery, —at least, that he was told so either by Seid Back or by the insured

himself. The policy was a renewal of a similar policy issued by the company upon an application made through Arnold the previous year. I am of the opinion that Arnold, in the procuring of this policy, was acting as the agent of the company, and not of the insured, and that the company is bound by the knowledge which Arnold had of the usages that existed among Chinese contractors, and of the purpose of the insured to supervise the laborers employed through his agency. Arnold had been the agent of the company prior to the issuance of the first policy, and had the names of a number of Chinese patrons in his possession, from whom he solicited business after the new agent was appointed, and he acted as intermediary between the insurer and the insured in the procuring of the policies to be issued. It was his habit to go around among these Chinese patrons and solicit their renewals,—a habit that conforms to the practice common among insurance companies of soliciting renewals of policies from their patrons. That the company did not send around other agents or employes is probably due to the fact that Arnold acted in that capacity. His commissions for such service were paid by the company. He testifies that he simply deducted the commissions, and took the company's receipt therefor. Such conduct can have no other interpretation than that of a business relation between the company and the man who was thus acting. It is undisputed that there was no special understanding between Arnold and the company, or its agent, with reference to these commissions. The understanding was implied. He simply withheld his commissions, as an agent may be presumed to do who has an existing business relation with the parties with whom he thus deals. The judgment will be in favor of the plaintiff for the sum of \$5,000, according to the terms of the policy in suit.

ST. PAUL FIRE & MARINE INS. CO. v. KNICKERBOCKER STEAM TOWAGE CO.

(Circuit Court of Appeals, First Circuit. April 26, 1899.)

No. 243.

1. MARINE INSURANCE—CONSTRUCTION OF POLICY.

A marine policy permitted a tug to navigate the waters of Long Island Sound and shores and "all inland and Atlantic Coast waters of the United States, and all waters adjacent, connecting, or tributary to any of the above waters." The policy also provided that any deviation beyond the limits named should not avoid the policy, but that no liability should exist during such deviations, and "upon the return of said vessel within the limits named herein" the policy should be and remain in full force and effect. The tug went without the waters described to Mexico, thence with a tow she started for New York, and when off Charleston Bay, standing in for a supply of coal, was wrecked on a shoal about 1½ miles from the nearest mainland. *Held*, that the place of loss was in the "Atlantic Coast waters of the United States," and was covered by the policy.

2. SAME—CONDITIONS—OVERINSURANCE.

A policy of marine insurance provided that it should be void if other insurance was made on the vessel exceeding \$50,000. The policy also provided that, in the event of a deviation from certain waters, the policy should be suspended, and take effect on return to such waters. The tug, desiring to go outside of the waters designated, applied to defendant

company for permission and indorsement on the policy, which was refused. Thereafter it took out a policy in another insurance company, which, with the policies then existing, would have exceeded the prescribed limits. The latter policy provided that, if the assured had other insurance prior in date, the company should be liable only for so much as the amount of the prior insurance was deficient towards covering the property insured. This prior insurance was to the total value of the vessel. Held that, as such latter policy could take effect only on the suspension of the other policies, and was at once suspended upon the revival of the other policies on a return within the limits, there was at no time insurance in effect more than the agreed amount, and the policy sued on was not void for overinsurance.

In Error to the Circuit Court of the United States for the District of Maine.

Eugene P. Carver (Edward E. Blodgett, on the brief), for plaintiff in error.

Orville D. Baker, for defendant in error.

Before PUTNAM, ALDRICH, and BROWN, District Judges.

BROWN, District Judge. This suit is upon a marine policy on the tug B. W. Morse. The policy runs for the term of one year from May 1, 1893, to May 1, 1894, "unless sooner terminated or made void by conditions hereinafter expressed." The loss occurred on October 10, 1893, within the term of the policy. The tug was "privileged to use and navigate the port, bays, and harbor of New York, East and North or Hudson rivers, waters of New Jersey, Long Island Sound, and shores, and waters as far as New Bedford, and all inland and Atlantic Coast waters of the United States, and all waters adjacent, connecting, or tributary to any of the above waters, but not beyond said waters, and tow vessels to and from sea, and search for vessels at sea, according to the custom of the port of New York."

The questions in this case arise from the fact that the tug, during the term of the policy, went without the waters described, on a voyage from New York to Nassau, thence to Havana, thence to Progreso, Mexico, whence, with a schooner in tow, she started on October 4, 1893, bound for New York. On this voyage, the tug reached latitude 31.35 N., and longitude 79.40 W., on October 9th, and then stood in for Charleston bar and harbor for a supply of coal, and on the next day, October 10th, was wrecked on Pumpkin Hill shoal, about 1½ miles from the nearest mainland, and became a total loss. The circuit court found "as matter of fact, under the proper construction of the policy, that the place of loss was covered by the policy, and that it was in Atlantic Coast waters of the United States." The assured contends that the test of liability is purely geographical, and that if at the time of loss the vessel was actually within the geographical limits described in the policy the insurer is liable. The following provision is relied upon:

"Any deviation beyond the limits named in this policy shall not void this policy, but no liability shall exist during such deviation; and, upon the return of said vessel within the limits named herein, this policy shall be and remain in full force and effect."

In this opinion we will use the terms "plaintiff" and "defendant" to indicate the relation of the parties in the original suit.

The defendant contends that the tug had deviated from the waters covered by the policy, and had not returned thereto, within the terms of said policy, so as to be covered by it. It is urged that the putting in of the tug to Charleston was but an incident of her voyage from *Progresso* to New York, and that, as she had not completed the voyage on which she was engaged, she was lost on a voyage not covered by the policy in suit. We have then to determine whether the parties to the present contract intended to cover losses occurring in defined geographical limits within the period of the policy, or whether they contracted with reference to voyages from place to place within these limits, excluding losses occurring within the specified time and place upon voyages to and from ports without the specified limits. So far as we can see, there is no *prima facie* balance of probability in favor of either contention. Voyage policies and time policies are equally recognized in law, and a time policy has no necessary reference to any specified voyage or voyages. In fact, the printed form used by the parties seems to have been designed for a time policy applicable to special waters without regard to voyages. As originally printed it read:

"Privileged to use and navigate the port, bays, and harbor of New York, East and North or Hudson rivers, waters of New Jersey, Long Island Sound, and shores,

.....
and all waters adjacent, connecting, or tributary to any of the above waters, but not beyond said waters, and tow vessels to and from sea, and search for vessels at sea, according to the custom of the port of New York."

The waters named are such that their limits both towards the land and towards the sea are reasonably ascertainable. While there may be some uncertainty as to the location and extent of "waters adjacent, connecting, or tributary," yet it is apparent that these words are for the benefit of the assured, and to avoid a too rigid application of the restriction to the limits previously named. Though it might in some cases be necessary to refer to the intended employment of the vessel, in order to determine whether she were within "waters adjacent, connecting, or tributary," the possible necessity for such an incidental inquiry does not disturb, but tends rather to confirm, the opinion that the original printed form covers the vessel in limits determined by geographical description rather than by reference to voyages. Were the case before us upon the printed form without written additions, and had the loss occurred in the waters named therein, we should have no doubt of the correctness of the plaintiff's contention. We have then to inquire as to the effect of the written addition of the words, "and waters as far as New Bedford, and all inland and Atlantic Coast waters of the United States." A difficulty arises from the words, "and all inland and Atlantic Coast waters of the United States." Defendant's counsel argues that these words are to be taken conjunctively, and mean merely such of the coast waters as are inland waters. We cannot so interpret the clause, since this is in effect to reject the words "Atlantic Coast" as surplusage. The difficulty is in applying as a designation of geographical limits words so indefinite as "Atlantic

Coast waters of the United States." Were it necessary in this case to determine at what point on her voyage from Progresso the vessel entered these waters, or were it a question of defining the easterly boundary of these waters, serious doubts might arise under the terms of the contract. If a marine league were taken as the measure of the breadth of these waters, it might exclude the vessel on a voyage from port to port within the Atlantic Seaboard, even though she were on the usual course between these ports. It might exclude the vessel when driven off the coast by stress of weather. Therefore there would be reason in holding these words to mean those waters usually employed by vessels in voyages in the coasting trade between ports on the Atlantic Coast, and that a vessel properly pursuing such a voyage must be assumed to be within the Atlantic Coast waters, though at times scores of miles from shore. The waters would then be marked out, not by any particular voyage of any particular vessel, but by the usual course of trade. Conceding, however, that this contract of insurance contains terms which would in some cases be difficult of application, a recognition of these difficulties does not lead to the adoption of the defendant's view that the policy must be considered as if it covered a series of voyages, since by adopting this construction we fall into new difficulties in adapting it to the contemplated business. Referring to the contract for provisions as to the employment of the tug, we find:

"Warranted by the assured to be employed exclusively in the towing and wrecking business, * * * to be used mainly for general towing purposes, * * * and tow vessels to and from sea, and search for vessels at sea, according to the custom of the port of New York."

In construing this policy according to the nature of the business, we must first bear in mind that this business requires neither a port of lading nor a port of discharge. It is apparent, we think, that the parties did not have in mind that the tug should be solely engaged in a series of voyages from port to port in the coastwise trade. The business of towing might call for a long succession of trips, which could not be deemed voyages in the ordinary sense. The wrecking business contemplated by the contract might involve her in risks differing greatly from those of ordinary coastwise voyages from port to port. Between these trips she may have no necessity to make port, save for supplies and repairs. We cannot construe the policy in such manner as to impose upon her idle entries into port that would be of no service and might lessen her earning power. The fact that the business differs so greatly from that of a carrying trade, where the parties contemplate a terminus a quo and a terminus ad quem, renders it highly probable that only geographical limits were intended. The language of the policy is apt to express such an intention. See *Hennessey v. Insurance Co.*, 28 Hun, 98. In ordinary voyage policies, it is not contemplated that there shall be a departure from the defined course. Here, however, the parties not only contemplated departures from the described waters, but expressly provided for them by saying that they should not void the policy; providing, also, that the policy should be in full force upon "the return of said vessel within the limits named herein." As in cases of doubt construction should be

favorable to the assured, the defendant has the burden of satisfying us that the words "return within the limits" are equivalent to the words "return to a place of good safety within the limits"; in other words, that the word "return" used in this policy of marine insurance has a technical meaning and connotes a place of good safety. We find no evidence or legal authority that would justify us in giving it such a meaning in this case. On the contrary, considering the fact that the instrument is one drawn by an insurance company, we think that, had a return to a place of good safety been intended, the company would not have failed for lack of apt words or skill of expression to employ unequivocal and definite terms to express its intention. There is a wide difference between a return to certain waters and a return to places of good safety within those waters, and the assured is entitled to the full benefit of that difference. Should we hold that after a suspension the policy revives only upon a return to a place of good safety, at the end of a voyage begun without the limits, we should construe the contract not according to the tug's whole business, but according only to that part in which she engages in a full voyage from port to port. A proper construction must be one that provides for her entire business. If voyages are disregarded, and only geographical limits are provided for, the contract, so construed, is adequate to all the requirements of the business. The original printed form seems appropriate to meet these requirements, and we are of the opinion that the written additions do not indicate an intention in the present case to change the character of the contract set forth in the printed form. We can derive no aid from the cases of *Mark v. Insurance Co.*, 13 C. C. A. 157, 64 Fed. 804, and *Insurance Co. v. O'Connell*, 29 C. C. A. 624, 86 Fed. 150, as they differ so materially from the case before us as to be inapplicable as precedents. Whatever may be the difficulty in interpreting the words "Atlantic Coast waters" in cases where the easterly boundary is in question, no such difficulty arises as to the western boundary. There is no need for reference to any voyage to determine whether a vessel was wrecked in Atlantic Coast waters, if she were wrecked on the Atlantic shores of the United States, or upon a shoal situated a mile and a half from the mainland, as was here the case. The popular meaning of the terms, as well as the meaning that has reference to the three-mile limit and that which has reference to the usages of the coasting trade, are all properly applicable to the place where this vessel was wrecked.

We agree, therefore, with the finding of the circuit court, "as matter of fact, under the proper construction of the policy, that the place of loss was covered by the policy, and that it was in Atlantic Coast waters of the United States." We are also of the opinion that the facts found by the court below raise no question of the seaworthiness of the vessel at the time the policy in suit reattached on her return from without the limits.

The defendant next contends that the policy in suit was avoided by other insurance, in violation of the following provision:

"It is also agreed that this policy shall become void if any other insurance is or shall be made upon the vessel interested, hereby insured, which, together with this insurance, shall exceed the sum of fifty thousand dollars."

It appears that during or before the time covered by the general voyage from New York out and return, and before the loss of the tug, the plaintiff applied to the defendant company for permission and requested an indorsement on this policy for the general voyage above described, which was refused; and that thereafter, on or about September 21, 1893, the plaintiff took out a policy in the Atlantic Mutual Insurance Company for \$17,500. It is contended that thereby the plaintiff exceeded the permitted insurance. It is agreed that at the date of the issue of the Atlantic policy there was \$45,000 of insurance on the vessel, other than the \$5,000 policy in suit. Each of the policies was based upon an agreed valuation of \$50,000, and the policies in the aggregate reached that amount. So that prior to September 21, 1893, there was \$50,000 insurance, exclusive of the Atlantic policy. The loss occurred during the term covered by all the policies. The Atlantic policy contained, however, the following:

"Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said Atlantic Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured."

As the prior assurance was to the total value of the vessel, and was in effect at the time and place of loss, it is evident, we think, that the express terms of the Atlantic policy excluded it from liability, since there was no deficiency. By its terms, the Atlantic policy, under the existing state of facts, could take effect only upon suspension of the other policies, and was at once suspended upon the revival of the other policies upon a return within the limits, so that at no time was there in effect more than the agreed sum of \$50,000. The policy in suit, therefore, was not void for overinsurance, nor can the defendant reduce its liability by any claim for contribution by the Atlantic company. The fact that the defendant had refused permission to employ the tug outside the permitted waters we think immaterial. The rights of the parties were fixed by the contract contained in the policy in suit, and neither the refusal of the defendant company to enlarge its liability, nor the act of the plaintiff in insuring risks not covered by the former policy, can affect the construction of the contract in question, or restrict the legal obligations thereby incurred.

The judgment of the circuit court is affirmed, with interest, and the Knickerbocker Steam Towage Company, defendant in error, is awarded the costs of this court.

SOUTHERN EXP. CO. v. PLATTEN.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1899.)

No. 727.

1. CORPORATIONS—LIABILITY FOR TORTS OF AGENTS—SCOPE OF EMPLOYMENT.

A declaration, in an action against a corporation for personal injuries, which alleges that defendant employed certain detectives to investigate an alleged robbery, and that in the course of such employment such detectives, with other persons procured by them, committed an assault on

plaintiff for the purpose of compelling him to confess to the commission of the robbery, and inflicted the injuries sued for, states sufficient facts to connect the defendant with the injury, and to charge it with liability therefor; the means employed by its agents in the investigation being left to their discretion, in the exercise of which they were within their authority. A ratification or repudiation of their acts by defendant after they were committed, and plaintiff's right of action had accrued, would be immaterial.

2. SAME.

Under the modern rule adopted by the courts, a corporation is liable at common law for torts committed by its servants or agents, precisely as a natural person would be.

3. PLEADING—DECLARATION IN TORT.

A declaration to recover for an assault alleged to have been committed on plaintiff by representatives and agents of defendant in the course of their employment is not demurrable because it fails to state the names of some of the assailants, alleged to be unknown to plaintiff.

4. DAMAGES FOR ASSAULT AND BATTERY—MENTAL SUFFERING.

In an action of tort to recover damages for an assault and battery, where there is proof of substantial physical hurt and injury, the plaintiff is entitled to recover compensation for the mental pain and suffering that necessarily resulted from the original injury.

5. EVIDENCE OF AGENCY—ACTS OF ALLEGED AGENT.

Acts of an alleged agent tending to show the exercise of control and authority over the business of the principal, and declarations and statements of agency made in the presence of other known agents, are admissible to establish the agency.

6. PLEADING—VARIANCE—AMENDMENT DURING TRIAL.

The action of a trial court in denying a motion for judgment on the ground of a variance, and in permitting the amendment of the declaration, after the conclusion of plaintiff's evidence, to conform to the proof, is not an abuse of discretion, where it is not claimed that defendant was misled by the variance to his prejudice.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of Florida.

John F. Hartridge, for plaintiff in error.

H. P. Logan, J. W. Brady, and F. M. Hammond, for defendant in error.

Before PARDEE, Circuit Judge, and SWAYNE and PARLANGE, District Judges.

SWAYNE, District Judge. This is an action originally brought by John J. Platten, Jr., defendant in error, against the Southern Express Company, a corporation under the laws of the state of Georgia, plaintiff in error, to recover damages for personal injury inflicted upon him by reason of an assault with deadly weapons committed by certain employes of the defendant company. The suit was originally brought in the circuit court, Pope county, Fla., but was afterwards removed by the defendant company into the circuit court of the United States for the Southern district of Florida. The facts alleged by the plaintiff in his declaration, and proved on trial, except as hereinafter qualified, are as follows: That on or about the 1st day of April, 1897, the office of the defendant company situated in the town of Bartow, Fla., was robbed of the sum of \$2,500, and that shortly thereafter the defendant

company sent its agents, W. T. Sherrett and C. L. Myers, to the town of Bartow aforesaid, for the purpose of investigating the said robbery, and to procure, if possible, evidence sufficient to convict the person or persons who perpetrated the same; that the said W. T. Sherrett and C. L. Myers were especially selected by the defendant company for this purpose, and in pursuance of their employment, and in the investigation of the said alleged robbery, the said C. L. Myers, together with N. W. Buxton, and two other persons to the plaintiff unknown, were employed by the said agents to make an assault with deadly weapons upon the plaintiff, and to seize him, throw him down, and by brute force deprive him of his personal liberty, with intent to compel the said plaintiff to confess and admit that he had perpetrated the robbery upon the defendant above referred to; that the said agents and employes of the defendant company did endeavor to kidnap the plaintiff and carry him to a secluded spot, where they were to hang him up by a rope furnished by the officers of the company for that purpose; and that the object of the company in committing this assault was to compel the plaintiff to admit and confess that he had perpetrated the robbery above mentioned. There is a second count in this declaration, alleging a conspiracy between the defendant corporation, by its officers, agents, and special representatives selected and chosen to investigate the robbery above referred to, and other officers, agents, and representatives of the defendant company unknown to plaintiff, to commit the assault for the purpose hereinbefore set forth. To this declaration the defendant company demurred, which demurrer being overruled by the trial court, error was assigned; and the first question to be determined here is whether or not the court below erred in rendering judgment on this demurrer, sustaining defendant in error's declaration.

The three questions raised by the demurrer are: (1) Does the declaration show, by relation of fact, any connection between the defendant company and the assault complained of? (2) Were the employes of the defendant corporation, in committing the assault, acting within the scope of their employment? (3) Is it necessary that in such an action against a corporation the names of the parties who actually committed the assault be given?

To the first question it is alleged by the declaration that the defendant company selected, and sent to the vicinage of the robbery, its special agents and representatives, W. T. Sherrett and C. L. Myers; that these agents were specially instructed to investigate the alleged robbery, and that the said agents, in pursuance of their employment, and in the investigation of the alleged robbery, acting within the scope of their employment, committed the trespass, to recover compensation for which this action was brought. The assault upon the defendant in error by these agents of the express company was committed to further the investigation of the robbery, and the wrong to defendant in error was committed by the agents of the defendant company, therefore, in carrying out the purposes of their employment. It is true that if the assault alleged had been committed willfully by the agents of the corporation, and in the performance

of an act not within the scope of their employment, then these agents, who were merely the servants of the stockholders of the corporation, could not by their conduct render the corporation liable. In the case at bar certain persons were employed by the defendant company for the lawful and commendable purpose of ascertaining who was guilty of the robbery set forth in plaintiff's declaration. They were clothed by the defendant company with the power to exercise their discretion as to the methods to be adopted in ferreting out the crime. Acting under this authority, clothed with this discretion, seeking to accomplish the ends for which they were employed, the agents of the defendant company did the wrong to plaintiff set forth in the declaration. It would not be contended otherwise than that a natural person, standing in the same relationship to the active wrongdoers in the case at bar as did the defendant company towards these agents, would be liable under the circumstances set forth. At common law a corporation could not be made a defendant to an action of battery, or such-like personal injuries, for, in its corporate capacity, it could neither beat or be beaten; a corporation being, in the language of Sir Edward Coke, "invisible, and existing only in intendment and consideration of law," and wholly devoid of corporal body. But of recent years, with the growth of corporations, the multiplicity of interests owned by them, the diversity of business enterprises by them conducted, "judicial tribunals, with much wariness, and after close and exact scrutiny into their nature and constitution," ex necessitate have modified the strict rules of the common law in relation to corporate liability; and it is now declared to be the law that a corporation is liable civiliter for torts committed by its servants or agents, precisely as natural persons. *Fotheringham v. Express Co.*, 36 Fed. 252; *Railroad Co. v. Quigley*, 21 How. 202; *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055; *Railway Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286. It is admittedly correct, as stated by counsel for the defendant company, that affirmative, willful action by the chief officers of the defendant company could not have made the company liable for the acts complained of in the declaration, for the corporation is liable only for the acts of its servants and employes within the scope of their duties. But in the case at bar the detection of the felon who robbed the company's office was, in the judgment of the company, very important to it. They employed their agents to detect the wrongdoer and bring him to justice. It was their duty to have selected for this purpose safe, careful, and prudent men,—representatives who would pursue this special business of the company in a legal, proper, and prudent way. This they did not do. They selected as agents men regardless of the rights of others; men who sought only the end for which they were employed, regardless of the means adopted to bring about this desired consummation. These agents committed the assault upon the plaintiff; and for this action by its agents, acting within the scope of their authority, the defendant company cannot escape responsibility.

Whether or not there was a subsequent ratification of the acts of these agents by the chief officers of the company is immaterial, for the reason that immediately upon the perpetration thereof the liabil-

ity of the company to make satisfaction therefor attached. The acts of the agent were the acts of the company. If the perpetrators of this outrage had been successful, by means of the illegal and criminal methods employed against the defendant in error, in securing evidence against him that would lead to his conviction of the crime of robbery, or to the recovery by the company of the money of which it was robbed, then the company would have been the recipient of the advantage gained by the wrongful acts of its agents; and this was the end sought by the express company. But these agents were unsuccessful in their efforts, and the company gained nothing thereby. "The question is not whether the particular act was authorized, but whether the act done grew out of the exercise of an authority which the master had conferred upon the servant." The bare reading of the allegations of the declaration demonstrates that the acts complained of grew out of the exercise of the authority given by the defendant company to these representatives.

Should the demurrer to the declaration have been sustained for the reason that the names of the persons committing the assault were not named therein? There is nothing in this contention, for the reason that the names of these persons are set forth. In the declaration the names of these persons are given as follows: "Four persons, to wit, C. L. Myers, N. W. Buxton, and two others to plaintiff unknown," employes of the company, committed the acts complained of. But even if no names were set forth in the said declaration, and it was alleged simply therein that certain agents and representatives of the defendant company, to the plaintiff unknown, had been guilty of this trespass, then the contention of plaintiff in error could not be sustained, for the reason that this deficiency would be only in a matter of proof, and not of allegation in the pleadings. It follows that there was no error made by the trial court in overruling the plaintiff in error's demurrer.

It is contended by the plaintiff in error (the defendant below) that the trial court erred in permitting the plaintiff below to testify as to the mental suffering occasioned him by reason of the assault. Bearing in mind that this action was one purely of tort, and that there was proof of substantial physical hurt and injury, there can be no question but what the plaintiff below was entitled to recover compensation for the mental pain and suffering that inevitably and necessarily resulted from the original injury. As was said by Mr. Justice Gray in *Kennon v. Gilmer*, 131 U. S. 28, 9 Sup. Ct. 697:

"When the injury, whether caused by willfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded."

And in the case of *McIntyre v. Giblin*, 131 U. S. clxxiv., 9 Sup. Ct. 698, in an action brought by the defendant in error against the plaintiff in error to recover damages for negligent shooting, Chief Justice Waite expressly held that the plaintiff below was entitled to recover "a fair compensation for the physical and mental suffering caused by the injury."

Numerous assignments of error are based upon the admission of certain testimony which is alleged to be hearsay, and hence inadmissible. An examination of the record discloses that this so-called hearsay testimony was testimony of declarations and statements made by one who was proved to be an agent of the plaintiff in error while engaged in the transaction of the business of his principal, and hence was properly admitted in evidence. That the parties who made these declarations alleged to be hearsay were the agents of the plaintiff in error, there can be no reasonable doubt. The actions and conduct of W. T. Sherrett were of such a character, so continuous, so well known and notorious, not only to the people in and around the place where the robbery had been effected, but among the other recognized and admitted agents of the plaintiff in error. He was recognized, received, and assisted as an agent of the express company, and for nearly three weeks was virtually in control of its office at Bartow for the purpose of his employment. During this time, by his directions, the books of the company were mutilated, that the plaintiff below might be decoyed from his bed at night to be assaulted as described. These and other acts of W. T. Sherrett were properly submitted to the jury to establish agency. A careful examination of the record discloses no substantial error on the part of the trial judge in the admission of this testimony.

In the declaration it was charged that Myers and Buxton, and two others to the plaintiff unknown, were procured to make the assault set forth therein. There is no testimony whatever in the record that in any wise connects Myers with the assault, directly or indirectly. Upon the conclusion of the testimony on behalf of the plaintiff below at the trial, the attorney for the plaintiff in error moved the court to instruct the jury to bring in a verdict for the defendant on the ground that the evidence disclosed a fatal variance between the allegations of the declaration and the proof in this respect, which motion was denied by the court; and the ruling of the court on this motion was assigned as error. There is no allegation, or even intimation, that the plaintiff in error had been misled in maintaining its defense upon the merits by this variance. There is nothing in the record, or on the face of the pleadings, in any wise showing that the express company was prejudiced thereby in any respect. This being the case, such variance was an immaterial one, and the court was correct in overruling the motion, and allowing defendant in error at that time to amend his declaration by striking out the name of Myers. It is only in case of a very gross or flagrant abuse of the discretion of the trial judge in allowing amendments to the pleadings that the same will be interfered with in the appellate court. A careful examination of the entire record discloses no substantial error against the appellant, and the judgment appealed from is therefore affirmed.

PARDEE, Circuit Judge, dissenting.

In re BRICE.

(District Court, S. D. Iowa, C. D. May 4, 1899.)

1. BANKRUPTCY—JURISDICTION—"PRINCIPAL PLACE OF BUSINESS."

Where a petitioner in voluntary bankruptcy resides in one district, and is there employed as clerk in a store, but is engaged in trade on his own account, as a general merchant, in another district, the court of bankruptcy in the latter district has jurisdiction of the petition, the bankrupt's principal place of business being within its territorial limits.

2. SAME—WHO MAY BECOME BANKRUPT—INFANTS.

Where the law of the state (Code Iowa 1897, § 3190) provides that a minor may not disaffirm his contracts on reaching full age when, "from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting," if a minor engages in business as a merchant, and parties consequently assume that he is of full age, and deal with him in that belief, no inquiry or representation being made as to his minority, he becomes absolutely liable for the debts contracted in such business, and may be adjudged bankrupt on his own petition, though still an infant.

In Bankruptcy. On petition to vacate adjudication of bankruptcy.

Dudley & Coffin, for petitioning creditors.

W. S. Kenworthy, for bankrupt.

J. F. & W. R. Lacey and H. H. Sheriff, for opposing creditors.

WOOLSON, District Judge. Carl S. Brice having filed his petition in voluntary bankruptcy, the petition was regularly referred to George W. SeEVERS, Esq., as referee in bankruptcy. Upon April 3, 1899, said referee formally adjudicated said Brice to be a bankrupt, and duly gave notice for first meeting of creditors. Shortly prior to the day fixed for said first meeting, Wyman, Partridge & Co., claiming to be creditors of said Brice, presented to the judge of this court their petition, wherein they sought vacation of said adjudication. The grounds on which such vacation was sought were, in substance, that at date of such adjudication said Brice was "a minor, and under the age of twenty-one years, and not a 'person' within the intent of the bankruptcy statute, and therefore not entitled to the benefits of said statute"; that such fact was not disclosed by the petition filed by him, nor upon said adjudication. An amendment to such petition for vacation alleges as further ground that this court has not jurisdiction to entertain said Brice's petition, because said Brice, up to the filing of his petition, continuously had his domicile and residence and principal place of business within the Northern district of this state. To this petition for vacation of order of adjudication Brice files his answer, admitting that he is under 21 years of age, but averring that when he was 19 years old he was manumitted by his father, and that for more than 6 months before the filing of his said petition in bankruptcy, and at the date of such filing, he was openly engaged in business as a merchant in Mahaska county, in this district.

Counsel for said Brice, for said petitioning creditors, as well as for other creditors, have been heard orally and by briefs. Upon the hearing, said Brice was examined under oath. The following facts appear: In January, 1898, the father of said Brice executed an instru-

ment, which follows the general form and contains the substance of what is generally accepted as a manumission paper. It was conceded on the hearing that such paper is amply sufficient, as between father and son, to accomplish the purpose for which it was intended. This paper was published in one of the principal newspapers where the father and son resided. Since said date of manumission, and up to the filing of his petition herein, said C. S. Brice was employed in his father's store in Tama county, Iowa, as a clerk, upon a monthly salary. Said Brice also opened up, in Oskaloosa, Mahaska county, Iowa, a store, for general merchandise purposes, and had maintained the same for over six months prior to filing of his said bankruptcy petition. He was very seldom at his Oskaloosa store, and in fact took no leading part in the management or details of business therein. His brother-in-law, one Barber, was in charge as manager, made the purchases of goods, made whatever payments thereon were made, engaged those employed in said store, and attended to obtaining the lease of the store premises; but the lease was taken in the name of said Brice, and all purchases were also made in said Brice's name. There is presented herein no claim that any fraud was perpetrated or attempted in the matters named. All the creditors dealt with said store as being the property of said Brice. The debts scheduled in the petition for bankruptcy aggregate \$24,608.10. The stock of goods are scheduled at an aggregate of \$12,350.

First, as to jurisdiction: Without determining, but assuming, that this point is here properly presented, I find the facts proven sustain such jurisdiction in this court. Although Brice unquestionably had his domicile and residence without this district, yet his business without the district was that of a mere clerk; within this district, and for the entire period of six months prior to filing his petition, he was carrying on the business of a merchant upon such a scale as that his scheduled debts for merchandise and store expenses aggregated at filing of petition over \$20,000. Whether he might have filed his petition in the district of his residence is not the question here to be decided. The statute (30 Stat. 545, c. 541, § 2, par. 1) confers upon this court, as a court of bankruptcy, jurisdiction "to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within its territorial jurisdiction for the preceding six months, or the greater portion thereof." Brice has elected to file his petition in bankruptcy in the district of his principal place of business. If he is a "person" within the meaning of the statute, this court has jurisdiction. I do not deem it necessary to here determine the question presented by counsel for Brice that the plea of minority is a plea personal to the bankrupt in this proceeding, but will assume, for the purpose of this hearing, that a creditor may properly present it. Section 4, par. b, of the present bankruptcy statute provides that "any person, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." By section 1, cl. 19, it is provided that the word "persons" "shall include corporations, except where otherwise provided, and officers, partnerships, and women." No part of this statute appears expressly to provide for the case of minors. *In re Derby*, 8 Ben. 118, Fed. Cas. No. 3,815,

is cited by counsel for creditors petitioning for vacation as a well-considered case, wherein Judge Blatchford (then district judge, but subsequently an associate justice of the supreme court of the United States) decided that minors, in respect to their general contracts, are not embraced within the provisions of the bankruptcy act of 1867, as subjects of voluntary or involuntary bankruptcy. Opposing counsel have cited *In re Book*, 3 McLean, 317, Fed. Cas. No. 1,637, wherein it is decided, in answer to the question "whether the infancy of the applicant is good ground for opposition to his discharge as a bankrupt," that "an infant may claim the benefit of the bankrupt law." This last-cited case, while given as the "opinion of the court" on questions certified to the circuit court from the district court, under the provisions of the bankrupt act of 1841, appears to have been answered on general principles, and not upon any special provisions of that act, and to be the opinion of Justice McLean, then a member of the supreme court of the United States. In neither of these cases, apparently so contrary in decision reached, is there reference as a controlling factor to any special provision of the acts in force at dates of such decisions. Yet there are apparent principles in common recognized as underlying these decisions. In the course of the opinion Judge Blatchford states, apparently as the reason leading to the conclusion reached by him:

"The general contracts of an infant having no force if disaffirmed by him after attaining his majority, it is idle for him to set forth, in a voluntary case, a schedule of his creditors, and idle for them to prove their debts during his infancy, for the whole proceedings must be in vain if the debts are disaffirmed by him after he attains his majority."

Towards the close of his opinion he states:

"It is not intended to express an opinion as to whether or not an infant may not voluntarily petition in respect of contracts for which he is liable, such as debts for the value of necessities."

While Justice McLean states:

"An infant is bound to pay certain debts. The bankrupt law extends its benefits to all persons who are in a state of bankruptcy, without exception as to persons. Fiduciary debtors only are excepted. * * * When an infant brings his case within the bankrupt law, the law vests his property in the assignee."

Apparently, therefore, if the infant is liable for the debts he schedules, he may, so far as the decisions above cited have expressly decided, avail himself of the benefits of the bankrupt law, in the absence in such law of any provisions to the contrary. And the point decided in *Re Derby* must be regarded as applying adversely to the right of minors to be adjudged bankrupts only as to debts which the minor had the legal right to disaffirm. The industry of counsel has brought to the court only these two decisions as directly bearing on the question here presented. The contention presented in the pending matter may be regarded as closely analogous to the question presented under former bankruptcy statutes with reference to whether, and, if at all, to what extent, such former statutes extended their provisions to married women. The cases are numerous wherein the courts were called to determine how far the recognized legal disabilities of married women affected the application of the statute. In the pending

matter the legal disability is alleged as applying to a minor. Without attempting an exhaustive consideration of the decisions relating to the application of former bankruptcy laws to married women, a few may profitably be here considered. In *Re Slichter*, Fed. Cas. No. 12,943, Judge Nelson, in 1869, passed directly on the question, arising in the district of Minnesota, over which this distinguished judge so long presided, as to the status of a married woman under the act of 1867. Catharine Slichter and her son had been trading under the firm name of Slichter & Son. This decision recognizes that the statutes of that state had relieved married women of many of the disabilities to which they were theretofore subjected, but that Mrs. Slichter could make no contract, in the course and business of said firm, except as authorized by the laws of that state. "There being no evidence that Mrs. Slichter was engaged in business by virtue of any authority conferred by the statute, she could avail herself of her coverture to defeat the debt which was the basis of the bankruptcy proceedings."

In *re Kinkead*, 3 Biss. 405, Fed. Cas. No. 7,824, was decided in 1873 by Judge Blodgett. This decision with exhaustive clearness applies the statutes of Illinois regarding the legal status of married women as to property rights. J. D. Kinkead and his wife, under the firm name of Kinkead & Co., were carrying on a partnership business as traders. Kinkead & Co. and J. D. Kinkead, by proceedings in involuntary bankruptcy, had been adjudicated bankrupts. An individual creditor of J. D. Kinkead sought to have his debt established against the firm assets, on the ground that the contract of co-partnership was void and inoperative by reason of the inability of the wife to make a binding contract. After a full and clear statement of the statute of the state relating to the questions involved, Judge Blodgett, in closing his opinion, states:

"The fact that Mrs. Kinkead was not individually adjudged a bankrupt does not, in my view, change the aspect of the case. Such an adjudication could only be necessary for the purpose of reaching her individual property, if she has any, which is not alleged; and she may yet be so adjudged if it becomes necessary in the course of these proceedings."

The decision reached above was subsequently affirmed by Circuit Judge Drummond (1874), before whom the case was taken on review.

In *re Collins*, 3 Biss. 415, Fed. Cas. No. 3,006, was decided in 1873 by the same distinguished jurist. In this case was directly presented the question whether a married woman was entitled, on her own petition, to receive the benefits of the bankruptcy statute. The case arose upon the motion of a creditor to set aside and dismiss the bankruptcy proceedings after adjudication had thereon. After referring to the discussion had in the Kinkead Case, *supra*, Judge Blodgett says:

"I think the principles I have laid down in the Kinkead Case that a married woman could lawfully engage in business, and incur liabilities, justify her in coming to this court, and the court in taking jurisdiction of the case."

In *re Goodman*, 5 Biss. 401, Fed. Cas. No. 5,540, was decided by Judge Gresham in 1873, while district judge of the district of Indiana. Petition was filed against Rachel Goodman, a married woman, alleg-

ing that she had, in that district, been for years engaged in business in her own name as a trader, and had committed an act of bankruptcy (describing it) within the last six months, etc. The case came up on a motion of Mrs. Goodman to dismiss the bankruptcy proceedings. In his decision Judge Gresham states:

"Whether this proceeding can be maintained depends upon how far the legislature of Indiana has gone in changing the common-law rights of married women."

After discussing and summarizing the Indiana statutes, the opinion concludes:

"The rule, then, still being that a married woman cannot contract, and the power to do so being an exception to the rule, and the petition failing to show that Mrs. Goodman was possessed of any separate property or means with which she was carrying on her business, it follows that she cannot be adjudged a bankrupt. The petition is therefore dismissed."

An extended annotation to the case of *In re Kinkead*, 14 Fed. Cas. p. 602, closes with what appears to be a correct conclusion based on the cases above cited and others cited in such annotation:

"Impossible as it may be to reconcile the decisions on the general question of the rights and liabilities of married women, the duty of the federal courts in administering the bankrupt act would seem to be simply to determine the status of a married woman under the existing laws of the state where the jurisdiction is to be exercised, and administer the act upon the basis of the principles thus discovered. The foundation of bankruptcy proceedings is indebtedness; but the bankruptcy act does not make any new standard of liability; it simply operates upon those already existing. The application of the act to married women depends, clearly, not upon their rights, but their liabilities; and those liabilities are determined by the law of the forum where the jurisdiction is invoked."

While not directly applicable herein, an interesting case is *In re Cotton*, Fed. Cas. No. 3,269, wherein Judge Judson, of the district of Connecticut, applies the bankruptcy statute, as in force in 1843, to the state statutes of that state, and makes such application the decisive test whereunder he dismisses the application upon voluntary petition.

No good reason appears to me why the test above laid down may not be applied in determining to what extent, if at all, the present bankruptcy statute extends its benefits to minors. Throughout each of the cases above cited runs the query, is the person seeking or sought to be adjudged a bankrupt liable for his contracts, or for what is commonly understood to be his debts? Wherever this question is answered in the affirmative, the decision applies the bankruptcy statute, while, if answered in the negative, the application of the bankruptcy statute is denied. Turning, then, to the statutes of Iowa, we find the rights and liabilities of minors, so far as affected in the pending matter, as defined by the Iowa Code of 1897, as follows:

"Sec. 3188. The period of minority extends in males to the age of twenty-one years, and in females to that of eighteen years; but all minors attain their majority by marriage.

"Sec. 3189. A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his

control at any time after his attaining his majority, except as otherwise provided.

"Sec. 3190. No contract can be thus disaffirmed where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting."

How far, if at all, the matter pending is affected by manumission by the father, will not now be considered; that question not being deemed necessary to the decision reached herein. The alleged bankrupt was submitted to examination under oath on the hearing, and his testimony is before the court, together with the documentary evidence presented. His minority is conceded. There appear no express misrepresentations by him as to his minority. The petitioning creditors made no inquiry touching this point. No question appears to have arisen in their minds as to his being of age. They dealt with him as one of full age. He was engaged in business as an adult. From his having thus been engaged, the evidence clearly shows that these creditors had good reason to believe, and did believe, Brice was capable of contracting. There is thus met every requirement, essential under the Iowa Code, to place the debts or claims held by these creditors beyond the power of Brice to disaffirm, when he shall, in the coming December, have reached the age of 21. He cannot now or then, under the Iowa statutes, disaffirm these debts; and thus he is liable therefor, as though at time of his contracting them he had attained his majority. This conclusion satisfies the reasons underlying the above-cited cases as to married women, and it is not antagonistic to either of the cases cited as to minors, as above interpreted, and it appears just to all concerned in the results reached under it.

It becomes unnecessary formally to consider the fact, appearing on the hearing, that the petitioning creditors herein had instituted, and are now maintaining, in the state court, action as for debt against said Brice on the same claims which they set up in their petition herein as giving them the right to a vacation of the adjudication of bankruptcy. Such action in the state court is aided by attachment against the stock of merchandise, which, if the adjudication be sustained, will pass to the trustee. That such action, if prosecuted to judgment, must result in recovery for such creditors against Brice, is beyond question, under the evidence before me. The result would then be, if the petition of such creditors be sustained, and bankruptcy proceedings dismissed, that for the very debts, on account of which, in these bankruptcy proceedings, such creditors claim Brice cannot maintain these proceedings because he is not liable therefor, they would, in their action in the state court, recover judgment, because Brice is, under the Iowa statute, powerless to disaffirm, and, consequently, liable therefor. In such case the writ of attachment issued at their instance would result in paying their claim in full, to the disadvantage of other creditors, who are content to accept that equality of distribution of assets whose accomplishment is the primary object of the bankruptcy statute.

Having reached the conclusion above announced, it follows that the petition of Partridge, Wyman & Co., for vacation of order of adjudication of said Carl S. Brice as a bankrupt must be denied and dismissed, and at their costs.

In re JEFFERSON.

(District Court, D. Kentucky. May 2, 1899.)

1. **BANKRUPTCY—PROVABLE DEBTS—RENT.**

A lease for a term of years, reserving rent payable in monthly installments, is terminated by the adjudication of the lessee as a bankrupt during the term; and the landlord has no provable claim against the tenant's estate in bankruptcy for the rent which would have accrued under the lease after the date of such adjudication.

2. **SAME—LESSOR'S STATUTORY LIEN.**

A state statute giving to a lessor a lien on property of his tenant on the premises to secure the payment of one year's rent due or to become due does not entitle the landlord, when the tenant becomes bankrupt during the term, to priority of payment out of his estate for a year's rent from the date of the adjudication. The lease being terminated by the bankruptcy, no rent can accrue thereafter.

3. **SAME.**

A state statute providing that, in case a tenant's property on the premises is levied on under execution or attachment, a year's rent to accrue shall be paid out of the proceeds, as a prior claim, does not entitle the lessor to recover such future accruing rent on the bankruptcy of the tenant.

4. **SAME—OCCUPATION OF PREMISES BY TRUSTEE.**

A trustee in bankruptcy, or the estate which he represents, does not succeed the bankrupt as tenant in a lease of property held by the latter at the time of the adjudication. The landlord is entitled to compensation for the use of the premises while the same are occupied by the trustee, the amount thereof being chargeable as part of the expense of administering the estate.

In Bankruptcy. On review of decision of referee disallowing claim.

John C. Russell, for proving creditor.

Charles S. Grubbs, for trustee in bankruptcy.

EVANS, District Judge. The adjudication in this case upon the voluntary petition of the bankrupt was made March 23, 1899. Among the proofs of debt filed was that of James B. Payne, trustee, for \$4,166.66 for rent. The demand was founded upon the terms of a written lease of the premises on Fourth avenue, in Louisville, where the bankrupt had conducted a large fancy grocery business. Those provisions of the lease material to the questions now at issue are as follows:

"Lease, Begins Feby. 15, 1896.

"This indenture, made this 21st day of January, 1895, between James B. Payne, trustee, of the first part, and C. W. Jefferson of the second part, witnesseth, that the party of the first part hereby leases to the party of the second part the following premises, to wit: The entire lot and the three-story, stone front building thereon situated on the east side of Fourth street, between Green and Walnut streets, and known as 'No. 551, 553, and 555 Fourth street, Louisville, Ky.,' being at the corner of the first alley north of Walnut street, together with the frame building on the rear end of said lot, for the space of five (5) years from February 15th, 1896, and covenant to keep the tenant in quiet possession of the premises during said term. It is hereby expressly agreed to and understood by the said parties that the said property is to be used as herewith described, and not otherwise, viz. as a fancy grocery store on the first floor and cellar; the upper floors to be sublet by the lessee for business or apartment rooms, if he so elects. In consideration whereof the party of the second part binds himself to pay for the same three hundred and thirty-three and 33 $\frac{1}{3}$ -100 dollars at the end of each and every month, being at the rate of four thousand dollars per annum; to take good care of the premises; and return the same, at the expiration of said time, in as good

order as received, ordinary wear and tear and natural decay excepted, unless the improvements should be destroyed by lightning or other natural cause, or fire not caused by his default; and not to erect, or permit to be erected, on the premises any nuisance, or commit any waste. If destruction as aforesaid, total or partial, ensues, so as to make the premises untenable for the purpose designed, the lessee may surrender and cancel this lease. The following additional stipulations are hereby declared to be a part of this lease:

"(1) The premises shall not be underlet, except the upper floors, as above stated, or the term, in whole or in part, assigned, transferred, or set over by the act of the lessee, by process or operation of law, or in any other manner whatsoever, without the written consent of the lessor; and for a violation of this stipulation, in addition to the forfeiture provided in the ninth stipulation, the rent shall be doubled while the default continues. * * *

"(p) This lease, at the option of the lessor, shall be void and forfeited in case of any violation of any stipulation herein contained. The stipulation is not to be considered or construed as a penalty, but shall be punctually enforced."

The creditor presenting the claim insists that as landlord he is entitled to a priority of payment of one year's rent to accrue subsequently to the date of bankruptcy by virtue of a lien therefor upon the property on the premises, which lien he claims is given by the laws of the state of Kentucky. The referee disallowed the claim except to the extent of the rent accrued up to the date of the adjudication, and the creditor has asked the court to review the action of the referee, and allow the entire claim. The question presented is one which is constantly arising, and will continue to do so, and its importance has induced the court, after an able argument at the bar, to give it the fullest consideration the pressure of other duties would permit. So much of the statute law of Kentucky as applies to it is as follows:

"A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture and other personal property of the tenant, or under-tenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days. And if any such property be removed openly from the leased premises, and without fraudulent intent, and not returned, the landlord shall have a superior lien on the property so removed, for fifteen days from the date of its removal and may enforce his lien against the property wherever found." Ky. St. § 2317.

"If the property be taken under execution or attachment, the officer shall, out of the proceeds of the property found on the leased premises, and levied on or taken by him, make payment of the rent payable in money, due and to become due, for the year in which the levy is made unless a bond of indemnity be executed. But the plaintiff in the execution or attachment may compel a sale of the property under his process by executing to the officer a bond of indemnity, such as provided for in the Civil Code of Practice, and the remedy provided in it, on a bond of indemnity, shall operate in favor of the person to whom the rent is payable, or other claimant of the property on the bond provided for in this section." Ky. St. § 2315. See provisions in Civ. Code Prac. §§ 211, 641.

"Unless the landlord consents thereto in writing, every assignment or transfer of his term or interest in the premises, or any portion thereof, by one who is a tenant at will, or by sufferance, or who has a term less than two years, shall operate a forfeiture to the landlord," and he may on 10 days' notice recover possession. Ky. St. § 2292.

All the provisions of the bankrupt act (30 Stat. 544) which seem to have any important bearing on the proposition to be discussed may

be grouped as follows: Section 1, among other things, provides that the word "debt" shall include any debt, demand, or claim provable in bankruptcy; and that the word "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by the act. Section 4 provides that any person who owes debts, except a corporation, shall be entitled to the benefits of the act. Section 14 provides that after the expiration of one month from the adjudication the bankrupt may apply for his discharge, and, if there be no opposition on the grounds specified in the section, the discharge will be granted. If there be opposition, provision is made for a prompt settlement of the question. Section 17 provides that a discharge in bankruptcy shall release the bankrupt from all his provable debts except—First, taxes; second, those evidenced by judgments in actions for frauds, malicious injuries, etc.; third, those not properly scheduled, unless the creditor otherwise had notice or actual knowledge of the proceedings; and, fourth, those created by frauds, embezzlement, misappropriation, or defalcation of the bankrupt while acting in a fiduciary capacity. Section 47 prescribes the duties of trustees, and provides that they shall respectively (1) account for and pay over to the estates under their control all interest received by them upon the property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees under the direction of the court, and close up the estate, as expeditiously as is compatible with the best interest of the parties in interest, and also that they shall perform the other duties specified in the section, not one of which includes the continuance of the tenancy of rented property. Section 57 regulates the manner of proving claims, and gives the requirements of the act as to the character and contents of proofs of debt, requires the filing of the writing if the claim is founded on one, and also that, if the creditor holds any securities for the payment of the debt, they shall be stated. Section 63 provides that debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable, and did not bear interest; (2) due as costs taxable; (3) founded upon a claim for taxable costs; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgment between the adjudication and the discharge of the bankrupt less certain costs. This section also provides that unliquidated claims against a bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate. Section 64 provides that debts having a priority are: First, taxes; second, costs of preserving the estate; third, filing fees paid by creditors in certain cases; fourth, costs of administration; fifth, wages earned within three months by workmen, clerks, and servants; and, sixth, debts owing to any person who, by the laws of the state or the United States, is entitled to priority. By section 67 certain liens are

declared void, but it is provided that liens given or accepted in good faith, and not in contemplation of or in fraud of the act, and which have been recorded, if the law so requires, shall be excepted.

The lease under which the claimant insists that he is entitled to priority of payment under the laws of Kentucky certainly created a tenancy, which, by its terms, might continue until the 15th day of February, 1901. During that term the bankrupt's undertaking was to pay monthly to the landlord \$333.33 $\frac{1}{3}$ rent as it accrued. Under the Kentucky statute above cited, a landlord, speaking generally, has a lien on the property of a tenant on the premises to secure the payment of the rent for a year ahead. These propositions are undeniable, and unless the necessary and inevitable result of the adjudication in bankruptcy be to deprive the landlord in this case of his tenant, and consequently of his rights as stipulated in the lease and supplemented by the statute, and also to dissolve the contract relations between them, that result should be avoided. If the act of the bankrupt in securing the adjudication is to deprive the landlord in the midst of the term of all the security and advantage for which he had been so careful to provide, the hardship is obvious. His arrangements for a permanent tenancy of the most advantageous kind would thus be destroyed without any agency of his own, and in spite of what he may have taken infinite pains to avoid by the exercise of the wisest and most businesslike foresight. While other creditors, it is true, must suffer by the bankruptcy, no other contract of the bankrupt is liable to precisely similar vicissitudes. And yet the court sees no way to avoid the conclusion that the relation of landlord and tenant in all such cases ceases, and must, of necessity, cease, when the adjudication is made. If the relation does cease, the landlord afterwards has no tenant and the tenant has no landlord. At the time of the adjudication the bankrupt is clearly absolved from all contractual relations with, and from all personal obligations to, the landlord growing out of the lease, subject to the remote possibility that his discharge may be refused,—a chance not worth considering. After the adjudication there is no obligation on the part of the tenant growing out of the lease. He not only owes no subsequent duty, but any attempt on his part to exercise any of the rights of a tenant would make him a trespasser. His relations to the premises and to the contract are thenceforth the same as those of any other stranger. He cannot use nor occupy the premises. No obligation upon his part to pay rent can arise when he can neither use nor occupy the property. The one follows the other, and it seems clear that no provable debt, and, indeed, no debt of any sort against the bankrupt, can arise for future rent. No rent can accrue after the adjudication in such a way as to make it the debt of the bankrupt, and future rent had not, in any just sense, accrued before the adjudication. This result grows unavoidably out of the peculiar relations of landlord and tenant, and the peculiar contract between them, by which rent accrued monthly as the occupation and use of the property progressed. The latter might be interrupted by any of several contingencies; for example, the destruction of the premises, or by the breach of the lessor's covenant for quiet possession, or by forfeiture for subletting, etc. So

that, if use and occupation ceased, so did rent. Hence the claim for future rent is not a fixed liability, as defined in section 63 of the bankrupt act, not only because of the contingencies indicated, but because of the possible dissolution of the term by an act of bankruptcy. And if it be true that rent never accrues after the adjudication, then it follows that there is no lien upon the property to secure the rent. A lien must find its support in the debt. The debt is the principal thing, the lien only the incident. If the debt ceases to exist, the lien necessarily falls. A mortgage executed to secure the payment of a debt created and existing upon an executed consideration—for example, a loan of money—is amply protected by the act, but even such a lien would be instantly destroyed by anything which satisfied or barred the debt. Here the supposed debt, so far from being based upon an executed consideration,—such, for example, as use and occupation of the premises,—never arose at all, because the relation of landlord and tenant, which alone made it possible, had previously been dissolved. Use and occupation, or at least the right to enjoy them, can alone raise the duty or obligation to pay rent for the premises. The one is correlatively the consideration of the other. The duties of the trustee of the bankrupt are clearly defined by section 47 of the act, and can in no way be construed as making him the tenant, nor as authorizing the estate to be a tenant of the landlord under the lease, however much the trustee may become such by express or implied agreement with the landlord for the short time he may be compelled to occupy the premises in the discharge of the duties of trustee. He should, of course, for that time pay rent, and it should be treated as part of the expense of administering the trust estate.

The state statute which provides that in cases where the tenant's property on the premises is levied upon under an execution or attachment a year's rent to accrue shall be paid out of the proceeds as a prior claim is not applicable to cases in bankruptcy. It is a state regulation in cases in which no discharge from his contract obligations can be given by law to the tenant, and in which there is no dissolution by operation of law of his contract relations with the landlord. The bankrupt act alone can do that, and it has made no provision similar to that of the state statute. The court has not overlooked the state law which gives a lien for rent which may accrue within one year, etc., but for the reasons above indicated the court is of opinion that no rent can accrue under the lease after the date of the adjudication. And, as has been seen, if no rent can accrue, there is nothing upon which to make priority of payment, and consequently nothing upon which to rest a lien. The court has not omitted to consider whether there was any way to treat the claim as an unliquidated demand under the provisions of section 63, so that, if it were, it might be adjusted upon a basis that might provide for paying rent during a period that would give the landlord reasonable opportunity to find another tenant; but the effort soon developed the impossibility of doing it upon a logical or satisfactory basis consistent with this opinion, or upon any reasoning that was not wholly artificial. The practice under the

act of 1867 seems to have proceeded upon views similar to those just expressed, and to support the conclusion the court has reached in this case, namely, that the claim for the rent which otherwise would have accrued after March 23, 1899, was not a provable debt against the bankrupt's estate, as the rent never can accrue at all, because of the bankruptcy. *Bailey v. Loeb*, 2 Fed. Cas. 376, 11 N. B. R. 271; *In re Webb*, 29 Fed. Cas. 494, 6 N. B. R. 302; *In re Breck*, 4 Fed. Cas. 43, 12 N. B. R. 215. In reaching this conclusion the court has attached little or no importance to the forfeiture clause of the lease in case of a subletting, because the court would have reached the same conclusion had no such clause been found in the contract, nor a similar provision in the Kentucky Statutes. Indeed, it seems to the court that this result inevitably follows from the peculiar relations between landlord and tenant alone, and from the severance of those relations by the operations of the bankrupt act. Of course, this leaves the landlord at full liberty to make a better lease if he can, although unfortunately it may find him unable to make one so good. This, however, is the unavoidable consequence of any dissolution of the tenancy. The bankrupt act, it must be observed, dissolves practically all the contracts of the bankrupt, and the one with the landlord is no more sacred than the others. The result therefore is that the action of the referee in disallowing the landlord's proof of debt against the bankrupt's estate for rent to accrue after the date of the adjudication is approved and confirmed.

In re FRANCIS-VALENTINE CO.

(District Court, N. D. California. May 2, 1899.)

No. 2,762.

1. BANKRUPTCY — DISSOLUTION OF LIENS — POSSESSION OF PROPERTY UNDER LEVY.

Where actions are begun in a state court, and writs issued and levied on property of an insolvent debtor, within four months before the institution of proceedings in involuntary bankruptcy against him, the trustee is entitled to recover possession of such property from the sheriff holding the same under the levy; and the court of bankruptcy has jurisdiction to order the surrender of the property on summary petition by the trustee.

2. SAME—SHERIFF'S COSTS.

A sheriff, holding property of an involuntary bankrupt under writs levied within four months before the commencement of the proceedings in bankruptcy, has no right, as against the trustee, to retain possession of such property until payment of his costs.

In Bankruptcy.

Gordon & Young, for petitioner.

Reddy, Campbell & Metson, for respondent.

DE HAVEN, District Judge. This is an application made by the trustee of the estate of the Francis-Valentine Company for an order commanding and directing one Richard I. Whelan, his deputies and employes, not to interfere in any way with any of the property of said estate in bankruptcy, or with the trustee's possession thereof.

The respondent does not claim title to the property adversely to the Francis-Valentine Company, but he insists that, prior to the commencement of the proceeding by which the Francis-Valentine Company was adjudged bankrupt, the property had been by him, as sheriff of the city and county of San Francisco, levied upon under writs of attachment and execution issued out of the superior court of the state of California, in and for the city and county of San Francisco, in certain actions pending in that court, in which the Francis-Valentine Company was a defendant; and it is further claimed by him that this court has no jurisdiction, in a summary proceeding like this, to inquire into his right to withhold the possession of said property from the trustee. In my opinion, this court has jurisdiction, as there is no question here of conflicting titles to property; it being conceded that the property belonged to the Francis-Valentine Company, and that the legal title thereto, subject, of course, to all lawful liens, passed by operation of law to the trustee in bankruptcy. The actions in the state court were all commenced, and the writs of attachment and execution issued and levied, within four months prior to the filing in this court of the petition in bankruptcy against the Francis-Valentine Company, and the liens obtained thereby became, under subdivision f of section 67, of the bankruptcy act of 1898, null and void when that company was adjudged bankrupt. Such being the case, the respondent, whose only claim is based upon the proceedings in the state court, is not entitled to the possession of the property levied upon by him, as against the trustee of the bankrupt.

Whether the respondent is entitled to have the costs incurred by him in the attachment proceedings paid out of the proceeds arising from any sale of the property made by the trustee is a question not necessary to be passed upon at this time. If it should be conceded that he has such right, it still cannot be admitted that he has the right to withhold the possession of the property from the trustee for the purpose of enforcing such demand. Application granted.

In re COLES.

(Circuit Court, N. D. California. April 24, 1899.)

No. 12,565.

CUSTOMS DUTIES—CLASSIFICATION—ANTHRACITE COAL.

Under the tariff act of 1897, anthracite coal containing less than 92 per cent. of pure carbon is dutiable, being clearly embraced within the language of paragraph 415, which imposes a duty on "coal, bituminous, and all coals containing less than ninety-two per centum of fixed carbon," and thus brought within the exception contained in paragraph 523, placing on the free list "coal, anthracite, not specially provided for in this act."

This is an application by Charles P. Coles for the review of a decision of the board of general appraisers relative to the classification for duty of a cargo of anthracite coal.

Sidney V. Smith, for petitioner.

Samuel Knight, Asst. U. S. Atty.

MORROW, Circuit Judge. The petitioner, Charles P. Coles, on the 24th day of July, 1897, imported from Swansea, Wales, into the port of San Francisco, Cal., in the United States, 3,494 $\frac{1}{2}$ tons of anthracite coal, in the British ship Muskoka. On August 3, 1897, the collector of the port of San Francisco classified the importation as "coal containing less than 92 per cent. of fixed carbon," under the act of July 24, 1897, and dutiable, under paragraph 415 of that act, at the rate of 67 cents per ton. The petitioner paid the amount levied, but within the proper time entered his protest against this classification and liquidation by the collector, on the ground that the importation was anthracite coal, so known to the trade commercially, and entitled to free entry, under paragraph 523 of the act of July 24, 1897, as "coal, anthracite, not specially provided for in this act." The collector referred the matter to the board of United States general appraisers at New York, and the classification and decision of the collector was there upheld. To reverse this decision, petitioner appeals to this court for a review of the questions of law and fact therein involved.

The act entitled "An act to provide revenue for the government and to encourage the industries of the United States," approved July 24, 1897 (30 Stat. 151), provides:

"That on and after the passage of this act, unless otherwise specially provided for in this act, there shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:

* * * * *

"Schedule N.—Sundries.

* * * * *

"Par. 415. Coal, bituminous, and all coals containing less than ninety-two per centum of fixed carbon, and shale, sixty-seven cents per ton of twenty-eight bushels, eighty pounds to the bushel; coal slack or culm, such as will pass through a half-inch screen, fifteen cents per ton of twenty-eight bushels, eighty pounds to the bushel: provided, that on all coal imported into the United States, which is afterwards used for fuel on board vessels propelled by steam and engaged in trade with foreign countries, or in trade between the Atlantic and Pacific ports of the United States, and which are registered under the laws of the United States, a drawback shall be allowed equal to the duty imposed by law upon such coal, and shall be paid under such regulations as the secretary of the treasury shall prescribe; coke, twenty per centum ad valorem.

* * * * *

"Free List.

"Sec. 2. That on and after the passage of this act, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty:

* * * * *

"Par. 523. Coal, anthracite, not specially provided for in this act, and coal stores of American vessels, but none shall be unloaded."

It is admitted by the appellant that the cargo of coal involved in this case contained less than 92 per centum of fixed carbon, but he contends that this fact does not bring it within the provisions of paragraph 415 of the tariff act, because the coal is commercially known as "anthracite coal," and is specifically designated and provided for in the free list, under paragraph 523; that the term "containing less

than ninety-two per centum of fixed carbon," in the duty list, is a general, descriptive phrase, referring only to a certain quality possessed by coal, which must yield to the special commercial designation implied in the word "anthracite"; that the words "not specially provided for," in paragraph 523, are words introduced into the statute out of abundant caution, and do not limit the words "coal, anthracite," in the same section; that, as a matter of fact, anthracite is by its nature so differentiated from other coals as to require special mention, and that the expression "all coal containing less than ninety-two per centum of fixed carbon" is meaningless as regards anthracite coal, all cargoes of which contain less than 92 per centum of fixed carbon; that anthracite has been free of duty for the last 30 years; and that no reason has been shown why congress should have intended to legislate differently from heretofore as regards this substance.

By the act of July 4, 1789 (1 Stat. 24, 25), the duty on coal imported into the United States was fixed at 2 cents per bushel. The act of August 10, 1790 (1 Stat. 180), increased the duty to 3 cents per bushel. The act of May 2, 1792 (1 Stat. 259), further increased it to 4½ cents per bushel, and the act of June 7, 1794 (1 Stat. 390, 391), to 5 cents per bushel. The act of July 1, 1812 (2 Stat. 768, 769), added 100 per centum to the permanent duties then existing, making the duty on coal 10 cents per bushel. The act of April 27, 1816 (3 Stat. 310, 311), reduced the duty to "five cents per heaped bushel." By the act of May 22, 1824 (4 Stat. 25-28), the duty was increased to 6 cents per "heaped bushel," and this continued to be the rate of duty on coal for the period of 18 years, or down to the act of August 30, 1842 (5 Stat. 548-553), when the rate of duty and the unit of measurement were changed to \$1.75 per ton. By the act of July 30, 1846 (9 Stat. 42-45), the duty was changed to 30 per centum ad valorem; and by the act of March 3, 1857 (11 Stat. 192), the duty was reduced to 24 per centum ad valorem. By the act of March 2, 1861 (12 Stat. 178-182), a duty of \$1 per ton of 28 bushels, 80 pounds to the bushel, was levied on bituminous coal; on all other coal, a duty of 50 cents per ton; and on coke and culm of coal, 25 per centum ad valorem. By the act of July 14, 1862 (12 Stat. 543-546), the duty on bituminous coal was increased 10 cents per ton of 28 bushels, 80 pounds to the bushel; on all other coal, 10 cents per ton; and on coke and culm of coal, 5 per centum ad valorem. By the act of June 30, 1864 (13 Stat. 202-206), the duty on bituminous coal and shale was fixed at \$1.25 per ton of 28 bushels, 80 pounds to the bushel; on all other coal, 40 cents per ton; and on coke and culm of coal, 25 per centum ad valorem. The act of July 14, 1870 (16 Stat. 256-266), was an act to reduce internal taxes, and for other purposes. In this act "coal, anthracite," was placed on the free list, and is the first mention of anthracite in the tariff laws. In all previous acts, and for a period of 80 years, it had been subject to duty as other coal. The act of June 6, 1872 (17 Stat. 230), was an act to reduce duties on imports, and to reduce internal taxes, and for other purposes. By this act a duty was levied on all slack coal or culm, such as would pass through a half-inch screen, of 40 cents per ton of 28 bushels, 80 pounds to the bushel; on all bituminous coal or shale, 75 cents per ton of 28 bush-

els, 80 pounds to the bushel. Anthracite coal was not mentioned in this act. But it appears in the free list in the Revised Statutes (June 22, 1874), under section 2505, as "coal, anthracite," while the duty on all other coal, as provided in the act of 1872, appears under the schedule of "Sundries," in section 2504. The act of March 3, 1883 (22 Stat. 488), reduced the duty on slack coal or culm, such as will pass through a half-inch screen, to 30 cents per ton, but made no other change in the duty or description of other coal. Anthracite coal was continued on the free list. The act of October 1, 1890 (26 Stat. 567), commonly known as the "McKinley Act," provided, in paragraph 432, p. 600, as follows:

"Coal, bituminous, and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel; coal slack or culm, such as will pass through a half-inch screen, thirty cents per ton of twenty-eight bushels, eighty pounds to the bushel."

"Coal, anthracite," is continued on the free list, in paragraph 536, p. 605. The act of August 27, 1894 (28 Stat. 509), commonly known as the "Wilson Act," was an "Act to reduce taxation, to provide revenue for the government, and for other purposes." It provided, in paragraph 318½, p. 533:

"Coal, bituminous and shale, forty cents per ton; coal slack or culm such as will pass through a half-inch screen, fifteen cents per ton."

And in the free list, in paragraph 441, p. 539:

"Coal, anthracite, and coal stores of American vessels, but none shall be unloaded."

We come now to the act of July 24, 1897 (30 Stat. 151), commonly known as the "Dingley Act." It is entitled "An act to provide revenue for the government and to encourage the industries of the United States." In paragraph 415, p. 190, it is provided:

"Coal, bituminous, and all coals containing less than ninety-two per centum of fixed carbon, and shale, sixty-seven cents per ton of twenty-eight bushels, eighty pounds to the bushel."

The language of this section, as will be seen by comparison, is a departure from that of all previous sections of the law upon this subject, and distinctly provides that all coals containing less than 92 per centum of fixed carbon, including bituminous coal, which had been mentioned by name in all the acts since the act of March 2, 1861, should be subject to a duty of 67 cents per ton. There is no question but that the article involved in this controversy is coal, and, that being so, there remains but one other inquiry to determine whether it comes under this section, and that is, does it contain less than 92 per centum of fixed carbon? It is admitted that it does. Then it is distinctly described, and made subject to the duty of 67 cents per ton.

But the appellant contends that he has found a more specific provision for this coal in the free list, under paragraph 523, where "coal, anthracite," is enumerated. But, how enumerated? Not as it was enumerated in all the acts from 1870 down to this act of 1897, but with this distinct qualification: "Not specially provided for in this act." This section is therefore limited. It does not provide for the free entry of all anthracite coal, as did the previous acts. It leaves some coal of that name to be found elsewhere, and, by returning to

paragraph 415, we find it in the character of all coal which contains less than 92 per centum of fixed carbon. It is clearly the duty of the court to read a statute according to the natural and most obvious import of the language without resorting to subtle and forced constructions, for the purpose of either limiting or extending its operation. *Waller v. Harris*, 20 Wend. 555, 561. It is also a cardinal rule in the construction of a statute that all of its parts are to be brought into harmony, if possible, and so construed that no clause, sentence, or word shall be void, superfluous, or insignificant. *Suth. St. Const.* § 240; *In re Trustees of the New York & B. Bridge*, 72 N. Y. 527. Under this rule of construction, the two sections of the act may be combined, and form one clear, concise, and logical enactment, providing that coal of any description whatsoever, containing less than 92 per centum of fixed carbon, is liable to a duty of 67 cents per ton, while anthracite coal, containing 92 per centum and more of fixed carbon, is to be admitted free. The two sections express the will of congress with respect to all coal.

With regard to appellant's contention that such a construction excludes anthracite coal from the free list altogether, for no cargo of anthracite coal contains more than 92 per centum of fixed carbon, it is sufficient to say that the statute does not impose the duty by the cargo, but on the unit of a ton; and it appears, from the evidence, that as a matter of fact samples of anthracite coal, taken and tested, show a variation in the amount of fixed carbon ranging from 86 to 94 per centum. There is, then, an imported article of coal upon which the free list provision of the statute may operate; and, if this is so, there is no ground for saying that the statute is meaningless. It is only where a word or sentence is unintelligible, or produces absurd and conflicting results, that it may be disregarded in giving effect to other provisions.

The decision of the board of appraisers is affirmed.

SIMONDS ROLLING-MACH. CO. v. HATHORN MFG. CO. et al.
HATHORN MFG. CO. et al. v. SIMONDS ROLLING-MACH. CO.

(Circuit Court of Appeals, First Circuit. April 25, 1899.)

Nos. 260 and 261.

1. PATENTS—ANTICIPATION—PRESUMPTIONS.

On a question of anticipation, if the identity of methods and results is doubtful, the doubt must be resolved in favor of the successful patentee, who, in a practical way, has materially advanced the art.

2. SAME.

A patent for a machine for making leaden bullets and shot by rolling or forging the piece of lead between cylindrical dies, the edges of which are sharpened to cut away surplus material, *held not to have anticipated* an invention for forging metal articles which are circular in cross section, such as car axles, etc., which operates by forging the hot metal and spreading or crowding away the surplus material, and compacting the outer surface of the article forged.

3. SAME—DIES FOR FORGING METAL ARTICLES.

The Simonds patent, No. 319,754, for improvements in dies for forging articles circular in cross section, such as car axles, etc., *held not anticipated*

by the Bundy English patent of May 1, 1806, for "machines or instruments for making leaden bullets and other shot," and also *held* valid and infringed as to claim 1.

4. SAME—ANTICIPATION.

The Simonds patent, No. 419,292, for a method of making rolled-metal forgings that are circular in cross-sectional area, *held* not anticipated by the Bundy English patent of May 1, 1806, and also *held* valid and infringed.

5. SAME—JOINT AND SEVERAL DEFENDANTS.

Where the suit is brought against a corporation and certain individual defendants, and infringement is found, the decree need not be limited to the joint infringement of all the defendants, but may also go against the individual defendants for their several individual infringements.

90 Fed. 201, modified.

Appeals from the Circuit Court of the United States for the District of Maine.

Frederick P. Fish and William K. Richardson, for Simonds Rolling-Mach. Co.

Benjamin Phillips (T. Hart Anderson, on the brief), for Hathorn Mfg. Co. and others.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

COLT, Circuit Judge. This suit was brought for infringement of two patents, No. 319,754, dated June 9, 1885, and No. 419,292, dated January 14, 1890. The first patent was issued to George F. Simonds for dies "for forging articles circular in cross section," such as car axles, and the second to the complainant, as assignee of Simonds, for the method of making irregular shaped metal articles, or "of making wrought-metal forgings that are circular in cross-sectional area." The court below held that the first claim of the die patent was limited to irregular shaped articles, and did not cover dies for making balls; that the second claim must be strictly construed, and therefore was not infringed; and that the method patent was valid, and infringed by the defendants. 90 Fed. 201. The complainant appeals from so much of the decree below as limits the scope of the first claim of the die patent, and holds that the defendants do not infringe the second claim. The defendants appeal from so much of the decree as declares that they infringe the first claim of the die patent and the method patent.

It is apparent that the method and the die patents are not for the same invention. The former covers the method, irrespective of the specific means or instrumentalities employed; the latter covers certain specific features of dies used in carrying out the method. These are distinct inventions. The main defense to both patents relied upon in the court below and on this appeal is the alleged anticipation of Simonds' method and dies by the prior English patent granted to William Bundy. Preliminary to the consideration of this question, it may be observed that Simonds' method was radically new in the metal-forging art. It revolutionized the branch of the art to which it relates. It is practically and commercially successful. The Si-

monds method patent is for "making wrought-metal forgings which are circular in cross-sectional area." It deals with the forging of not metal. It contains a description of the method, the mode of operation, and refers to different forms of dies which may be employed in carrying out the method. The dies illustrated in the drawings are so shaped as to roll balls, car axles, and other articles circular in cross section. The dies are used in pairs, and have raised working parts. They rotate and shape the blank between them. They travel in parallel lines in opposite directions. At the beginning of the operation the forward ends of the dies are opposite one another, and at the end of the operation the rear ends are opposite one another. The complainant's expert, Mr. Livermore, gives a clear description of the Simonds method and dies:

"Briefly stated, the method consists in acting progressively upon different parts of the surface of the blank, the point of action traveling around the circumference of the blank, and at the same time traveling lengthwise of the blank; or, in other words, being in a spiral path around the blank, beginning at some point between the ends of what is to be the finished forging, and extending gradually towards the ends thereof. The action at each point consists in straining or spreading or crowding the surplus metal of the blank towards the ends, and at the same time compressing the metal that remains in the finished forging to the exact form required at that point. Thus, at any given moment between the beginning of the operation on the blank and the completion of a forging there is a portion of the length of the forging that has been brought to the final shape, and the remainder is at this time completely unformed; and as the operation continues the length of the finished portion is extended towards the ends, until finally the entire length has been completed, the end portion being finished at the last round of the spirally traveling, spreading, and compressing action." "The dies are constructed to be used in pairs in a machine in which they are caused to travel in relatively opposite directions, the distance between the dies, generally speaking (or, more accurately, the maximum distance between the working portions of the dies), being substantially equal to the diameter of the blank; so that, without taking into account the shaping effect of the dies, their action in traveling one past the other upon the blank between them is to rotate or roll the blank much as a pencil is rolled between the hands of a person when sliding one hand along the other, with the pencil lying between the two and at right angles to the line of movement. The two dies stand, at the beginning of the rolling operation, with their forward ends directly opposite one another, and during the rolling movement one die has passed completely over the other, so that at the end of the rolling operation the rear ends of the dies are opposite one another." "The dies have raised working parts, which act upon and shape the blank rolling between them, said raised parts of the dies having a groove or channel extending lengthwise thereof, the cross-sectional shape of the bottom of which channel is the same as the longitudinal outline to be imparted to the forging; so that, if a finished forging were rolled along in the channel of the die, its line of rolling contact would fit the channel. * * * These channels are not, however, of full width for the full length of each die, but are of full width only at the rear end of the die, the sides of the channeled, raised portions being cut away on diagonal lines, which converge from the rear end, where the channel is of full width, towards the front end of the die, where the channel substantially vanishes by reason of the cutting away of its sides." The raised portion of the dies along the sides of the channel are cut away upon planes that slope outward and downward from the line of intersection with the channel. * * * The surface of the bottom of the channel * * * is called the 'forming surface' of the die, as it imparts to the forging the exact form or shape that is desired; while the sloping diverging surfaces at the sides of the forming channel * * * are called 'reducing' and 'spreading' surfaces, as they serve in the operation of the die to crowd the surplus metal of the blank towards the ends of the

forging, leaving only the metal which conforms to the shape of the bottom of the channel."

Dr. Coleman Sellers, complainant's expert, says, respecting the Simonds method:

"It is evident that the advantage to be derived from this method of rolling is that steel can be worked at the lowest forging heat, precisely as a blacksmith would work it, and by means of dies that put no undue strain upon the metal, but give the work necessary for a compact forging."

The claim of the method patent is as follows:

"The method herein described of making rolled-metal forgings by acting upon all parts of a metal bar in spiral lines, so as at each part in succession and upon such lines to cause the bar to rotate, and to strain and spread the metal axially, and compress it to the required shape and size."

The Bundy English patent was granted in 1806. It was for an invention of "machines or instruments for the purpose of making leaden bullets and other shot." It was not for forging hot metal. It does not appear that leaden bullets were ever made with the Bundy machine, or that it made any impression on the art of metal working. The specification says:

"The two molds, D, D, have a groove or flute cut in each of them on the side facing the other,—that is, upon the lower side of that which is fixed to the bar A, and upon the upper side of that upon the bed C,—each being half a cylinder, and making, when closed together at the two extremes, F, F, a complete cylindrical hole, the diameter of the ball intended to be made. This hole is continued regularly and equal from F to G, the edges of which then taper gradually off to the extreme circumference of the cylinder, which terminates at the ends of the molds, D, D, at H, H. Suppose, then, a cylindrical piece of lead (or any other proper substance, the end of which is seen at I) nearly of the same diameter (but not less) as the cylindrical hole in the two molds, D, D, when closed together at the two extremes, F, F, is placed across and between the two molds, D, D, at H, H. By drawing the bar, A, A, horizontally by a parallel motion to the right, the cylindrical piece of lead will be rolled and gradually pressed and cut away by the sides of the grooves or flutes in the two molds, D, D, which are made sufficiently sharp for that purpose."

There is certainly a close resemblance between the Bundy dies for making lead balls and (apparently) their mode of operation, and the Simonds dies for forging balls and their mode of operation. But the complainant contends that there are important differences, which may be stated as follows: Bundy makes only leaden bullets. Simonds forges various articles circular in cross section from a heated metal blank. Bundy cuts away the surplus lead by sharp cutting edges, and shapes the remainder. Simonds spreads or crowds away the surplus hot metal, and compacts the outer surface of the article forged. Bundy provides corrugations within the grooves to rotate the leaden balls. Simonds places his corrugations outside the grooves so as to rotate the mass of the heated blank. Bundy made no impression on the art. Simonds' patent is the foundation of a new industry. We are not prepared to say that the cutting and molding of the cold lead by the Bundy dies is the same as the spreading and compacting of the hot metal by the Simonds forging dies. Nor are we fully convinced that in mode of operation and result the dies are essentially different.

If the question of identity of method and result is doubtful, the doubt must be resolved in favor of the successful patentee, who has

in a practical way materially advanced the art. *Washburn v. Gould*, 3 Story, 122, 144, Fed. Cas. No. 17,214. In *Bundy* the corrugations for causing the rolling of the metal are located at the bottom of the forming groove of the die, while in *Simonds* they are located outside the forming groove. It appears that dies with *Bundy* corrugations would be inoperative for forging hot metal. Further, *Bundy* speaks of the sides of the grooves of the two molds being "sufficiently sharp" to press and "cut away" the lead. This does not accurately describe the *Simonds* die for spreading, crowding, and compacting the surplus hot metal on the outer surface of the forged article. Again, and perhaps of greater consequence, we are not fully satisfied from the evidence in the record relating to the experiments which were made that the *Bundy* patent describes practically operative means for making lead bullets. It can, at least, be said, we think, that the *Bundy* patent does not disclose practically operative means for forging metal articles circular in cross section. Upon the whole we do not find in the *Bundy* patent a description of the *Simonds* method in such "full, clear, and exact terms" as are necessary to anticipate the *Simonds* patents. *Hanifen v. Godshalk Co.*, 28 C. C. A. 507, 84 Fed. 649; *Heap v. Tremont & S. Mills*, 27 C. C. A. 316, 82 Fed. 449, 452; *Consolidated Car-Heating Co. v. American Electric Heating Corp.*, 82 Fed. 993, 997, on appeal 29 C. C. A. 386, 85 Fed. 662, 665. As it is not seriously contended that any prior patent in the forging art anticipates the *Simonds* method, it follows that the *Simonds* method patent is valid, and that the defendants infringe this patent.

We come next to the die patent. This patent is entitled, "Die for forging metal articles circular in cross section." The specification says that the inventor has "invented certain improvements in faces for car-axle dies designed to be used in pairs." The specification further says:

"My invention consists in dies designed to be used in pairs, and provided with forming surfaces raised upon the plane face of the die, and with reducing and spreading surfaces running diagonal to the line of movement of the die, and standing oblique to the plane of the die. My invention further consists, in providing the reducing and spreading surfaces above mentioned, when necessary, with corrugations or irregularities, to engage the metal and insure the rotation of the work."

The claims are as follows:

"(1) Dies adapted to form metal articles circular in cross-sectional area, with the working parts raised upon a plane surface, and provided with forming surfaces running in line with the movement of the die, to give the shape required, and diverging reducing and spreading surfaces to force the metal laterally, substantially as described. (2) Dies adapted to form metal articles circular in cross-sectional area, having forming surfaces to give the shape required, and reducing and spreading surfaces to force the metal laterally, provided with corrugations or irregularities, to engage the mass of metal and insure its rotation, substantially as set forth."

We agree with the court below that the second claim is narrow, and is limited to the corrugations "substantially as set forth." The defendants' dies not having the same corrugations, or the corrugations located in the same situation on the dies, do not infringe this claim. This does not apply to *Ball Dies No. 1*, and *Boot-Calk Dies No. 1*, used only by defendant *Hathorn*, for they have the corrugations

in the same location described by Simonds. As to the first claim, however, we do not think it excludes dies for making balls, and is limited to dies for forging car axles, boot calks, and other irregular shaped articles analogous to car axles. We are of opinion that this claim fairly covers "dies for forging metal articles circular in cross section," substantially as described, and that it embraces the dies for forging balls which are used by the defendants. This suit was brought against the Hathorn Manufacturing Company and three individual defendants. The court below limited its decree in favor of the complainant to the joint infringement of all the defendants. We see no sufficient reason, under the present bill, why the defendant Hathorn should not account for his several or individual infringements. We understand this to be the general rule. *Herring v. Gage*, 3 Ban. & A. 396, 402, Fed. Cas. No. 6,422; *Tatham v. Lowber*, 4 Blatchf. 86, 87, Fed. Cas. No. 13,765; *New York Grape Sugar Co. v. American Grape-Sugar Co.*, 42 Fed. 455. The decree of the circuit court is modified as to the construction of the first claim of patent No. 319,754, and as to the liability of defendant Hathorn for his several infringements, and the case is remanded to that court for proceedings not inconsistent with this opinion. Costs in this court are awarded to the complainant, the Simonds Rolling-Machine Company.

WARREN v. CASEY et al.

(Circuit Court of Appeals, Third Circuit. May 1, 1899.)

No. 29, March Term.

1. PATENTS—INFRINGEMENT—EYEGLASS CASES.

A patent for an eyeglass case, having a cover or lid of stiff material, bulged out in the middle, or buckled, so that the edges thereof fit close on the edges of the front piece while at the middle of the cover room is left to fit over the projecting or bulged portion of the front piece of the eyeglasses, *held* not infringed by a case which, among other differences, has a flexible and resilient lid, which is not bulged or buckled, but has a plain surface.

2. SAME—INFRINGEMENT.

The Warren patent, No. 589,676, for an eyeglass case, construed as limited in view of the prior state of the art to the particular device described, and *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by Roy L. Warren against John Casey and others for alleged infringement of a patent for a new and improved case for eyeglasses. The circuit court held that the patent was void for want of invention, and was also not infringed, and accordingly dismissed the bill. 91 Fed. 653. The complainant appealed.

Hector T. Fenton, for appellant.

E. H. Fairbanks, for appellee.

Before ACHESON, Circuit Judge, and BUFFINGTON and KIRKPATRICK, District Judges.

KIRKPATRICK, District Judge. The bill of complaint in this cause charges the defendants with infringement of letters patent of the United States No. 589,676, granted to Roy L. Warren, September 7, 1897, for a new and improved spectacle case. The only claim of the patent is as follows, viz.:

"As a new article of manufacture, an eyeglass case, comprising a pocket, composed of a back plate and a front plate, secured at three of its edges to the back plate; a distance block in the middle of the pocket, to hold the front piece away from the back plate, and protect the nose piece of an eyeglass, the free edge of the front piece cut low to enhance the insertion and removal of an eyeglass; a bulged-out or buckled lid of stiff material, hinged to the upper edge of the back plate of the pocket; and a lock for securing the lid in a closed position, as and for the purposes set forth."

The defenses interposed by the answer are anticipation, nonpatentability, and noninfringement.

A reference to the file wrapper shows that the foregoing claim of the patent was at first rejected by the patent office on reference to prior patents granted Straus (No. 150,126), Sewell (No. 295,949), and to Hauck, Jr. (No. 426,378). The inventor distinguished his device from those disclosed in the patents above referred to by the lid or cover of stiff material and buckled for the purposes set forth, which his device possessed, and which was wanting in the others; and from the patents to Farley (No. 477,235) and to Closs (No. 559,438), which showed distance blocks, because their addition to the Straus, Sewell, or Hauck, Jr., would produce an article different from that described in applicant's specification. This differentiation being satisfactory to the patent examiner, the claim was allowed, and the patent issued. Such allowance and issue carried with it prima facie evidence of novelty and utility. *Lehnbeuter v. Holthaus*, 105 U. S. 94. This presumption has been strengthened by the testimony of one acquainted with the trade, showing that the device is popular, and has gone into general use. It has not been overthrown by the evidence produced on the part of the defendants, resting, as it does, for the most part on the patent-office references. We are of the opinion, upon the whole case as presented in the record, that the patent is valid.

The specification of the complainant's patent describes the cover or lid of the spectacle case as "bulged out in the middle, or buckled so that the edges thereof fit close on the edges of the front piece, while at the middle of the cover or lid is left room to fit over the projecting or bulged-out portion of the front piece. This cover or lid of stiff material, when closed, gives stiffness and rigidity to the case." It seems to us that, reading the claim of the patent in the light of the specification, the lid or cover of the complainant's spectacle case is required to be a concave lid where the edges are in the same horizontal plane, but the inner portion arches towards a higher center. Being so bulged or buckled, it must be made of stiff material, and so constructed as to cover the front and reach to the lower edges of the pocket, and thereby give stiffness and rigidity to the case. This was the construction placed upon the claim to obtain allowance in the patent office, and the record shows that the cases were at first made in strict conformity therewith. An examination of the defendants' device shows that its lid is flexible and resilient. It does not cover

the lower pocket, and reach to the lower edges, thereby becoming the means of giving stiffness and rigidity to the case. It is not bulged or buckled, but has a plain surface, the surface of which reaches no further than the upper end of the pocket. In all these particulars it differs from the lid or cover required to make the complainant's device. In view of the prior state of the art and the proceedings had in the patent office, the claim of the complainant's patent should be strictly construed against him, and be restricted to the particular device described. *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. 174, and 6 Sup. Ct. 451; *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021. We are of the opinion that the charge of infringement has not been sustained by the proofs, and for this reason the decree of the circuit court should be affirmed.

CHRISTY et al. v. HYGEIA PNEUMATIC BICYCLE SADDLE CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1899.)

No. 300.

1. PATENTS—INVENTION—BICYCLE SADDLES.

There is no invention in constructing a bicycle saddle top with vertical, walled depressions, adapted to receive two cushions or pads, and hold them firmly in place.

2. SAME—EVIDENCE OF PATENTABILITY—LARGE SALES.

Large sales and increasing popularity cannot be accepted as certain proofs of novelty and invention, especially when the article, as made and sold by complainant, differs in many respects from the article shown in the specifications, and covered by the claims.

3. SAME—BICYCLE SADDLES.

The Christy patent, No. 532,444, for a bicycle saddle having a solid top, with vertical, walled depressions, adapted to receive and hold in place two cushions or pads, is void for want of invention.

Appeal from the Circuit Court of the United States for the District of Maryland.

Julian C. Dowell and Wm. A. Redding, for appellants.

Arthur Steuart and Horace Pettit (*Stinson & Williams*, on the brief), for appellees.

Before GOFF, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

GOFF, Circuit Judge. This is an appeal from a decree passed by the circuit court of the United States for the district of Maryland dismissing the bill of complaint filed in said court by the appellant, the object of which was to restrain the appellees from manufacturing, selling, or using certain bicycle saddles, which it was alleged in said bill constituted an infringement of the letters patent of the United States, No. 532,444, issued January 15, 1895, to Henry A. Christy, for improvements in a bicycle saddle, which patent, it was claimed, was owned by the complainant company. The complainant below was a corporation organized under the laws of the state of Illinois; and the defendant, a corporation organized under the laws of the state of

Maryland. The defenses relied on were the nonpatentability of the invention and noninfringement. The court below held that, in view of the prior state of the art, the claims set up in the patent were invalid, and entered a decree dismissing the bill, from which the appeal we now dispose of was taken. 87 Fed. 902.

We have given due consideration to the appellants' assignments of error, have carefully examined the claims made in support of the patent in suit, and also the insistence that defendants below had infringed the same; and we find ourselves impelled to the conclusion that the validity of said patent depended upon whether it required invention to manufacture the bicycle saddle described therein,—the prior state of the art considered,—and, as we also find that no invention was necessary in order to construct the same, that the patent was invalid, and the bill was properly dismissed. The testimony, all prior patents bearing on the one in controversy, as also the state of the art when said patent was issued, were so fully considered in the opinion of Judge Morris, by which he so clearly demonstrated the invalidity of said patent, that we not only deem it proper, but find it best, to quote the same here in full, approvingly. It is as follows:

"Bill of complaint for the infringement of letters patent No. 532,444, issued to Henry A. Christy January 15, 1895, for bicycle saddle. The defenses are want of patentable novelty and noninfringement.

"The claims of the patent are as follows: '(1) A bicycle saddle having a solid top provided upon its upper surface, with recessed or sunken portions at each side of the seat portion, constructed to receive and hold removable pads,—said recesses being formed with abrupt marginal walls to prevent the pads from slipping,—substantially as described. (2) A bicycle saddle having a solid top provided upon its upper surface, with recessed or sunken portions at each side of the seat portion, constructed to receive and hold pads,—said recesses being formed with abrupt marginal walls to prevent the pads from slipping,—in combination with pads adapted to fit said recesses so as to be removably retained therein, substantially as described. (3) A bicycle saddle having a solid top provided upon its upper surface, with recessed or sunken portions at each side of the seat portion, constructed to receive and hold removable pads, and having a horn portion shortened or truncated so that it will not project between the legs of the rider, and also cut away or recessed upon its upper surface centrally of said horn portion, substantially as described.'

"The complainant contends that claims 1 and 2 are infringed. Claim 3 is not in controversy, for the reason that in the defendant's saddle it is conceded that the horn is not truncated or shortened up so as not to project between the legs of the rider, as called for by claim 3. Claim 1 is for the saddle plate, made with sunken recesses on each side of the center line of the seat; the recesses being formed with abrupt marginal walls to receive and hold removable pads, and prevent the pads from slipping. Claim 2 is for the same device in combination with pads adapted to fit the recesses so as to be removably retained therein. As the defendant's saddle has the removable pads fitted into the recesses, if it infringes either it infringes both claims; and, so far as this case is concerned, claims 1 and 2 may be considered as identical.

"The Christy saddle, as manufactured by the complainant and known to the trade, is quite different in some of its features from the saddle described in the specification, and the drawings of the patent, so that the question to be decided in this suit turns, not upon the similarity of the defendant's saddle to that made by the complainant, but upon the validity of the claims of the patent in suit, and the infringement of those claims as explained by the specification. The prior patents put in evidence show that there was nothing new in any of the objects which Christy has in mind to accomplish. Christy states that his object was to lessen the discomfort and injury which bicycle riders suffer from the pressure of the saddle upon the perineum, and from

the rubbing of the legs against the horn. In Hicks' patent for a cushion seat designed particularly for bicycles (No. 487,367; October 11, 1892), he states that his object is to obtain a cushion seat that will adjust itself to the shape of the rider, and at the same time prevent injurious pressure against the perineum. This he tried to accomplish by an inflatable cushion, with a covering of any suitable material, secured in any desired manner to a base of some inelastic material, preferably of wood; the cushion to be formed with a fissure extending from the front rearward to any desired extent. He says: 'This fissure prevents upward pressure on the perineum when a person sits thereupon. This fissure may be formed by securing a portion of the top of the cushion intermediate the sides down firmly upon the lower portion thereof, allowing the cushion to be inflated at each side thereof. The fissure may extend only part way towards the rear of the cushion, * * * or it may pass to the rearward limit of the cushion, dividing it into two separate air chambers. * * * Such a form relieves the perineum. * * * We thus have in Hicks' device an inelastic base upon which are secured two cushions to support the ischial tuberosities of the rider, and separated along the center line of the seat by a vacant space which relieves the perineum from all pressure. This is precisely what is accomplished by the two separate cushions or pads, with the space between them, shown in the Christy saddle, as manufactured by the complainant. In the English patent to Henson (No. 19,840) of 1893, the same object is declared to be the purpose of the bicycle saddle there described, in which there is cut out from the framework of the saddle the portion between the points where the ischial tuberosities are to rest, or a depression is formed in the frame there, so as to leave a vacant space, with nothing to press against the perineum. It is apparent, therefore, that the claim of Christy was rightly restricted to the mechanical device by which a saddle having two separated cushions or pads, with a space between them, might be constructed; his invention, as claimed by him in his patent, being solely for the sunken depressions in the solid saddle top, so formed as to receive the cushions or pads, and prevent the pads slipping. It is conceded that, if cushions or pads similar to those shown in the defendant's saddle are fastened to the top of a saddle without depressions, there is no infringement. The validity of the patent then depends upon whether, in view of the state of the art, it required invention to construct a saddle top with vertical, walled depressions, adapted to receive the two cushions and hold them in place. It is certainly a case in which all that is new in the mode of construction is not very distinguishable from mere mechanical improvement, and, if it can be shown that the idea of the mode of construction was not new, then I think nothing remains but mechanical skill.

"It being conceded that all that the complainant can make claim to is the depressions to receive the pads, it is important to see if that idea, in connection with the seat of a metal-top saddle, was new. It is a matter of observation that a depression, more or less deep, made in a seat in order to receive a cushion, is common and old; and in the English patent in evidence (No. 12,854 of 1889), to Henry Edward Newton, he describes an equestrian saddle to be made of thin sheet steel or iron, in which 'two cup-like depressions are stamped, one depression being on each side of the central axis of the blank. These depressions are subsequently filled up with India rubber, gutta percha, padding, or any other suitable elastic substance, so as to render the seat comfortable and elastic to the rider.' And his claim 2 is for 'the cup-like depressions, F, F', as described, as illustrated in the drawing, for the purposes herein set forth.' This, it seems to me, is the substance of the complainant's specification and claim, viz. in a metal-top saddle, a depression on each side of the axial line, made to receive padding, intended to make the seat elastic to the pressure of the tuberosities of the ischii. Here we have the same problem of a rigid metal seat to be made elastic at the same two points of contact with the rider's body, and the same device to accomplish it, viz. depressed spots in the metal, to be filled with pads. It is urged that there are in the complainant's device the additional elements that the depressions are made with abrupt walls to prevent the pads from slipping, and that the pads are removable, both of which features are asserted to be important and useful improvements. But with cup-like depressions to hold the pads, already

shown by Newton's patent, it does not appear that it required invention to make the depressions sufficiently abrupt to prevent the filling from slipping. In his specification, Christy states: 'In my improved saddle I have only a truncated horn; * * * and I also prefer that this truncated horn portion, instead of being convex upon its upper surface, as in the old construction, should be cut away, or concave, centrally thereof, thereby giving room for the portions of the person which are so easily injured. I also preferably make the rear of the saddle wider than ordinarily constructed, so as to sustain the fleshy portions of the buttocks as well as the pelvis, and provide upon each side of the seat portion a sunken portion or recess constructed to receive and hold pads or cushions which may be removably fitted therein for the comfort and ease of the rider.' In the drawings the pads are shown lying in the depressions, and not extending above the plane of the metal top of the saddle. In the Christy saddle, as manufactured, the horn is not truncated, it is not cut away or made concave on its upper surface, and the saddle is not made wide, and does not support the fleshy portion of the buttocks at all. As manufactured, the Christy saddle presents nothing to the body of the rider but the two small pads on which the two ischil rest, sustaining the whole of the rider's weight. Instead of the concavity, the truncated horn being cut out to relieve the pressure on the perineum, there is substituted on the saddle, as manufactured, an open space the whole length of the saddle, from front to rear, between the two cushions, which space, from the cushions being considerably separated, and being built up quite high above the plane of the metal saddle, is both wide and deep. Merit is claimed for the saddle because the cushions are removable, but, as manufactured, they are held in the recesses by catches of twisted wire. Any cushion which is affixed to a solid base may be removed, if the fastenings are released. Great advantage is also claimed because the abrupt walls of the sunken recesses prevent the cushions from slipping. But if it was not new, as is shown by the English patent to Newton, to make the recesses in a metal saddle to receive cushions, it can hardly be said to require invention, when the cushions as used are liable to slip, to make the recesses sufficiently abrupt to prevent slipping. The strongest and most persuasive argument which the complainant urges in favor of the patentability of the Christy saddle is based upon the testimony showing the rapidly increasing sales and its decided popularity since it has become known upon the market. But the saddle manufactured differs so widely from the saddle shown in the specification and drawings that it is not easy to determine just what features make it acceptable to the trade and to those who use it. It would appear that some of the features of the saddle as manufactured, which are not shown in the saddle as patented, possess more novelty and utility than those described in the patent. It may be well that the advantages of the manufactured saddle result from the fact that the saddle plate is reduced in size until it is nothing more than a support for the two pads, and has no bearing at all for the fleshy portion of the buttocks, so that the rider's weight rests exclusively upon the two ischil of the pelvis, and also from the fact that the interval between the cushions or pads leaves an open space from front to back similar to that shown in the Hicks patent, through which there can be a current of air, and because of which there can be no pressure upon the perineum. It seems quite probable that it may be these unpatented features, not shown in the specifications or drawings, which have given the Christy saddle the acceptance which it has obtained, rather than any advantage of construction arising from the fact that the pads are set in depressions and are detachable. It may also be that, with the enormously increased use of bicycles, experience may have taught particular riders that in the long run it is less injurious to use one kind of a saddle than another, although not so agreeable at first. The fact of comparative utility, when the acceptance of the improved device may just as well be attributed to features not claimed in the patent, is an unsafe guide in determining the existence of patentable invention.

"Upon the whole case, considering the prior state of the art, I have been forced to the conclusion that it did not require invention to form the recesses on the surface of a solid-top saddle with abrupt marginal walls to receive the pads and keep them from slipping."

Appellant claims that the fact that the saddle manufactured by it so soon went into extensive use, and largely superseded the saddles made prior to the date of the patent in suit, is evidence, not only of novelty and value, but also of usefulness and invention. It must be conceded that the sales were phenomenally large, and that the evidence shows the Christy saddle was received with great favor by those who used the bicycle; and also it may be admitted that it not only added to their comfort, but contributed to their safety. But still we do not think that it follows that, therefore, invention was required to design and construct it. On this question the supreme court of the United States, in *McClain v. Ortmayer*, 141 U. S. 419, 12 Sup. Ct. 76, said:

"That the extent to which a patented device has gone into use is an unsafe criterion, even of its actual utility, is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market, and large commissions to dealers, as by the intrinsic merit of the articles themselves. The popularity of a proprietary medicine, for instance, would be an unsafe criterion of its real value, since it is a notorious fact that the extent to which such preparations are sold is very largely dependent upon the liberality with which they are advertised, and the attractive manner in which they are put up, and exposed to the eye of the purchaser. If the generality of sales were made the test of patentability, it would result that a person, by securing a patent upon some trifling variation from previously known methods, might, by energy in pushing sales, or by superiority in finishing or decorating his goods, drive competitors out of the market, and secure a practical monopoly, without in fact having made the slightest contribution of value to the useful arts. The very case under consideration is not barren of testimony that the great success of the McClain pads and claspings hooks, a large demand for which seems to have arisen and increased year by year, is due partly, at least, to the fact that he was the only one who made the manufacture of sweat pads a specialty; that he made them of a superior quality, advertised them in the most extensive and attractive manner, and adopted means of pushing them upon the market, and thereby largely increased the extent of their sales. Indeed, it is impossible from this testimony to say how far the large sales of these pads is due to their superiority to others, or to the energy with which they were forced upon the market. While this court has held in a number of cases—even so late as *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71, decided at the present term—that in a doubtful case the fact that a patented article had gone into general use is evidence of its utility, it is not conclusive even of that; much less, of its patentable novelty."

The United States circuit court of appeals for the Ninth circuit, in the case of *Klein v. City of Seattle*, 44 U. S. App. 741, 23 C. C. A. 114, and 77 Fed. 200, used the following language, which we think applicable to the case now under consideration:

"A patent must combine utility, novelty, and invention. It may in fact embrace utility and novelty in a high degree, and still be only the result of mechanical skill, as distinguished from invention. A person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof. In the language of the supreme court: 'It is not enough that a thing shall be new, in the sense that, in the shape or form in which it is produced, it shall not have been before known, and that it shall be useful, but it must, under the constitution and statute, amount to an invention or discovery.' *Hill v. Wooster*, 132 U. S. 693, 701, 10 Sup. Ct. 228, 231, and authorities there cited. A mere difference or change in the mechanical construction, in the size or form of the thing used, in order to obviate known defects

existing in the previous devices, although such changes are highly advantageous, and far better and more efficacious and convenient, does not make the improved device patentable. In order to be patentable, it must embody some new idea or principle, not before known. It must, as before stated, be a discovery, as distinguished from mere mechanical skill or knowledge. *Atlantic Works v. Brady*, 107 U. S. 192, 200, 2 Sup. Ct. 225; *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717; *Thompson v. Boisselier*, 114 U. S. 2, 11, 5 Sup. Ct. 1042; *Trimmer Co. v. Stevens*, 137 U. S. 423, 433, 11 Sup. Ct. 150; *Andrews v. Thum*, 33 U. S. App. 39, 15 C. C. A. 67, and 67 Fed. 911."

In *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. 699, the supreme court, speaking by Mr. Justice Jackson, said:

"The most that can be said of this Grant patent is that it is a discovery of a new use for an old device, which does not involve patentability. * * * The advantages claimed for it, and which it no doubt possesses to a considerable degree, cannot be held to change this result; it being well settled that utility cannot control the language of the statute, which limits the benefit of the patent laws to things which are new as well as useful. The fact that the patented article has gone into general use is evidence of its utility, but not conclusive of that, and still less of its patentable novelty."

The supreme court of the United States, in the case of *Aron v. Railway Co.*, 132 U. S. 84, 10 Sup. Ct. 24, said, as stated in the syllabus of said case:

"The same devices employed by him [the patentee] existed in earlier patents. All he did was to adapt them to the special purpose to which he contemplated their application, by making modifications which did not require invention, but only the exercise of ordinary mechanical skill; and his right to a patent must rest upon the novelty of the means he contrived to carry his idea into practical application."

We find no error in the decree appealed from, and it is affirmed.

RYAN v. RUNYON et al.

(Circuit Court of Appeals, Third Circuit. May 4, 1899.)

No. 4, March Term.

1. PATENTS.—INFRINGEMENT.—SPRING MATTRESSES.

A patent for an improved spring mattress made in two parts, and in which a conspicuous feature is the manner of hinging the two sections together by means of a continuous unbroken woven-wire facing, free from the ridge or hard unyielding hinge piece found in other hinged mattresses, is not infringed by a mattress in which the two sections have a central longitudinal iron brace or tie rod, which also acts as a hinge rod, running through the upper facing or web of the mattress from end to end.

2. SAME.

A patent for a bed bottom, in which the novelty consists altogether in connecting the ends of the transverse stiffening rods or strips to the side edges of the woven-wire fabric, is not infringed by a mattress in which there is no such connection, and which has its transverse tie wires attached at their outer ends to the frame.

3. SAME.

The Gail patent, No. 399,867, for an improvement in woven-wire mattresses or bed bottoms, construed, as limited by the prior state of the art to the specific form shown and described, and held not infringed.

4. SAME.

The Ryan patent, No. 403,143, relating to woven-wire mattresses or bed bottoms, construed, as limited by the prior state of the art to the specific constructions shown, and held not infringed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Stephen J. Cox, for appellant.

C. Godfrey Patterson, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. This bill charges the defendants with the infringement of two letters patent,—one of them being No. 399,867, dated March 19, 1889, granted to Daniel H. Gail and John F. Gail, and the other of them being No. 403,143, dated May 14, 1889, granted to James B. Ryan. Each of the patents in suit relates to woven-wire mattresses or bed bottoms. It appears as well by the general proofs in the case as from the specifications themselves that these patentees were improvers in an old art. Manifestly neither of the patents is for a primary invention. In each instance patentability may be conceded. Nevertheless, these inventions, by reason of the state of the prior art, belong to that class in which the patentee is to be restricted to the specific form of improvement shown and described by him. *Railway Co. v. Sayles*, 97 U. S. 554; *Duff v. Pump Co.*, 107 U. S. 636, 2 Sup. Ct. 487. The distinguishing feature of the invention of the patent first above cited (No. 399,867) is thus clearly set forth in a written communication found in the file wrapper from the applicant's solicitor to the commissioner of patents, in answer to adverse citations of prior patents referred to by the office as anticipatory:

"His invention consists in the manner of hinging the two sections of a spring mattress by means of a continuous unbroken woven-wire facing, which not only presents an unbroken surface from side to side, as well as from end to end, of the mattress, but in itself forms a hinged connection between the two folding sections free from the ridge or hard unyielding hinge piece found in other hinged mattresses. The perfect smoothness and uniformity of bearing surface of a single mattress supported upon spiral springs is thus secured, with the convenience attending a mattress which is hinged to double and fold over upon itself, and such a combination is not found in the references."

The specification of the patent gives great prominence to this feature of the improvement, namely, the unbroken woven-wire facing. Thus it states:

"The improved double mattress is constructed of an upper facing or section, A, which is made to extend in an unbroken sheet from side to side of the bed, and of two longitudinal lower sections hinged together lengthwise by means of the upper section, to which they are attached." Again: "The unbroken upper facing or section, A, of the woven wire is stretched upon two metallic frames, B B, each of which is formed of a single iron bar bent to inclose three sides of a rectangle, the fourth side being left open." And still again: "The two frames, B B, are placed so as to bring their open sides opposite each other at the middle of the woven-wire sheet, A, at which point the ends of the wire frames, B B, are bent inward, and enter adjacent coils of the woven web, a, as shown in Fig. 1, which thus becomes a hinge for said frames, B B, so that they may fold over on said middle line, e e, one upon the other."

Now, the defendants' mattress does not have the unbroken woven-wire facing of the patent. That distinctive feature of the Gail invention is entirely wanting in the defendants' bed bottom. On the

contrary, a central longitudinal iron brace or tie rod, which also acts as a hinge rod, runs through the upper facing or woven web of the defendants' mattress from end to end. The advantages which the patentees describe and claim for their mattress are not attained by the defendants. In this respect the case is like that of *Burns v. Meyer*, 100 U. S. 671, where it was held that there was no infringement. We agree with the circuit court that these two mattresses or bed bottoms are materially different, and that the defendants do not infringe the Gail patent.

We concur, also, in the conclusion of the court below with respect to the other patent sued on,—No. 403,143. The claim of this patent alleged to be infringed is the first, which is as follows:

"(1) In a bed bottom composed of a frame and a woven-wire fabric, the combination, with such fabric, of stiffening rods or strips passed transversely through its meshes, and having their ends connected to the side edges of the fabric, substantially as described."

The novelty of this claim consists altogether in connecting the ends of the transverse stiffening rods or strips to the side edges of the woven-wire fabric. The defendants, however, do not make such connection. The transverse tie wires in their bed bottom are attached at their outer ends to the frame. Therefore the court was right in holding that there was no infringement of this patent. We find no error in this record, and hence the decree of the circuit court is affirmed.

BRIGGS v. DUELL, Commissioner of Patents.

(Circuit Court of Appeals, Second Circuit. April 4, 1890.)

No. 43.

1. PATENTS.—ANALOGOUS USE.

There is no invention in merely applying and adapting, to the planing and grooving of cakes of ice, mechanism previously used in the planing of wood.

2. SAME.—REISSUE.—APPARATUS FOR PLANING CAKES OF ICE.

The incorporation, into the first claim of the Briggs patent, No. 367,267, for an apparatus for planing cakes of ice (which claim was adjudged invalid by the circuit court of appeals), of new matter describing a cutter consisting of a number of points, which will not only cut, but groove, the ice in one operation, and of an ice elevator adapted to force the ascending cakes of ice into contact with the cutter, would not make the claim patentable, so as to warrant a reissue.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This cause comes here upon appeal from a decree of the circuit court, district of Connecticut, dismissing the bill. 87 Fed. 479. The facts are sufficiently set forth in the opinion.

Benjamin F. Lee, for appellant.

W. A. Megrath, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. On July 26, 1887, a patent (No. 367,267) was granted to the complainant for new and useful improvements

in apparatus for planing cakes of ice for storing. Upon this patent suit was brought against the Central Ice Company in the Northern district of New York to restrain infringement of its first claim. Judge Coxe, who heard the cause at circuit, held that there was no infringement. 54 Fed. 376. An appeal was thereupon taken to this court. The claim there in question read as follows:

"(1) The combination, with the cutter head and the racks directly attached thereto, of the guides for both cutter head and the racks, arranged perpendicularly to the plane of the elevator, the pinions mounted on said guides and engaging in said racks, and the levers or arms for operating said pinions, all constructed substantially as described, so that the depth of the cut may be directly and positively regulated by means of the levers, as herein specified."

This court reviewed the state of the art, including patents to Chaplin (271,220), Smith (310,093), and Loring and Giles (329,400), and finding, in a patent to Butterfield (24,076, May 17, 1859), for a wood-plane attachment, the "same combination found in complainant's patent of cutter head, guides, racks, pinions, and levers," held that, in contemplation of law (of course, in fact, Briggs had never heard of Butterfield), the patentee "merely transported the devices of Butterfield into the old elevator, and cut away the useless feed roller." The conclusion was that the claim was invalid for lack of invention. Briggs v. Ice Co., 8 C. C. A. 480, 60 Fed. 87. The patentee thereupon applied for a reissue upon an application which contained several claims, of which the following only is now in controversy. For convenience of comparison, the new matter inserted in the claim is italicized:

"(3) The combination with the cutter head, and the racks directly attached thereto, of the guides for both cutter head and the racks, arranged perpendicularly to the plane of the elevator, the pinions mounted on said guides and engaging in said racks, and the levers or arms for operating said pinions, *a cutter consisting of a number of points entering the ice in such a manner as not only to cut but to groove it at one operation, and an ice elevator adapted to positively force the ascending cakes of ice into contact with the cutter and groover, all constructed substantially as described, so that the depth of the cut may be directly and positively regulated by means of the levers, and the ice at the same time properly grooved for storage.*"

It will be perceived that the phraseology of this claim calls for two elements not enumerated in the first claim of the original patent,—the ice elevator, and the multipoint cutter and groover. It will be perceived, from an examination of our former decision, that the ice elevator, although not specifically mentioned, was regarded as an element of the claim. It was also understood that some kind of a cutter was necessary to make the machine practically useful, and to enable the operator to regulate the depth of the cut. In the proposed reissue the combination is restricted to a peculiar variety of cutter, which, however, was not in itself new. Briggs himself had shown it in the specifications of his patent, No. 346,576 (August 3, 1886), calling attention to the circumstance that such a cutter would groove the ice, as well as cut it, and in the reissue of this earlier patent (reissue No. 11,060, February 18, 1890) this double function of grooving and planing is made the subject of a specific claim. The application for a reissue of No. 367,267 (which application was filed

July 16, 1894) was rejected by the patent office, upon the authority of *Briggs v. Ice Co.*, supra, as appears from the opinions of the examiners in chief and of the commissioner of patents. The patentee thereupon appealed to the court of appeals of the District of Columbia, which affirmed the decision of the commissioner of patents. 9 App. D. C. 478. Thereupon he filed a bill in equity for this decree, in accordance with the provisions of Rev. St. U. S. § 4915. The cause came before Judge Townsend upon pleading and proofs. The bill was dismissed (*Briggs v. Duell*, 87 Fed. 479), and from decree of dismissal this appeal is taken.

The argument has taken a somewhat wide range, embracing practically a reargument of questions passed upon in our opinion upon the original patent. Upon this branch of the subject it will be sufficient to say that we see no reason to modify the opinion heretofore expressed. It will be necessary only to examine the new facts upon which complainant relies to make out a case not covered, as he contends, by the former opinion.

1. Attention is called to the circumstance that, when the former opinion of this court was handed down (February 27, 1894, 60 Fed. 87), the supreme court had not decided *Potts v. Creager* (1895) 155 U. S. 597, 15 Sup. Ct. 194. It is not thought, however, that that case lays down any new principles of law, nor that it has overruled the earlier decisions which were cited in *Briggs v. Ice Co.* On the contrary, it indicates quite clearly that the question of so-called double use—whether, that is to say, the new use is so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill—is one dependent upon the peculiar facts of each case. It would be difficult to find uses more analogous than we have here. If the apparatus for raising and lowering had, in its earlier use, been applied, for instance, to the movement of ore buckets in a shaft, it might, perhaps, be urged that the analogy was imperfect; but here in both applications the apparatus moves a cutter (which is itself to remove surplus material) to the place where the operator wishes it to cut. It would seem to make little difference that the workmen who plane wood do not plane ice. In *Potts v. Creager* the supreme court approved their former decision in *Brown v. Piper*, 91 U. S. 40, where a patent for preserving fish for food purposes was held to be without patentable novelty, in view of an earlier patent for a "corpse preserver" used in the undertaker's art. See, also, *Stearns v. Russell*, 29 C. C. A. 121, 85 Fed. 218; *Rogers v. Fitch*, 27 C. C. A. 23, 81 Fed. 959.

2. It is next contended that the new matter introduced in the claim removes it from the operation of the opinion in *Briggs v. Ice Co.* As already pointed out, the express inclusion of the ice elevator as an element involves no change; it was read into the claim in our former opinion. The addition of the peculiar cutter and groover of the patentee which had already, by his own act in taking out No. 346,576 (reissue No. 11,060), been made a part of the prior art, does not change the situation. It adds nothing new to the combination, which remains a combination of old devices, just as it was in the original patent.

3. It is contended that undue weight was given to the Butterfield patent in our former opinion. The model, which was filed with application for that patent and which was damaged by the fire which occurred in the patent office in 1877, has been found, and the experts on both sides have testified as to the inferences which they draw from it. It exhibits a hole in the frame of the machine, and a slot in the knife-carrying frame. There is no reference to these in the specifications, nor are they shown in the drawings, nor is there anything in the patent to indicate what purpose they were intended to subserve. Complainant's expert draws the inference that they were devised so that a set screw might be used to clamp the knife-bearing frame after the racks and pinions had raised or lowered the knife to its desired position. Defendant's expert suggests that we may quite as fairly infer that they were adapted to receive "a rod or stop which might brace the frame, or hold the knife frame from falling upon the rollers at the bottom." In the absence of any reference to a set screw, either in the specifications, claims, or drawings, we are not inclined to give much weight to either of these inferences. Nor does the evidence satisfy us that the machine of Butterfield would be inoperative without a set screw. And, even if irregularities in the boards to be planed would at times destroy the adjustment of the knife (unless a set screw were used), as complainant's expert claims, by reason of the increased pressure of the plank against the feed roller, causing the latter to rise and carry the rest of the frame with it, that difficulty would disappear with the disappearance of the feed roller; and, as was stated in *Briggs v. Ice Co.*, "it is obvious that the feed roller would be unnecessary in an ice-planing machine," where the substance to be cut is fed forward by the moving base on which it rests. The decree of the circuit court is affirmed, with costs.

JACOBSEN et al. v. DALLES, P. & A. NAV. CO.

(District Court, D. Oregon. May 6, 1899.)

No. 4,432.

1. PARTIES IN ADMIRALTY—JOINDER OF LIBELANTS IN ACTION FOR COLLISION.

Under the rule in admiralty that all parties may join as libelants where their rights of recovery rest on a common cause of action, whether the suit is in personam or in rem, though, as between themselves, their interests may be separate, persons suffering separate injuries from a collision may join in a libel to recover damages therefor from the owner of the vessel in fault.

2. PLEADING IN ADMIRALTY—SUFFICIENCY OF LIBEL FOR COLLISION.

A libel to recover for personal injuries received in a collision must set out the facts which constitute the negligence, and also the injuries complained of.

3. DAMAGES—ACTION FOR COLLISION.

Expense incurred by a libelant in replacing certain papers lost by him in a collision is not recoverable as an element of damages, being too remote.

In Admiralty. On exceptions to libel.

T. J. Geisler and Geo. W. Hazen, for libelants.

F. P. Mays, for defendant.

BELLINGER, District Judge. This is a libel in personam for damages resulting from a collision on the Columbia river, between the river steamer Sarah Dixon, navigated under a lease by the defendant company, and a small sailing vessel owned by the libelant Jacobsen. Jacobsen sues in his own behalf for the loss of the vessel and other property and for personal injuries. Dresser and Forde are joined in the libel,—Dresser as the administrator of the estate of Hansen, who was on board the sailing vessel, and who was drowned as a result of the accident; and Forde, who was also on board the sailing vessel, and who claims to have sustained personal injuries, and damages in the loss of certain personal property. Defendant excepts to the libel on various grounds,—among them that there is a misjoinder of distinct causes of suits; that there are different causes of action, not separately stated in the complaint; that the negligence complained of is not specially stated, and that there is no allegation tending to show in what the negligence complained of consisted; that the libel is defective in failing to specify the injuries from which the damages have resulted; and that the libelant Forde is not entitled to recover on account of the loss of certain papers which the libel alleges relate to an estate owned by him in England, and which loss has entailed upon him an expenditure of \$1,000 in supplying the papers so lost.

The rule as to the question of misjoinder is that all parties in admiralty suits may join as libelants whose interests rest upon a cause of action common to all, though, as between themselves, their interests are separate and distinct, and that this rule applies both in suits in personam and in rem; and the rule has been so far extended as to allow the master of a vessel in collision cases to bring actions in behalf of seamen, shippers, and passengers. *Insurance Co. v. Johnson*, 1 Blatchf. & H. 9, 1 Fed. Cas. 665; Ben. Adm. § 384. In this case, the cause of action being common to all the parties, it is sufficient; it is not material that the interests of the parties are distinct. The exceptions are overruled as to the third and fourth grounds of exception above stated, and they are sustained as to the allegation of negligence, as well as that of damages, set forth in articles 5, 6, and 10. It is not enough to allege generally that the defendants were guilty of negligence, but the facts showing the negligence must be alleged. A general charge of negligence does not state any fact, but a mere conclusion, and leaves the defendants in the dark as to the character of the charge they are required to meet. So, too, of the general allegation of physical injury. This is not sufficient. The libelants must specify their injuries; the ultimate facts showing the injury must be alleged. The allegation of damages to Forde resulting from the loss of the papers in question is not sufficiently definite and certain to be made the basis of a decree; and, furthermore, these damages are not the natural and probable consequence of the act complained of, and for this reason there can be no recovery for such damage.

DAVIS v. ADAMS.

(District Court, N. D. California. April 29, 1899.)

No. 11,829.

PLEADING IN ADMIRALTY—ACTION BY SEAMAN—VARIANCE.

A libel for damages, on the alleged ground that libelant was induced to visit a vessel by fraudulent pretenses, and there detained, and compelled to go on a voyage, sounds in tort, and a recovery cannot be had thereunder for wages due the libelant for his services as seaman rendered under shipping articles, which he signed.

In Admiralty.

Libel for damages. The libel alleges that the libelant was induced by fraudulent pretenses and assurances to go on board the bark *Retriever*, then lying in the harbor of San Francisco, for the purpose of visiting said vessel, and when on board "was unable to escape from said vessel, and was threatened, under penalty of being placed in irons, if he attempted to escape or make an outcry," and was thus compelled to go upon the voyage referred to in the opinion of the court.

P. C. Dormitzer, for libelant.

Charles E. Naylor, for respondent.

DE HAVEN, District Judge. The evidence in this case shows that the libelant, on or about the 11th day of May, 1895, signed shipping articles by which he agreed to go as a seaman on board the bark *Retriever*, on a voyage from San Francisco to Port Hadlock and return. In pursuance of this agreement, the libelant proceeded on the bark to Port Hadlock, and there left the vessel. In my opinion, the evidence shows that he was justified in leaving. The evidence also shows that the libelant has not been paid the wages earned by him. The libel will, however, have to be dismissed, as there is a fatal variance between the case proven and the cause of action alleged in the libel. The cause of action set forth in the libel is for a tort in the nature of false imprisonment, and not upon the contract established by the evidence. Libel dismissed, the respondent to recover costs.

HALL et al. v. WITTER.

(District Court, N. D. New York. May 8, 1899.)

ADMIRALTY—ACTION FOR REPAIRS AND SUPPLIES—COSTS.

The record owner of a vessel during the time repairs were made and supplies furnished to her is not entitled to recover his costs in an action brought against him to recover for such repairs and supplies, though he is successful in defeating recovery by showing that he was not in fact the owner.

In Admiralty.

Ingram, Mitchell & Williams, for libelants.

Josiah Cook, for respondent.

COXE, District Judge. This is a libel in personam, filed November 16, 1898, against the respondent as the owner of the steam canal boat Hugo Keller, to recover for supplies furnished to the said boat and repairs made thereon during the years 1895, 1896, and 1897. It is agreed by both parties that the only question is one of fact, namely, was the respondent the owner of the Keller during the period in question? The testimony is exceedingly conflicting and it is difficult to explain some of the transactions upon any rational business principle, but after considering the entire evidence, oral and documentary, the court has reached the conclusion that the respondent was not the owner. The respondent testifies that in 1893 he sold the Keller for \$6,000 to Edward Wildey, who continued to own and hold the uninterrupted possession of her until December, 1897. At the time of the sale Wildey paid the respondent \$2,500. The testimony as to this payment is not denied by Wildey. Wildey had the entire management of the boat, made purchases and ordered repairs, including those in controversy, and exercised all the rights of ownership. Various payments were made from time to time on account of the sale and statements of the amounts paid were rendered by the respondent to Wildey. The latter denies the sale generally, but his testimony is inconsistent with this denial and leads to the conclusion that the respondent's version of the transaction is substantially correct. For instance, he says regarding the sale in December, 1897: "He [Witter] asked me if I would sell her [the Keller] and I told him I would if he could make arrangements. * * * Finally I told him if he would give me \$2,000 * * * I would get off the boat." Subsequently he testified that although he never agreed to pay anything for the Keller and never agreed to pay a "certain sum," he did actually pay for her; that when in December, 1897, she was transferred to Fisk he received \$1,000 and later \$200; that the respondent credited him from time to time with sums paid by him on the purchase money of the boat and that he expected that he would get a bill of sale when he "got the boat paid for." There is no escape from the conclusion that there was a sale; as to this fact both vendor and purchaser agree. There was no record of the conveyance and many of the respondent's acts are entirely inconsistent with his present contention, but it is thought that the presumptions arising from these acts are insufficient to overcome the positive and uncontradicted testimony establishing a sale. The libel is dismissed, but as the libelants were justified in bringing the suit against the record owner, the dismissal should be without costs.

THE CARRIER DOVE.

(District Court, D. Massachusetts. May 9, 1899.)

No. 993.

SEAMEN—VOYAGE ON LAYS—RIGHT TO LIEN ON VESSEL.

An agreement by seamen to serve on lays on a fishing voyage, made with the master, who had made an oral agreement with the owners of the vessel to ship the crew and to pay to the owners a specified portion of the proceeds of the catch, does not change their character as seamen,

their shares being substantially wages, nor deprive them of their right to a lien therefor against the vessel, where the master, after disposing of the catch, absconded with the proceeds.

In Admiralty. Libel in rem against the fishing schooner Carrier Dove by Joseph Williams and others, as members of the crew, to recover their lay.

J. W. Keith, for libelants.

Carver & Blodgett, for respondent.

LOWELL, District Judge. The owners of the libeled fishing schooner made with one Silva, her master, an oral agreement for a fishing voyage. Silva was to ship the crew, and the owners had no connection with the crew except through Silva. The terms agreed upon between Silva and the owners, and between Silva and the crew, were as follows: From the gross proceeds of the catch, wharfage and scalage were to be deducted. One quarter of the balance was to go to the owners; the remainder, after deducting the cost of groceries, ice, bait, etc., and 10 per cent. paid to the master for use of gear, was to be divided equally among the crew, including the master. A custom was proved that the master should sell the catch and collect the price, and that, in his absence, the crew should appoint one or more of their number to take his place. All supplies were bought by the master or other member of the crew. If the catch was insufficient to discharge the bills incurred for supplies, the same were charged against the next voyage; but there was no evidence how the bill was to be collected if the next voyage was made by another master and crew. This, I understand, is called the "quarter clear." The master sold the catch, collected the price, and absconded therewith. The other members of the crew bring their libel against the vessel for their lay.

This case seems to be covered by *Crowell v. Knight*, 2 Low. 307, Fed. Cas. No. 3,445. There the circumstances were in some respects more favorable to the claimants than here. The libelants were "sharesmen," of whom there were four, while seven other seamen were shipped for special wages in money. In that case, there was stronger reason than in this in holding the libelants to be partners and joint charterers. It is true that in *Crowell v. Knight* it was said that "they [the sharesmen] have no voice in the disposal of the catch in any respect," while here it was otherwise; but this difference seems to me not very important. The method of sale is not decisive upon the question of title, and was probably adopted largely for the convenience of all parties. The supreme court of Massachusetts has decided that seamen have no lien upon the catch for their lay. *Story v. Russell*, 157 Mass. 152, 31 N. E. 753. But that case was made to turn largely upon a construction of Rev. St. §§ 4391-4394, which provisions are not applicable here. The same court has decided, in a case like this in some respects, that those who furnish supplies have no lien. *Rich v. Jordan*, 164 Mass. 127, 41 N. E. 56. This may be true. For the sake of argument, it may be admitted that, if courts of admiralty considered seamen to deal on equal terms with owners, the former might not prevail in a case like that at bar; but, consider-

ing the favor always shown in admiralty to seamen, I think that the agreement here made should not be construed to deprive them of their lien.

AMERICAN SUGAR-REFINING CO. v. MADDOCK.

(Circuit Court of Appeals, First Circuit. May 12, 1899.)

No. 279.

SHIPPING—LIABILITY OF CARRIER FOR SHORTAGE IN CARGO—EFFECT OF BILL OF LADING SIGNED BY MASTER.

The rule that the master of a vessel has no authority by virtue of his position, either actual or apparent, to sign a bill of lading for cargo not actually received, on board, applies when there is only a deficiency in part through mistake, and the owner cannot be held liable, either by the original consignee or an indorsee of the bill of lading, for such a shortage, where the quantity actually received is delivered.

Appeal from the District Court of the United States for the District of Massachusetts.

Charles T. Russell and Arthur H. Russell, for appellant.

Eugene P. Carver (Edward E. Blodgett, on brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. In this case, the American Sugar-Refining Company purchased, in Cuba, a quantity of sugar in bags, and paid in full therefor. The parties of whom it purchased shipped the sugar by the steamer Salamanca, and took a bill of lading for a precise number of bags named, which also gave the weight. The bill of lading contained also the following words: "Weight and contents unknown." It acknowledged that the sugar was shipped by the parties of whom the cargo was purchased, and it ran in favor of the American Sugar-Refining Company and its assigns, deliverable at Boston. It is admitted that the steamer delivered all the sugar which she received, but the delivery was short of the bill of lading 37 bags. There was no claim that there was any shortage in weight. The American Sugar-Refining Company claims to be allowed the value of 37 bags, estimated at the average weight per bag of the whole cargo, and this is the issue in the case. The proceeding below was by a libel in personam in the district court, and the decision was in favor of the owner of the vessel. 91 Fed. 166.

In *The Freeman*, 18 How. 182, it was held that neither a vessel nor her owners were liable in that case in favor of a bona fide holder of a bill of lading, it having been shown that none of the goods called for by it were shipped. The American Sugar-Refining Company, however, maintains that there is a substantial distinction between a case where a bill of lading is issued fraudulently, or where no merchandise called for by it was in fact shipped, and the case at bar, where it is claimed that the master erred innocently in his count, and there is only a small shortage in what the shipping documents call for. It is not denied that, as towards an

original holder of a bill of lading, it stands as a mere receipt, so far as the amount of merchandise called for by it is concerned, and is therefore subject to explanation; but it is claimed that in the present case the American Sugar-Refining Company stands in the position of an innocent indorsee of a bill of lading for value, and that the vessel is therefore estopped so far as concerns the shortage. The American Sugar-Refining Company is not in form an indorsee, and it does not appear distinctly that it made payment to its correspondents in Cuba on the faith of the bill of lading; and it may well be, in any event, that it should deal for the shortage with the parties of whom it purchased the sugar and who shipped it, and not with the vessel. However, the case has been submitted by both parties on the theory that the American Sugar-Refining Company stands in the position of an innocent indorsee for value.

With reference to the distinction attempted to be made by the American Sugar-Refining Company, none of the authorities relied on by it sustain it, except the local decisions of the state courts of New York. With those exceptions, the entire weight of authority, which ought to influence us, recognizes no distinction, and we perceive no principle of law which should require them to do so. The Freeman, already referred to, treats of this question. At page 191, the opinion says that the master has no more an apparent unlimited authority to sign bills of lading than he has to sign bills of sale of the vessel. It says he has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped, but his act does not bind the owner, even in favor of an innocent purchaser, if the facts on which his power depends do not exist; and the court adds: "It is incumbent upon those who are about to change their condition upon the faith of his authority to ascertain the existence of all the facts upon which his authority depends." It also says it takes the law to be now settled by several cases cited, among the rest *Grant v. Norway*, 10 C. B. 665, thus approving that decision.

Grant v. Norway (decided in 1851) is a case of very great authority, having been heard in the common pleas by Chief Justice Jervis, Justice Cresswell, and Justice Williams. At page 688 the opinion says that the court cannot discover any ground on which a party, taking a bill of lading by indorsement, would be justified in assuming that the master had authority to sign such bills, whether the goods were on board or not. It also states that it is generally known that the master derives no such authority from his position as master, so that the case may be considered as if the party taking the bill had notice of an express limitation of his authority. On page 689 it says:

"So here the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and the party taking the bill of lading, either originally or by indorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it."

Another leading case is *McLean v. Fleming*, L. R. 2 H. L. Sc. 128, decided in 1871. The facts were almost like the case at bar, in that the bill of lading was taken out by the persons from whom the merchandise was purchased, running to the purchaser. It covered a

cargo of cattle bones. There was a nominal shortage of 210 tons, and the cases already cited were applied; the lord chancellor stating, at page 130, that the master has no authority to sign bills of lading for a greater quantity of goods than actually put on board. *Grant v. Norway* and *McLean v. Fleming* are usually cited in England whenever this question is referred to. The latter case especially is like the one at bar, not only in the circumstances already stated, but also in that no fraud on the part of the master was alleged. In *Cox v. Bruce*, 18 Q. B. Div. 147 (decided by the court of appeal in 1886), the same rule was given as to an indorsee of a bill of lading; Lord Esher, M. R., stating, at page 152, the effect of the decision in *Grant v. Norway* to be, not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of his authority are well known among mercantile persons. *Carv. Carr. by Sea* (2d Ed.; 1891), in section 69, states the rule as follows: "This description and statement of quantity are evidence against the shipowner that goods of that kind and amount have been shipped. But they are not conclusive. He may show that they are incorrect, whether the claim be by consignees on whose account the shipment was made or by indorsees of the bill of lading." It is also added: "And this does not depend upon words of reservation, such as 'weight and contents unknown,' being inserted in the bill of lading." This last expression shows, if it was necessary to show it, that the presence of like words in the bill of lading in suit does not affect the case. *Abb. Shipp.* (13th Ed.; 1892), at page 368, states the same general rule, and adds, even as against an indorsee for value: "If the quantity of goods shipped is uncertain, the master cannot bind his owners by acknowledging receipt of a specific quantity of goods." *McLean v. Fleming* is cited in support of this proposition. *Macl. Shipp.* (4th Ed.; 1892), lays down the same general rule in broad terms, citing *McLean v. Fleming* and *Grant v. Norway*, without making any distinction between fraud and mistake on the part of the master, or between cases where there is no shipment or only a partial shipment.

Among the cases cited by the American Sugar-Refining Company, we need notice only *Shepherd v. Naylor*, 5 Gray, 591, *Sears v. Wingate*, 3 Allen, 103, and 1 *Pars. Shipp. & Adm.*, at page 190, where these cases are referred to. These authorities discuss the power of a master to bind the owners by statements in bills of lading as to the rate of freight and certain other matters, and also discuss under what circumstances the master himself may be liable for an excess statement in a bill of the amount shipped, but, on the question before us, they weigh against the American Sugar-Refining Company instead of for it. Other citations relied on are mere dicta, uncertain in expression, and of no weight as against the mass of authorities to which we have referred. The libel was filed in the court below to recover a balance of freight against which the American Sugar-Refining Company sought to recoup the shortage which we have stated. The decree below was in favor of the vessel, and it should be affirmed. The decree of the district court is affirmed, with interest, and the costs of appeal are awarded to the appellee.

PEACOCK et al. v. THREE MILLION FEET OF LUMBER et al.

(District Court, N. D. California. May 8, 1899.)

No. 11,636.

1. SALVAGE—NATURE OF SERVICE—RIGHTS OF CREW.

A steamer towed a raft of lumber, found adrift on the sea, to a port, where, on communicating with the owners of the vessel, the master was directed to let go of it, and proceed on his voyage. He left the raft in a comparatively safe place, in charge of third persons, who agreed to give him a part of whatever they might receive for it. They sold the raft, and the purchaser had it towed to San Francisco, where he resold it to the claimant. *Held*, that the crew of the steamer had a claim for salvage services which they were entitled to enforce against the lumber, their right not being affected by the action of the owners in abandoning the raft, nor by the agreement of the master for a share of its proceeds, though such agreement debarred the master from recovering.

2. SAME—AMOUNT—RECOVERY BY CREW.

The personal services of the crew having been comparatively small, and rendered without danger, an allowance of \$120 was made them, the value of the lumber after its delivery in San Francisco being about \$7,200.

This was a libel on behalf of the crew of a steamer to recover for salvage services.

D. T. Sullivan, for libellant.

Andros & Frank, for claimant.

DE HAVEN, District Judge. On September 30, 1898, the steamer Whitesboro, bound on a voyage from Mendocino to Port Harford, discovered, adrift upon the ocean, the raft of lumber mentioned in the libel, and made fast to and towed the same into the port of Santa Cruz. The lumber referred to had, some time before being thus picked up, broken off from a larger raft while being towed to the port of San Francisco. Upon arriving at Santa Cruz, the master of the Whitesboro communicated with the owners of the steamer, and received orders from them to let go of the raft, and proceed upon his voyage. The master thereupon gave possession of the raft to some fishermen under an agreement that he was to have a certain share of what might be received in the event of its being sold by them, or claimed by its owners. It was thereafter sold by the fishermen, for the sum of \$500, to one Cowell, who caused the same to be towed to the port of San Francisco, and there delivered to the claimant, upon the payment by the latter of the sum of \$2,500. The claimant has also paid to the owners of the Whitesboro the sum of \$500 on account of the services rendered by that steamer in taking the raft into Santa Cruz. The raft, when delivered in San Francisco, was of the value of about \$7,200. The port of Santa Cruz is so situated that it is only protected from northerly winds, and for that reason cannot be regarded as a secure place for a raft of lumber to remain at anchor for any great length of time, but on the day when the raft referred to was brought there the wind was from the northwest, the sea was smooth, and such a raft, properly anchored in that port, would not have been considered, nor was this one in fact, in any immediate

danger of loss; and there can be no doubt that what was done by the Whitesboro in bringing the raft into that port contributed, in some degree at least, to its ultimate recovery by the owners. In my opinion, the service thus rendered by the Whitesboro and her crew may properly be regarded as a salvage service. It may be that the owners of the steamer would not be entitled to recover as for a salvage service because of the direction given by them to the master to abandon the raft at Santa Cruz, but, the raft having been brought into a place of comparative safety as the result in part of the efforts of the crew, the right of the latter to recover their proportion of the value of such salvage service was not forfeited by this action of the owners of the steamer, nor was the right of the members of the crew in any way affected by the agreement made between the master and the fishermen. They were not parties to that agreement, and, as it appears from the evidence, knew nothing of it. Under such circumstances they were not bound by it. *The Sarah Jane*, 2 W. Rob. Adm. 110; *The Britain*, 1 W. Rob. Adm. 40.

The only question that remains is that which relates to the amount of the judgment to be awarded in favor of the libelant. The service rendered by the Whitesboro and her crew in bringing the raft into Santa Cruz was not of so meritorious a nature as to justify a large award by way of compensation, and in determining how much should be awarded on account of that service to the libelant, who sues in behalf of himself and the master and other members of the crew, the language of Judge Brown in delivering the opinion of the court in the case of *The William Smith*, 59 Fed. 615, may well be adopted by me as entirely applicable to the claims of the libelant and those in whose behalf this action is brought: "The personal services of most of the ship's company in this case were comparatively small, and without danger. The expense and risk were chiefly on the part of the ship and her owners." The master is not, by reason of his agreement with the fishermen, entitled to recover anything in this action, and, in my judgment, an allowance of \$120 will sufficiently compensate the libelant and the remaining persons in whose behalf this suit is brought. The said sum to be divided between them in proportion to the wages received by them. The libelant is also entitled to recover costs. Let such a decree be entered.

HAYS v. JAMES REES & SONS CO.

(Circuit Court of Appeals, Third Circuit. May 8, 1899.)

No. 20, March Term.

MARITIME LIENS—EQUIPMENT FOR VESSEL—NECESSITY FOR DELIVERY.

Under the Pennsylvania statutes, either Act June 13, 1836, as amended by Act June 24, 1895, or Act April 20, 1858, relating to liens for work done or materials furnished in the building or equipment of vessels, a delivery of an article made for the equipment of a steamer, either by placing it in the vessel or delivering it to the owners, is essential to create a lien on the vessel therefor.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Charles S. Crawford, for appellant.

J. S. Ferguson, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. The appellee, upon the order of the owners of the steamer Cyclone, made a shaft, bedplate, and pillow block for that vessel. The price agreed upon was \$725.40. The work was done, and what thereafter occurred appears from the testimony of Mr. James M. Rees, as follows:

"Q. Captain, you are the president of the James Rees & Sons Company? A. No, sir; vice president and general manager. Q. Captain, your claim against the steamer Cyclone has been objected to by Mr. Crawford, for the reason that it appears by the testimony of D. A. Rees that your charges under date of December 31, 1896, amounting to \$687.16, were for one new shaft extra for the boat, and fittings,—material charged for which had not been delivered. I will ask you whether or not that shaft is still in the shop of your company. A. I believe it is; yes, sir. Q. And will you explain why the shaft was permitted to remain there, and why it wasn't delivered to, and put upon, the boat? A. The shaft was ordered as an extra, and made some time after being received, and then the fittings for the shaft was ordered, so that, in case of emergency, they would have the extra shaft ready to put on the boat in a short space of time, without losing or causing any delay. Q. Mr. D. A. Rees testified that the shaft and fittings were permitted to remain in your shop at the request of one of the owners of the Cyclone. Do you know anything about that? A. Yes, sir; I personally requested Mr. Posey to take the shaft away, as it was in the way. He then told me to fit it up as far as I could, and hold it subject to their order where to deliver it, and, in case I could hold it there, as long as possible to do so, but, when it became too much in the road, then to set it out on the bank, any place where they might get it. Now, that was somewheres about a year ago. On becoming busy last fall,—in January,—I took everything that was in the shop, and piled it at one end, in a promiscuous pile, by the crane. That shaft to-day, among three that was there, is on top of four pairs of cylinders and two other shafts, and about eight feet from the ground. Q. Did you take any note from the steamer Cyclone for your account or any part of it? A. Yes, sir. Q. I show you note dated July 1, 1897, made by the steamer Cyclone and owners to the order of your company for \$873.53, payable two months after date, and ask you whether or not that note included the charges for the extra shaft and fittings. A. Yes, sir; that is a note received in our account, and includes the shaft, six months after we had entered it in our books in settlement of the account up to that date."

Upon the facts and under the circumstances disclosed by this evidence, did James Rees & Sons Company have a lien for the shaft and other articles referred to? The Cyclone having been sold under admiralty process, and the proceeds brought into the district court for distribution, that court held that such a lien did exist, and decreed accordingly. The learned judge found that the articles had been delivered, and therefore held that the case fell within the purview of the Pennsylvania statute of June 13, 1836, as amended by the act of June 24, 1895, by which a lien is given "for all work done and materials and supplies furnished or provided in the building, repairing, fitting, furnishing, supplying or equipping of such ships or vessels." We are unable to concur in this view. We incline to think

that the act of April 20, 1858, is more nearly applicable than that of June 24, 1895; but, be this as it may, we do not doubt that delivery is, under either act, essential to lien. It is not necessary to decide whether it be requisite that the articles should be placed upon the vessel itself; but that the possession must be transferred, either to the vessel or to its owner or proper representative, we think is unquestionable. *James Dalzell's Son & Co. v. The Daniel Kaine*, 31 Fed. 748. In the present case there was in fact no change of possession, and the reason for this is not, in our opinion, material.

The motion to quash is not well founded. The position now assumed in support of that motion was not taken in the court below, and the fact that the appellant bought the steamer *Cyclone* from the sheriff of Washington county, on the 6th day of May, 1898, is distinctly shown by the record before us.

The decree of the district court is reversed, and the cause will be remanded to that court for further proceedings to be there taken in pursuance of this determination.

MEMORANDUM DECISIONS.

THE AMERICA.

THE NIAGARA.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

Nos. 133, 134.

MARITIME LIENS.

Appeals from the District Court of the United States for the Eastern District of New York.

These causes come here upon appeals from decrees of the district court, Eastern district of New York, dismissing the libels, which were filed to recover wharfage from the *America* for the period from December 3, 1890, to May 20, 1891, and from the *Niagara* for the period from March 27, 1891, to July 31, 1891. 86 Fed. 785. The district judge dismissed the libels, on the ground that no maritime lien for wharfage arose against the vessels while withdrawn from navigation.

F. D. Sturges, for appellants.

Geo. M. Van Hoesen, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The brief of counsel for libelants (appellants) opens with this statement: "With regard to the *America*, the evidence shows substantially that she was a vessel engaged in towing on the Hudson river; that she was laid up at libelants' wharf, under an arrangement with her agent, during the winter months, awaiting the opening of navigation in the spring, when she was to be generally overhauled, and would resume her occupation. The case of the *Niagara* is somewhat different, as she went to libelants' wharf in the spring." Inasmuch as the berths were occupied under "an arrangement" between libelants and the agent of the boats, it should first be ascertained what that arrangement was. The boats in question and others belonged to Schuy-

ler's Steamboat Company (formerly Line), which had for years been accustomed to lay its vessels up for the winter at libelants' wharves, and to make such other use of the wharves as occasion required. During the period in question here, as on previous occasions, some of the boats were laid up next to the wharf, and the others outside of the ones first berthed. There were four berths next the wharf, and at times as many as four boats, one inside and three outside, occupied the same berth. The agent of the company testified that the arrangement with the owner of the wharf was that they were to pay "five dollars a day for each boat lying next to the wharf, nothing for any outside boat lying outside of the boats lying next to the wharf"; that in prior years the bills were rendered in bulk at the end of the season, after the boats had all left there, and were "against each large steamboat,—that is, the steamboat lying next to the dock,"—and that no charge was made upon the boats that lay outside. The libellant Robinson denied that any such arrangement was made as to inside and outside boats. Were this all the testimony, it might be difficult to reach a conclusion. But Egan, libelants' clerk who had charge of their wharves and kept the books, testifies that he understood that the company was to pay five dollars for each berth occupied. The book containing the account of the wharfage of these boats shows that, contrary to his custom in respect to other boats, he made no entry of tonnage, no entry of the charge for the wharfage (save for the first month, which he subsequently erased under direction), and that he apparently rendered one bill for each berth, however many boats were stored at it. We are satisfied that the arrangement for the season of 1890-91 was the same as in prior years, viz. that the boat lying next to the dock should pay five dollars a day, and that claimants might lay up boats outside of her without further charge. Whatever lien there might be for wharfage, therefore, would attach only to the boat against which wharfage was to be charged, and not against the outside boats. The evidence shows that neither of the boats libeled in these suits at any time during the period in controversy occupied an inside berth. Egan, who had charge of libelants' wharves, testified that the America, during the time she was there, occupied berth No. 2, and was outside all the time, and that when the Niagara came there she first occupied berth No. 3, outside, and then removed for the rest of the time to berth No. 1, outside. The record book corroborates his testimony. It would appear then that, under the arrangement, no charge for wharfage was to be made against either of these boats, and therefore no lien attached. The conclusion we have reached as to the facts renders it unnecessary to discuss the questions of law which were argued upon the appeals. The decrees of the district court are affirmed, with costs.

ATLAS GLASS CO. v. BALL BROS. GLASS MFG. CO. et al. (Circuit Court of Appeals, Second Circuit. May 1, 1899.) No. 111. Appeal from the Circuit Court of the United States for the Northern District of New York. Wm. L. Pierce, for appellant. F. G. Fincke, for appellees. Before WAL-LACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This appeal must be dismissed for want of jurisdiction. The case of *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, is conclusive. See 87 Fed. 418.

BALTIMORE & O. R. CO. v. JOY. (Circuit Court of Appeals, Sixth Circuit.) Questions of law certified to the supreme court of the United States. See 19 Sup. Ct. 387.

CHILE GOLD-MIN. CO. et al. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO. (Circuit Court of Appeals, Ninth Circuit. February 13, 1899.) No. 461. Appeal from the Circuit Court of the United States for the Southern Division of the District of Montana. Stapleton & Stapleton, for appellants. Louis Marshall and John F. Forbis, for appellee. Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This suit relates to the property which was the subject of the controversy in the case of *Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co.*, 93 Fed. 274. It is admitted that the allegations of the bill are identical with those of the bill in that case, and that the questions involved are the same. Upon the reasoning and the authorities cited in that case, the objection to the jurisdiction in the present case must be sustained. It is suggested that this court cannot go further than to order the dismissal of the appeal, since the question of the jurisdiction only is involved. The record shows, however, that the appeal was taken upon the merits also. The cause will be remanded, with instructions to dismiss the bill.

CITY OF LYNN v. GREEN. (Circuit Court of Appeals, First Circuit. May 12, 1899.) No. 220. Appeal from the Circuit Court of the United States for the District of Massachusetts. Dismissed per stipulation of counsel. See 81 Fed. 387.

THE ED. ROBERTS. (Circuit Court of Appeals, Third Circuit. April 23, 1899.) No. 17. Appeal from the District Court of the United States for the Western District of Pennsylvania. Albert York Smith, for appellant. D. F. Patterson, for appellee. Before **ACHESON** and **DALLAS**, Circuit Judges.

ACHESON, Circuit Judge. The question upon which this case turns is altogether one of fact. If the libellant sustained no substantial injury by reason of his fall, he was not entitled to recover substantial damages, under all the circumstances. Now, the learned district judge found that the libellant had not received any substantial injury from his fall, and that his stay at the Marine Hospital was occasioned by rheumatism, from which he suffered. This finding is well supported by the proofs. The clear weight of the evidence, we think, is with the respondent upon this question. The medical certificate which the libellant procured at the hospital, if admissible at all as against the respondent, was explained, and its effect greatly weakened, by the testimony of the physician whose signature it bears. The proofs, considered as a whole, fairly lead to the conclusion that the libellant's real trouble came from rheumatism, and that his fall had no connection with that ailment. After a most careful examination of this record, it is our judgment that the appellant has no just reason to complain of the action of the court below. Therefore the decree of the district court is affirmed.

E. T. BURROWES CO. v. ADAMS & WESTLAKE CO. et al. (Circuit Court of Appeals, First Circuit. April 27, 1899.) No. 288. Appeal from the Circuit Court of the United States for the District of Maine. Elmer P. Howe, for appellant. Dismissed. See 93 Fed. 462.

FARMERS' LOAN & TRUST CO. v. CITY OF CORINTH, MISS., et al. (Circuit Court of Appeals, Fifth Circuit. April 11, 1899.) No. 776. Appeal from the Circuit Court of the United States for the Northern District of Mississippi. Josiah Patterson and George Gillham, for appellant. J. M. Boone and E. S. Chandler, for appellees. Before **PARDEE**, **MCCORMICK**, and **SHELBY**, Circuit Judges.

MCCORMICK, Circuit Judge. In this case the material questions, both of law and fact, are substantially the same that were presented and considered in

the case between this appellant and the county of Alcorn, just decided (93 Fed. 579); and, in accordance with the views expressed in our opinion in that case, the decree of the circuit court in this case is affirmed.

POPE v. LOUISVILLE, N. A. & C. R. CO. (Circuit Court of Appeals, Seventh Circuit.) Appeal to the Supreme Court of the United States. Dismissed. See 19 Sup. Ct. 500.

SARRAZIN v. AUGUSTUS CRAFT CO., Limited. (Circuit Court of Appeals, Fifth Circuit. April 11, 1899.) No. 789. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. W. R. Stringfellow and T. M. Gill, for plaintiff in error. E. H. Farrar, E. B. Kruttschnitt, B. F. Jonas, and Hewes T. Gurley, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The pleadings, rulings, bills of exception, assignments of error, and the questions involved in this case are precisely the same as in Sarrazin v. Tobacco Co. (just decided) 93 Fed. 624, and, for the reasons given in the opinion in that case, the judgment of the circuit court is affirmed.

WELSBACH LIGHT CO. v. REX INCANDESCENT LIGHT CO. et al. (Circuit Court of Appeals, Second Circuit. April 27, 1899.) No. 108. Appeal from the Circuit Court of the United States for the Southern District of New York. John R. Bennett, for appellant. Louis Hicks, for appellees. Appeal dismissed, and cause remanded to the circuit court, with instructions to entertain another motion for an injunction. See 87 Fed. 477.

In re FINKELSTEIN. (Circuit Court, S. D. New York. May 10, 1899.)

BROWN, District Judge. Before referees in bankruptcy dilatory proceedings should not be permitted, nor adjournments allowed, except for good cause, properly substantiated. The common practice of granting adjournments for convenience only should not be imitated, but progress with diligence be enforced by short adjournments only, except for good cause.

HARPER et al. v. LARE et al.

(Circuit Court, E. D. Pennsylvania. April 27, 1899.)

No. 56.

COPYRIGHT—INFRINGEMENT.

In Equity.

A. T. Gurlitz, J. R. Sypher, and Geo. L. Rives, for complainants.
H. T. Fenton, for respondents.

DALLAS, Circuit Judge. This case has been heard upon pleadings and proofs. It was previously before this court upon motion for a preliminary injunction (84 Fed. 224), and the judgment upon that motion was subsequently reversed by the circuit court of appeals. 30 C. C. A. 373, 86 Fed. 481. The application then made was for an injunction to restrain the defendants—First, from continuing an alleged violation of copyright; and, second, from using, in connection with any book whatever, the name or designation, "The Fram Expedition: Nansen in the Frozen World." The appellate court decided adversely to the complainants with respect to the matter first stated, and its

opinion upon that subject is, I think, conclusive even now. Therefore, the only question which I regard as being still, even partially, an open one, is that which arises under the allegation of unfair competition in trade; but it is proper to mention that the learned counsel of the plaintiffs, upon the oral argument, expressly reserved their right to hereafter insist upon every ground for relief which they had set up, and in their brief they say "that complainant cannot rest this case until it has been passed upon by the court of ultimate jurisdiction. The questions of copyright are of such controlling importance, and are so bound up with other questions involved, that such a course is absolutely imposed upon us." Upon the hearing of the motion for a preliminary injunction, I reached the conclusion that a case of unfair competition had been established, but, I am now authoritatively instructed that that conclusion was erroneous. The proofs as now presented have, I think, somewhat strengthened the plaintiff's position, but, after careful consideration of them, I am unable to find that the defendants' competition was unfair, without giving to some of the facts which were considered by the court of appeals a significance which that tribunal has said should not be ascribed to them. Consequently I am constrained to hold that the bill has not been sustained. The primary facts are, in general, plain and uncontroverted. The only substantial question is as to the inference which should be deduced from them, and as that question, together with those relating to copyright, is to be again submitted to the court of last resort, I do not believe that any useful end would be attained by any further discussion of it by me. Bill dismissed, with costs.

In re MARTIN.

(Circuit Court, S. D. New York. May 11, 1899.)

BANKRUPTCY—SOLVENCY.

BROWN, District Judge. A debtor having permitted all his stock in trade to be sold under a judgment and execution, and the residue of his property being insufficient to pay his debts, held, upon the issue of "solvency," that the "fair valuation" of the goods levied on (Bankruptcy Law, § 1, subd. 15) must be taken with reference to the actual situation and the liability of the goods to sale under execution; and, if the sale under execution thereafter had was in all respects a fair and reasonable one, that the debtor was bound by the result as to the valuation of the goods, and could not prove his solvency by higher estimates of their value if they had been free from levy, and sold at retail, or in the ordinary course of business.

REYNOLDS v. RITCH et al. (Circuit Court, S. D. New York. April 3, 1899.) William Blaikie and Roger M. Sherman, for the motion. William B. Putney, for Amherst College. Bronson Winthrop, for Hamilton College. C. N. Bovee, for Thomas G. Ritch. John E. Parsons, for Bulkley & Vaughan. Noah H. Swayne, for Lafayette College.

LACOMBE, Circuit Judge. (1) The motion to require defendants to appear, demur, plead, or answer to the cross bill is denied. (2) The motion that this cause be heard with the principal cause instituted in the original bill by Emma S. Fayerweather and others is denied, with leave to renew when this cause is actually ready for hearing. (3) The motion that the testimony taken by the complainant under the replication to the plea and answer of trustees of Hamilton College to said original bill stand and be read and received with the same force and effect as if the same had been taken in support of the cross bill is granted. (4) The motion to stay proceedings is denied.

SOUTHERN PAC. R. CO. v. GROECK et al. (Circuit Court, S. D. California. January 6, 1897.) J. D. Redding, for complainant. W. B. Wallace, for defendants.

ROSS, Circuit Judge. To the second amended bill of complaint, filed herein July 6, 1896, the defendants interposed a plea, which the complainant caused to be set down for argument, and which was, by the respective parties, submitted upon the same briefs theretofore filed upon the hearing of the plea to the first amended bill. For the purpose of disposing of the plea so submitted, the court must assume, without proof on either side, the facts to be as set out in the amended bill where not controverted by the plea, and, where so controverted or inconsistent, to accept as true the contradictory and inconsistent allegations of the plea, together with such additional facts as are therein set out. *Railroad Co. v. Groeck*, 74 Fed. 585, and cases there cited. The case, as now presented, is substantially the same as when last under consideration. For the reasons given in the opinion then filed, and which is reported in 74 Fed. 585, an order will be entered sustaining the plea, with leave to the complainant, if it be so advised, to reply to the plea, and take issue in respect to the matters of fact therein alleged, within 20 days from this date.

THOMSON-HOUSTON ELECTRIC CO. v. BULLOCK ELECTRIC CO. (Circuit Court, S. D. New York. March 6, 1899.) Motion for Preliminary Injunction. Frederick H. Betts, for the motion. Arthur Stem, George J. Harding, and Clifton V. Edwards, opposed.

LACOMBE, Circuit Judge. In view of the conflict of testimony, both expert and other, it would seem an unwise exercise of judicial discretion to grant restraining order before the hearing upon pleadings and proofs.

END OF CASES IN VOL. 93.